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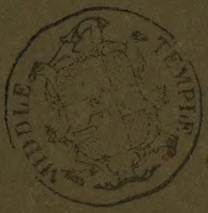


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# *SYSTEM OF CONVEYANCING.*

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WITH

## Dissertations and Practical Notes:


BY THE LATE

W. M. BYTHEWOOD, THOMAS JARMAN, & GEORGE SWEET,

BARRISTERS-AT-LAW.


**Fourth Edition,**

BY


LEOPOLD GEORGE GORDON ROBBINS,

*OF LINCOLN'S INN, BARRISTER-AT-LAW.*

VOL. VII.

STAMP DUTIES—WILLS.


LONDON:

H. SWEET & SONS, 3, CHANCERY LANE,

Law Publishers.

MEREDITH, RAY AND LITTLER, MANCHESTER;
R. GRACE, BIRMINGHAM; HODGES, FIGGIS, & CO., DUBLIN.

1889.

LONDON:
BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

# PREFACE

TO THE

## SEVENTH VOLUME OF THE FOURTH EDITION.

The appearance of this Volume has been somewhat delayed by the numerous and important alterations and additions, which the passing of the Customs and Inland Revenue Act, 1888, rendered necessary in the Dissertation on Stamp Duties, which was then already in the press.

Considerations as to space have rendered necessary the omission from this volume of Precedents of special and miscellaneous instruments, which will accordingly appear hereafter, either in Vol. VI. (Registration, &c.), or as a separate volume, as may be found most convenient.

In conclusion, the Editor begs to renew his best thanks to Mr. A. Turnour Murray, of Lincoln's Inn, for his valuable assistance in the preparation and arrangement of the Common Forms and Precedents of Wills, and in the revision of sheets for the press.

L. G. GORDON ROBBINS.

4, Stone Buildings, Lincoln's Inn,
*December*, 1888.

# CONTENTS.

PAGE

TABLE OF CASES ..... xxxviii

TABLE OF STATUTES ..... lxxii

ADDENDA ET CORRIGENDA ..... lxxix

## STAMP DUTIES.

### PRELIMINARY DISSERTATION.

### CHAPTER I.

DUTIES IMPOSED BY THE STAMP ACT, 1870, AND SUBSEQUENT STATUTES.

1. **Admissibility of Unstamped Instruments.**—To exclude Parol Evidence, 3—For Collateral Purpose, 5.

2. **General Provisions as to Stamping Instruments.**—How Duties are to be Determined, 11—Opinion of Commissioners, 13—How Duties are to be Denoted, 14.

3. **Stamping after Execution.**—By Commissioners, 16—Admission of Unstamped Instruments in Court, 21.

4. **Alteration and Re-execution of Instruments,** 23.

5. **Several Stamps on One Instrument,** 27.

6. **Instruments Executed or to Operate Abroad, &c.**—Generally, 33—Foreign Securities, 34.

7. **Agreements.**—Stamp Duties on Agreements, 35—Matter not of Value of £5...41—Agreements for Hire of Labourers, &c., 43—Agreements for Sale of Goods, &c., 43—Special Exemptions, 46.

8. **Appraisements and Awards,** 47.

9. **Apprenticeship,** 48.

10. **Bills of Exchange and Promissory Notes.**—Bills of Exchange Act, 1882...50—Provisions of Stamp Act, 1870...56—Foreign Bills and Notes, 59—Special Exemptions, 61.

11. **Bonds,** 62.

**STAMP DUTIES**—*continued.*

12. **Conveyances on Sale.**—Definition of Term, 65—What Considerations Chargeable, 66—What is Property, 67—Mere Contracts not Liable to *ad valorem* Duty, 69—Reduction and Apportionment of Consideration, 73—Exemptions, 74.
13. **Copies—Secondary Evidence,** 75.
14. **Copyholds,** 77.
15. **Leases.**—Duty, how Chargeable, 78—Exemptions, 80.
16. **Letters of Attorney,** 81.
17. **Mortgages.**—Generally, 82—Agreement, or Memorandum of Deposit, 85—Security for Account Current, 88—Distinct Securities in One Deed, 90—Transfer of Mortgage, 90—Exemptions, 93.
18. **Receipts.**—Generally, 93—Exemptions, 96.
19. **Release or Renunciation,** 97.
20. **Schedule,** 97.
21. **Settlements,** 99.
22. **Rates of Duties.**—Present Duties, 100—Repealed Duties, 142—Tables of Duties on Certain Instruments, 158.

## CHAPTER II.

PROBATE DUTY.

**Statutory Enactments as to Rates of Duties,** 164—Stat. 55 Geo. 3, c. 184...164—Stat. 22 & 23 Vict. c. 36...169—Stat. 43 Vict. c. 14...169—Stat. 44 Vict. c. 12...171—On what Property the Probate Duty is Payable, 174—Deductions of Debts and Funeral Expenses, 185—The Affidavit of Value, 190—Rectification of Errors, 192—Exemption from Probate Duty, 193—Estates not exceeding £300 in Value, 195—Stamp Duty on Accounts, 197—Penalties, 201.

## CHAPTER III.

**Legacy Duty.**—Rates of Legacy Duty, 202—Enactments relating to Legacy Duty, 205—Stat. 36 Geo. 3, c. 52...205—Stat. 39 Geo. 3, c. 73...210—Stat. 42 Geo. 3, c. 99, s. 2...210—Stat. 45 Geo. 3, c. 28, s. 4...211—Stat. 8 & 9 Vict. c. 76, s. 4...211—Stats. 43 Vict. c. 14, and 44 Vict. c. 12...212—What Dispositions are Chargeable with Duty, 213—Domicil, 215—Appointments by Will under General and Limited Powers, 221—Rent-charges, &c., 224—Proceeds of Sale, &c., of Real Estate, 224—Release of Debt, 228—Accretions to Capital, 229—Retainer and Payment of Legacies, 231—Liability of Executors, &c., as to Payment of Duty, 236—Gifts free of Legacy Duty, 240—Statutory Exemptions from Legacy Duty, 246.

## CHAPTER IV.

SUCCESSION DUTY.

Rates of Succession Duty, 249—Enactments Relating to Payment of Duties on Successions, 252—What Property is Chargeable with Succession Duty, 266—Domicil, 266—Money Payable under an Engagement, 271—Legacies and Annuities charged on Realty, 272—What Dispositions or Devolutions of Property confer Successions, 274—Mode of Assessment of Duty, 289—Charge of Duty, and Accountable Persons, 293—Exemptions, 299—Tables and Rules, 300.

---

# WILLS.

## PRELIMINARY DISSERTATION.

## CHAPTER I.

INTRODUCTORY CHAPTER.

1. **Form of the Instrument, &c.**—What Instruments are Testamentary, 304—Effect of Probate in Determining the Character of Instruments, 310.

2. **By what Local Law Wills are Regulated.**—General Principles, 312—Conflict of Laws, 315—Domicil, 321.

## CHAPTER II.

WHO MAY MAKE WILLS.

Stat. 34 & 35 Hen. 8, c. 5...327—Disabilities of Infants, 328—Wills of Idiots and Lunatics, 329—Wills of Blind and Deaf Persons, 333—Wills of Married Women, 335—Confirmation of Void Wills, 335—Devises by Aliens, 336—Devises and Bequests by Traitors, Felons, &c., 337.

## CHAPTER III.

TO WHOM DEVISES OR BEQUESTS MAY BE MADE.

Devises to Corporations, 339—Devises to Aliens, 340—Gifts to Attesting Witnesses, 341—Effect of Devise to Heir, 343—Gifts to Bastards, 343—Gifts to Infants, *Femes Coverts*, &c., 344.

## CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.

Joint Estates, 345—Executory Interests, 347—Rights of Action and Entry, &c., 348—From Day a Will Speaks, 350—Equitable Interests, Contracts for Purchase, &c., 353—After-Acquired Copyholds, 354—Chattel Interests, 356—Estates *pur autre vie*, 357.

## CHAPTER V.

EXECUTION AND ATTESTATION.

As to Wills made before 1838...360—Freeholds under 29 Car. 2, c. 3... 360—Old Law as to Personalty and Copyholds, 361—As to Wills made since 1837...363—What is Sufficient Signature, 365—What is Sufficient Acknowledgment, 370—Meaning of Word "Present," 371—Attestation and Subscription, 373—Attestation Clause, 374.

## CHAPTER VI.

REVOCATION.

By Marriage, 376—By Burning, Cancelling, Tearing, or Obliterating, 377—By Alienation, &c., of Estate, 385—By Void Conveyances, 394—By Subsequent Will or Codicil, 396.

## CHAPTER VII.

**Republication,** 412 *et seq.*

## CHAPTER VIII.

RESTRAINTS ON THE TESTAMENTARY POWERS.

1. **Rule Against Perpetuities.**—Statement and History of the Rule, 420—Case of *Cadell* v. *Palmer*, 422—Executory Devises, 424—Remainders, 428—Subsequent Events, 430—Alternative Gifts, 436—Postponement of Possession, 438—Gifts to Unborn Persons for Life, 439—Powers of Appointment, 441—Doctrine of cy Près, 443—Exceptions to the Rule, 446.
2. **Restraint on the Accumulation of Income.**—Operation of the Thellusson Act, 447—Destination of Income Illegally directed to be Accumulated, 452—Exemptions from the Operations of the Act, 454.

## CHAPTER IX.

LAPSE.

1. **Doctrine of Lapse.**—Nature and Application of Doctrine Generally, 458—Excessive Appointment, 461—Gift to Next of Kin of Married Women, 462—Death of Joint Devisee, 462—Gifts to Classes, 463—Alternative Gifts, 466—Effect of Lapse on Devise of Onerated Lands, 467.

2. **Effect of Failure of Particular Gifts,** 468.

3. **Operation of Residuary Bequest,** 471.

4. **Operation of Residuary Devise.**—Every Devise Specific under the Old Law, 475—Whether a Devisee takes Beneficially or as Trustee, 477.

5. **Effect of the Wills Act, Sects. 25, 32, and 33, on the Doctrine of Lapse,** 479.

## CHAPTER X.

CONVERSION.

1. **The Doctrine of Constructive Conversion.**—Statement of the Doctrine, 482—Election, 483—Conversion of Residue, 485—Exclusion of the Doctrine, 489—Duties of Trustees, &c., as to Actual Conversion, 494.

2. **Undisposed of Interests in Realty,** 496.

## CHAPTER XI.

AMBIGUITIES IN WILLS, AND ADMISSIBILITY OF PAROL EVIDENCE.

1. **Gifts when Void for Uncertainty.**—As to Ambiguities in Wills Generally, 503—Uncertainty as to Subject of Gift, 504—Uncertainty as to Object of Gift, 508—Uncertainty as to Other Matters, 509—What Accuracy of Description is Necessary, 510—Repugnancy and Contradiction in Wills, 511.

2. **What Words are Sufficient to Create a Trust.**—Gifts for a Specific Purpose, 513—Precatory Trusts, 516.

3. **Admissibility of Parol Evidence,**—Patent Ambiguities, 523—Latent Ambiguities, 525—Evidence of Extrinsic Facts, 532—Incorporation of Unattested Documents, 537—Incorporation of Trusts not Disclosed by Will, 543.

## CHAPTER XII.

ESTATES ARISING BY IMPLICATION.

Implication of Estates for Life in Realty, 545—Implication of Estates Tail, 549—Implication of Life Interest in Personalty, 552—Implication of Absolute Estates and Interests, 553.

## CHAPTER XIII.

OPERATION OF A GENERAL DEVISE OF REAL ESTATE.

Trust and Mortgage Estates, 557—Remainders and Reversions, 559—Leaseholds, 562—Copyholds, 563—Powers, 563.

## CHAPTER XIV.

VESTING OF DEVISES AND BEQUESTS.

1. **Vesting of Interests in Real Estate.**—General Rule as to Vesting, 571—Devises Vested, notwithstanding Expressions of Contingency, 574—Effect of Express Terms of Contingency, 576—Whether Contingency Extends to Successive Limitations, 577.
2. **Vesting of Pecuniary Charges on Land,** 579.
3. **Vesting of Legacies of Personalty,** 581.
4. **Vesting of Residuary Bequests,** 587.

## CHAPTER XV.

EXECUTORY INTERESTS.

1. **Executory Devises.**—Nature and Operation of Executory Devises Generally, 594—Stat. 40 & 41 Vict. c. 33...595—Executory Devises in Defeasance of Estates of Freehold, 596—Executory Devises Unsupported by Antecedent Estates of Freehold, 600—Curtesy and Dower, 601—Statutory Restriction on Executory Limitation, 601.
2. **Executory Bequests,** 603.

## CHAPTER XVI.

GIFTS TO CHILDREN, &c.

1. **Description of Persons Included,** 605.
2. **Mode of Distribution among Issue of Various Degrees,** 610.
3. **Class Entitled in Reference to the Period of Birth.**—Where the Gift is Immediate, 615—Where the Gift is Preceded by a Life Interest, 616—Where Distribution is Postponed to a Certain Age, 621—Words Operating to Restrict or Enlarge the Class, 623—Claims of Child *en ventre sa mère*, 625—Rule Applicable to Grandchildren, Brothers, &c., 626—Gifts over upon Death without Children, or without Having or Leaving Children, 627.
4. **Gifts to Younger Children, &c.,** 628.

**WILLS**—*continued.*

5. **Rule in Wild's Case,** 632.
6. **Rule in Shelley's Case.**—Statement of the Rule, 635—Extent and Operation of the Rule, 636—Cases where the Rule does not Apply, 641—Doctrine of General and Particular Intention, 643.

CHAPTER XVII.

GIFTS TO ILLEGITIMATE CHILDREN.

Gifts to Children *in esse*, 645—Gifts to Children *en ventre sa mère*, 653—Gifts to Future Children, 655.

CHAPTER XVIII.

GIFTS TO NEXT OF KIN, &c.

1. **Gifts to Next of Kin.**—Construction of such Gifts, 657—Period for Ascertaining the Class, 661.
2. **Gifts to "Relations,"** 663.
3. **Gifts to Representatives, Executors, &c.**—Construction of such Gifts, 667—Whether Executors, &c., take Beneficially, 670.
4. **Gifts to "Family" and "House,"** 672.
5. **Gifts to "Heir" in Relation to Personalty,** 674.
6. **General Remarks on Gifts to Classes,** 676.

CHAPTER XIX.

**Joint Tenancy and Tenancy in Common,** 680 *et seq.*

CHAPTER XX.

**Limitations to Survivors,** 685 *et seq.*

CHAPTER XXI.

INDEFINITE GIFTS OF REAL ESTATE AND LEASEHOLDS.

As to Beneficial Interests, 692—As to Estates of Trustees, 697

## CHAPTER XXII.

**What Passes under the Words "Household Furniture," "Goods and Chattels," "Household Effects," &c.,** 703 *et seq.*

## CHAPTER XXIII.

**Priority and Order of Payment and Abatement of Legacies,** 711 *et seq.*

## CHAPTER XXIV.

**Devolution of the Personal Estate of Persons Dying Intestate,** 714 *et seq.*

---

## APPENDIX.

### PART I.

Wills Act, 1 Vict. c. 26...724 *et seq.*

### PART II.

Suggestions to Persons Taking Instructions for and Preparing Wills, 735 *et seq.*

### PART III.

GENERAL SCHEME OF WILL.

**Where the Residue is to be Converted into Money,** 744.

## COMMON FORMS IN WILLS.

### COMMENCEMENTS, 745—747.

PAGE
1. Commencement of Will: Revocation of Former Wills ..... 745
2. Another Form ..... 745
3. Commencement of Codicil ..... 745
4. Another Form ..... 745
5. Will Conditional on not Leaving Issue ..... 746
6. Will where Testator has Property Abroad ..... 746
7. Confirmation of Indian Will, which is Recited ..... 746
8. Confirmation of Marriage Settlement ..... 747

### APPOINTMENT OF EXECUTORS, GUARDIANS, &c., 747—757.

1. Appointment of Sole Executor ..... 747
2. Wife as Sole Executrix ..... 747
3. Two Executors, Except as to Certain Property ..... 747
4. Wife during Widowhood and Son Executors ..... 748
5. Substituted Executors ..... 748
6. Son at Majority Executor ..... 748
7. Special Executor of Life Policies ..... 748
8. Special Executor of Partnership Share ..... 749
9. Special Executor of Business ..... 749
10. Special Executor of Mortgage Debt ..... 749
11. Special Executor of Specific Debts ..... 750
12. Special Executor of Leasehold, with Bequest, &c. ..... 750
13. Special Executor of Letters, Copyrights, &c. ..... 751
14. Special Executor of Letters, &c., with Special Powers ..... 751
15. Special Executor of Property in Colony ..... 751
16. Appointment of Guardians ..... 751
17. Wife Sole Guardian during Widowhood ..... 752
18. Executors and Guardians: Proviso for Cesser ..... 752
19. Guardian with Power to Appoint Successor ..... 752
20. Guardian with Power to Substitute ..... 753
21. Guardians for Sons, with Special Directions: also for Daughters, with Substitution in Case of Death ..... 753
22. Guardians of Children, including an Illegitimate Child ..... 755
23. Sister to have Care of Daughters of Late Wife with an Annuity for Each ..... 755
24. Devise to Executors of Trust and Mortgage Estates in Copyhold and Customary Lands ..... 756

DIRECTIONS AS TO FUNERAL, PAYMENT OF DEBTS, &c., 757—759.

PAGE
1. Direction respecting Funeral ..... 757
2. Another Form ..... 757
3. Charge of Debts on Real Estate ..... 757
4. Another Form ..... 758
5. Mortgage Debt out of Personalty ..... 758
6. Charge of Legacies on Real Estate ..... 759

SPECIFIC BEQUESTS, 759—777.

1. Wearing Apparel to One Servant ..... 759
2. The Same among Servants ..... 759
3. The Same with Jewelry, &c., to Legatee ..... 759
4. Letters, &c, to Wife ..... 759
5. Manuscripts and Copyright to Wife ..... 759
6. Watch, &c., to Son ..... 760
7. Horses and Carriages ..... 760
8. Wine ..... 760
9. Coins and Curiosities to British Museum ..... 760
10. Minerals, Books, &c., with Request as to their Disposition ..... 760
11. Picture to Son with Precatory Trust to Grandson ..... 760
12. Books: Part to Wife, Remainder to Son at Twenty-one ..... 761
13. Books on Payment of Two-thirds of Value ..... 761
14. Consumable Stores to Wife ..... 761
15. Household Effects to Wife ..... 761
16. The Same to Son, Short Form ..... 762
17. Plate to Children ..... 762
18. Household Furniture to be Selected by Wife ..... 762
19. Furniture, &c., to Son, on Condition of Quitting Messuage ..... 762
20. Furniture in Certain Rooms ..... 763
21. Specific Articles by Reference to Schedule ..... 763
22. Request to Executors to Distribute by Reference to Separate Paper ..... 763
23. Direction as to Delivery of Articles Bequeathed ..... 764
24. Leasehold House and Furniture to Wife during Widowhood: She to Repair: Trustees to take Inventory ..... 764
25. Use of Furniture to Wife while she Resides in England, or during Widowhood, afterwards to Son, Exoneration of Trustees from Responsibility ..... 764

**WILLS**—*continued.*

PAGE
26. Trustees to Repair and Insure Furniture ..... 765
27. Wife to Repair and Insure Furniture ..... 765
28. Inventory to be dispensed with ..... 766
29. Power to Sell Furniture ..... 766
30. Trust for Sale of Furniture ..... 766
31. Power for Tenant for Life to Purchase ..... 766
32. Daughters while Unmarried to have Use of Furniture..... 766
33. Plate, &c., as Heirlooms in Strict Settlement, where no Realty 767
34. Heirlooms, Another Form ..... 768
35. Ready Money to Wife..... 769
36. Law Books, &c., to Solicitor's Son ..... 770
37. Farming Stock to Devisee of Farm ..... 770
38. Leasehold Farm and Farming Stock ..... 770
39. Government Securities in Trust..... 771
40. Bank Stock and New Consols to Legatee ..... 771
41. Proviso in Case of Ademption ..... 772
42. Shares in a Company: Proviso in Case of Ademption..... 772
43. Income of Specific Funds to Widow for Life: Ademption Clause 772
44. Policies of Life Insurance ..... 773
45. Bond Debt: Ademption Clause..... 773
46. Mortgage Debt: Substitution of Pecuniary Legacy: Devise of Mortgage Estate..... 773
47. Bond Debt to go in Satisfaction of Legacy ..... 774
48. Release of Debt ..... 775
49. Bequest of Amount of Debt to Debtor ..... 775
50. Release of all Debts ..... 776
51. Release of Arrears of Interest: Payment by Instalments ..... 776
52. Debt to be Deducted: Proviso for Bankruptcy ..... 776
53. Share of Residue under another Will or Equivalent in Money... 776

BEQUESTS OF BUSINESS, 777—791.

1. Stock-in-Trade and Goodwill: Excepting Credits (*or* Including Credits): Indemnity to be given to Trustees .. ..... 777
2. Appointment of Successors in Partnership and Bequest of Share 778
3. Power for Trustees to Carry on Business, Profits to fall into Residue ..... 779
4. Recital of Partnership; Power to Trustees to continue Business: to renew Partnership: to increase Salaries: to employ Testator's Capital or withdraw it: Powers of Management, &c.: Option to Sons to take over Business on giving Security ..... 780

**WILLS**—*continued.* PAGE

5. Direction to Wife to carry on Business, with Occupation of Dwelling-house, until Son attains Twenty-one and takes Over Business; Power to Trustees to Increase or Diminish Testator's Capital: to see Accounts: Trusts of Profits: on Wife's Death Trustees to carry on Business: Son to take Over on Valuation and give Security: Trusts of Profits of Business carried on by Son: Trust for Sale in case Wife Dies before Son takes Business: Trusts of Proceeds, &c. ... 782

6. Business to be carried on by Trustees: Residuary Personalty to be added to Capital: Trustees may appoint Son a Manager: may diminish Capital: Option to Sons to Purchase at Valuation: General Trust for Conversion and Investment: Power to leave Purchase-money on Personal Security; Trusts of Profits ..... 785

7. Bequest of Coal and Iron Works to Trustees upon Trust to carry on, &c.: Annual Accounts: Power to Admit a Son: to Discontinue: to Sell: Trusts of Proceeds ..... 788

8. Power for Executors to Wind Up Testator's Partnership Business (*short form*) ..... 790

9. The same (*full form*) ..... 790

GENERAL PECUNIARY BEQUESTS, 792—823.

1. Immediate and other Legacies to Wife ..... 792

2. Legacy paid by Instalments ..... 792

3. Legacies to Trustees for Trouble: Legacy to Trustee apart from Trusteeship: Time for Payment ..... 792

4. Direction for Purchase or Appropriation of Stock for Children of a Living Person at Twenty-one or Marriage: Substitution of Children of Deceased Children ..... 793

5. Demonstrative Legacy ..... 793

6. Legacy in Trust ..... 794

7. Legacy for Mourning Rings ..... 794

8. Legacies to Clerks, Servants, &c. ..... 794

9. Legacy by Weekly Payments to a Widow: and Surplus for her Burial ..... 795

10. Allowance for Son ..... 795

11. Legacy to a Creditor ..... 795

12. Legacies to Creditors in addition to Amount Owing ..... 795

13. Legacy to Son if he Survives ..... 796

14. Legacy to Vest at Twenty-one without Interest ..... 796

15. Legacy to carry Interest ..... 796

16. Legacy to Niece at Twenty-one or Marriage: her Receipt, if an Infant, to be sufficient Discharge ..... 796

**WILLS**—*continued.*

PAGE

17. Legacy at Twenty-one with Interim Maintenance: Gift Over in case of Lapse ..... 796
18. Legacy to Class of Children with Interim Maintenance ..... 797
19. Legacy to Infant to be paid to Parent or Guardian ..... 797
20. Legacy to Son, to be Vested at Twenty-two, Interest in Meantime for Maintenance, and Power to Advance Capital: Second Legacy to same Son at Twenty-four, Payable on Death or Re-marriage of Testator's Widow ..... 798
21. Vested Legacy, Payable at Twenty-one, with Interest in Meantime ..... 798
22. Legacy to Collateral Relative not to Lapse ..... 799
23. Legacies to Several, not to Lapse ..... 799
24. Legacy to A. B.: Substitution of Children or Issue in case of Lapse ..... 799
25. The same to Several ..... 800
26. Legacy to Married Woman with Restraint on Anticipation during Coverture ..... 800
27. Legacies to Several: Females Restrained from Anticipation ... 800
28. Legacy upon Special Trusts for a Married Woman ..... 801
29. Legacy in Trust for a Lunatic ..... 801
30. Legacy in Trust for Family of Improvident Son ..... 802
31. Legacy in Trust for Improvident Son ..... 802
32. Legacy in Trust for Benefit of Bankrupt and his Family ..... 803
33. Legacies to Younger Sons ..... 804
34. Legacy to Natural Son of A. B. ..... 805
35. Legacy to Each Child (including a Natural Daughter), with Directions for Investment, &c., during Minorities; Advancement Clause, Provisions against Lapse, Substitution of Issue 805
36. Legacy among Children, *Nominatim* Equally: Shares of Children under Age to be Invested: Substitution of Issue, Accruer ..... 807
37. Wife to Maintain Children out of the Income of their Legacies: Power to Trustees to Settle Shares of Daughters Marrying under Twenty-one, costs of Settlement ..... 809
38. Legacy in Trust for Children of Sister: Adults to Receive Income from their Presumptive Shares; Distribution of Fund when Mother past Childbearing ..... 811
39. Legacies to Daughters on Marriage; Power to Daughters Dying Unmarried to Bequeath a Less Sum; Accruer Clause; Interest on Contingent Legacies for Maintenance; Provision for Daughter becoming a Nun ..... 811
40. Legacies to Nephew and Niece at Twenty-one or Marriage, with Cross Limitations and Gift Over ..... 813
41. Legacy to Six Children of A. B.; Substitution of Children and Widow or Widower of Deceased Child ..... 813

**WILLS**—*continued.*

PAGE

42. Legacy among Living Persons by Name and Children of Deceased Persons *per Stirpes*; Substitution of Personal Representatives of Legatee Dying before Testator ..... 814
43. Legacies to Specified Nephews and Nieces, with Substitution of Children of Deceased Nephews and Nieces, with Clause of Accruer ..... 814
44. Bequest of a Contingent Interest under a Settlement ..... 815
45. Appointment of Portions under Power in Settlement; Advancements in Lifetime to be in Satisfaction and in Exoneration of Estates Charged ..... 815
46. Legacy in Satisfaction of Covenant in Marriage Settlement ... 816
47. Legacy upon Trusts of a Marriage Settlement ..... 817
48. Legacies Charged on Specific Realty ..... 817
49. Legacy to Son Resident Abroad, and who has not been heard of for a long time ..... 817
50. Direction as to Priority of a Legacy ..... 818
51. The same as to Several Legacies ..... 819
52. Direction as to Abatement of Particular Legacies ..... 819
53. Direction that Legacies shall be Free of Duty ..... 819
54. Power to Postpone Raising of Legacies Bequeathed in Trust ... 819
55. Advancements not to be in Satisfaction of Legacies ..... 819
56. Advances to Son to be in Satisfaction of Legacy ..... 819
57. Charitable Legacy to be Invested for Benefit of Master of Grammar School ..... 820
58. Charitable Legacy to Infirmary or Hospital; Receipt of Treasurer ..... 820
59. Several Charitable Legacies; Direction as to Fund for Payment ..... 821
60. Legacy to a Scientific Institution ..... 821
61. Legacy to a Charity upon condition ..... 822
62. Charitable Legacies as Trustees shall select ..... 822
63. Sum to be Invested in names of Bishop, a Minister, and Churchwardens, for Education of Poor Children; Direction as to Change of Trustees ..... 822
64. Charitable Legacies to be Paid Out of Pure Personalty; other Legacies thrown on other Funds; Charitable Legacies to abate before other Legacies ..... 823

GIFTS OF ANNUITIES, 824—835.

1. Bequest of Annuity; Directions for Purchase ..... 824
2. Direction to Pay Annuity ..... 825
3. Annuity to be Purchased through a Savings Bank ..... 825

**WILLS**—*continued.*

PAGE

4. Annuities to Several; Funds to be Set Apart ..... 826
5. Direction to Appropriate Stock for Payment of Annuity..... 826
6. Direction to Set Apart a Fund for Several Annuities: Proviso for Payment out of Capital: Proviso for Cesser on Alienation ..... 827
7. Trust to Appropriate Fund out of Residue for Annuity, to Wife Reducible on Re-marriage: to be Paid until Appropriation out of General Personalty ..... 828
8. Annuity to Mother out of Income of Residue ..... 830
9. Authority to Trustees to Purchase Annuities ..... 830
10. Annuity for Wife for Maintenance of Herself and Unmarried Daughters ..... 831
11. Trust to Set Apart Weekly Sum for Improvident Son or his Wife: Unapplied Portion to Sink into Residue: Accumulations for Son's Widow and Children ..... 832
12. General Directions as to Annuities: Commencement: when Payable: Apportionment: Inalienable Use: Cesser on Alienation: if Fund Appropriated, General Estate Exonerated ..... 833
13. Trustees may Vary Times of Payment of Annuities ..... 834
14. Charge of Annuities on Real Estate ..... 834
15. Annuities Free of Legacy Duty ..... 834
16. Annuities to have Priority ..... 834
17. Power to Appoint Agents in Australia for Payment of Annuities 835

## SETTLED LEGACIES, 835—841.

1. Direction to Invest Sum or Appropriate Securities: Trust for Nephew for Life, then for his Issue: Hotchpot Advancement: on Failure to Fall into Residue ..... 835
2. Bequest of Sum to Trustees for Investment: Trust for Married Daughter for Life: Power to Appoint Life Interest to Husband: Daughter's Issue as she Appoints: in Default to Children, with Substitution of Children of Sons Dying under Twenty-one: Hotchpot in Default, as Daughter Generally Appoints: in Default for Next of Kin: Advancement ..... 836
3. Legacy in Trust for Brother's Widow for Life: Provision for Burial: Surplus to her Children, or Issue of those Dead ... 839
4. Legacy for Investment: Trust for Married Woman for Life, then for her Daughters: if Imbecile, Income to be Applied for her Benefit: Proviso for Cesser on Alienation..... 839
5. Legacies to Unmarried Daughters, Payable on Death or Marriage of Wife: Power to Advance Moiety on Daughter Marrying: if under Twenty-one Power to Settle such Moiety..... 840

## BEQUESTS OF LEASEHOLDS, 841—847.

PAGE

1. Bequest of House and Stabling in London to One ..... 841
2. Bequest of House and Grounds in Country to Trustees, for Widow for Life, then for Son ..... 842
3. Bequest of House and Furniture to Wife during Widowhood, then to Son ..... 843
4. Bequest of House to Trustees for Occupation of Wife: then Trust for Sale: Monies to Fall into Residue: Power to Postpone: Power to Lease ..... 843
5. Bequest of Renewable Leaseholds to Trustees: to Pay Rents, &c.: to Raise Money, for Renewals, &c.: to Renew, &c.: not Bound to Renew: Indemnity to Mortgagees: Trust for Children who First Attain Twenty-one, then for Wife Absolutely: Power to Invest Accumulated Rents in Purchase of Land: in Trusts of Residuary Real Estate: Fines Payable out of Accumulations ..... 844
6. Bequest of Leasehold Ground Rents ..... 847

## SPECIFIC DEVISES, 848—861.

1. Devise of Freeholds to One ..... 848
2. Devise of Copyholds to One ..... 848
3. Devise of Freeholds to Woman without Power of Anticipation 848
4. Devise of Freeholds and Copyholds for Use of Woman without Power of Anticipation ..... 849
5. Devise of Lands to Infant: Appointment of Trustees for Management, &c.: Gift Over on Death under Twenty-one... 849
6. Specific Devise of Real Estate and Bequest of Leaseholds ..... 850
7. Devise of Freeholds so as Not to Lapse ..... 850
8. Specific Freeholds to Nephew as he shall Appoint: if Lands Previously Sold, Nephew to have Purchase-money ..... 850
9. Devise to Illegitimate Child to Prevent Escheat ..... 850
10. Devise of Land *Cum Onere*, Except as to Arrears of Interest ... 851
11. Devise of Lands Free from Mortgage ..... 851
12. Devise of Freeholds Charged with Legacy (*short form*) ..... 851
13. Devise of Freeholds Subject to a Charge of an Annuity: Proviso for Lapse ..... 851
14. Devise in Fee, Subject to Debts ..... 852
15. Devise of Freeholds Charged with Debts to Trustees of a Settlement ..... 852
16. Devise to Two Persons as Tenants in Common, with Cross Limitations ..... 852

**WILLS**—*continued.*

PAGE

17. Devise to Several as Tenants in Common, with Cross Limitations ..... 853
18. Devise to Children of Testator *nominatim* ..... 853
19. Devise to Children as a Class, with Substitution of Issue ..... 853
20. Devise to One for Life, with Remainder to his Children as Tenants in Common in Tail ..... 853
21. Devise to Tenants in Common for Life, with Cross Remainders: Remainder to Trustees for Sale for Surviving Issue of Devisees for Life: in Default to Fall into Residue ..... 853
22. Devise to Several for Lives with Remainder over ..... 854
23. Devise to Wife for Life, then to Son in Fee ..... 854
24. Devise of Copyholds to a Son in Fee, Subject to Wife's Life Estate ..... 855
25. Devise of Copyholds as Tenant for Life and Remainderman shall Appoint ..... 855
26. Devise to Wife during Widowhood: Remainder to Son in Fee: Wife to Repair and Insure, &c. ..... 855
27. Devise of Mansion-house to Trustees: Trust for Sale: Consent of Wife while Residing: Wife may Occupy until Sale: Repair and Insurance: Wife may relinquish Right of Occupation: Power of Leasing ..... 857
28. Devise of Advowson to Trustees to Sell: Power to Postpone for Presenting Son: to Fill Vacancy in Meantime: Notice: Power to Sell to Son who is Presented: Value deducted from Share ..... 859
29. Devise of Advowson by Incumbent to Trustees, to Present a Person and then to Sell ..... 860

GIFTS OF RESIDUE, 861—866.

1. Personalty to Wife ..... 861
2. Personalty to Son ..... 861
3. Personalty to Several Equally ..... 861
4. Personalty to Surviving Children as Tenants in Common ..... 861
5. Personalty to Children as a Class ..... 862
6. Personalty to Children and Issue of Deceased Children ..... 862
7. Realty and Personalty to One ..... 862
8. Realty and Personalty to Children and Issue of Deceased Children; Power to Partition; Appointment of Trustees for Management, &c. ..... 862
9. General Devise and Bequest to Trustees of Marriage Settlement ..... 863

**WILLS**—*continued.* PAGE

10. Freeholds, Copyholds, and Leaseholds to Two Sons: Cross Limitations in Case of Lapse: Residue of Personalty to Sons Equally ..... 863
11. Realty and Personalty to Trustees ..... 864
12. Realty and Personalty to Trustees where no Copyholds ..... 864
13. Realty and Personalty to Trustees where there are Copyholds 865
14. Copyholds to One of the Trustees ..... 865
15. Realty to Son for Life: Remainder to Trustees for Sale ..... 866
16. Residuary Personalty to Trustees ..... 866

TRUSTS FOR CONVERSION AND INVESTMENT, 866—883.

1. Trust for Sale and Conversion of Residuary Realty and Personalty ..... 866
2. Powers Relating to Conduct of Sales ..... 867
3. Power to Appropriate Part of Purchase-monies for Indemnity of Purchasers ..... 867
4. Power for Trustees to Purchase Trust Estate ..... 868
5. Power for Son, although Trustee, to Purchase Trust Estate ... 868
6. Property before Sale to Sons at Valuation: Protection of Purchasers ..... 868
7. Power to Postpone Sale: Income until Sale ..... 869
8. Power to Suspend Conversion of Foreign Government Securities 870
9. Power to Executors to Continue Loan to Testator's Son: such Debts at Nominal Amount in Distributing Residue ..... 870
10. Trusts of Unconverted Residuary Estate ..... 870
11. Leaseholds, etc., to be Considered as Sold ..... 871
12. Whole Income of Leaseholds, &c., Applicable for Tenant for Life ..... 871
13. Authority to Postpone Conversion: Actual Income to be Invested: Fair Allowance for Income to be made ..... 872
14. Reversions not to be Sold until they Fall into Possession ..... 872
15. Trusts of Proceeds of Sale and Conversion ..... 873
16. Power to Mortgage for Debts, &c., and Legacies: Protection of Mortgagees: Application of Surplus Money ..... 873
17. Trust for Investment of Residue ..... 874
18. Investment Clause (Statutory Investments) ..... 874
19. Investment Clause (Investments Authorised by Settled Land Act, 1882) ..... 875
20. Investment Clause (Restricted Range) ..... 875
21. Investment Clause (Fair Range) ..... 875
22. Investment Clause (Comprehensive Range). See *Addenda* ... 876

**WILLS**—*continued.* PAGE

23. Power to Vary Investments ..... 877
24. Trustees to Stand Possessed of Investments upon Trust..... 877
25. Authority to Retain, &c., Investments in India: to Employ Agents, &c.: Trustees not Answerable..... 878
26. Power to Invest in Purchase of Land: Power to Re-sell: Trusts of Purchased Lands ..... 878
27. Real Estate not Considered Converted until Sold: Children may Take as Realty or Personalty ..... 880
28. Power to Partition ..... 880
29. Power to Appropriate Property to Satisfy Legacies, &c. ..... 881
30. Power to Advance to Sons on Personal Security out of Trust Funds ..... 882
31. Trust to Invest in Purchase of Lands to be Settled to Uses of Will..... 882
32. General Direction for Investment of Trust Monies ..... 882
33. General Direction as to Consents to Sales and Investments ... 883

GENERAL POWERS OF APPOINTMENT, 883, 884.

1. To One by Deed or Will ..... 883
2. To Female by Will, and while Discovert by Deed ..... 883
3. To Two and the Survivor..... 884

TRUSTS OF RESIDUARY PERSONALTY, 884—910.

1. Wife during Widowhood (Request for Maintenance of Children), then Issue, as Wife Appoints: Cesser of Power on Re-marriage: Children Equally: Hotchpot ..... 884
2. Wife for Life: Issue as Wife Appoints: Children and Issue of Deceased Children Equally: Hotchpot ..... 886
3. Wife for Life: Trust to Maintain Children: Children Equally at Twenty-one or Marriage: Settlement of Daughter's Shares: Daughter for Life: Issue as Daughter Appoints: Children Equally: General Power of Appointment to Daughter: Next of Kin of Daughter: Power to Daughter to Appoint Life Interest to Husband: Power to Daughter to Join Husband in Appointing to Children..... 887
4. Moiety to Wife during Widowhood: Whole for Children, Sons at Twenty-five, Daughters at Twenty-one or Marriage; Shares of Sons more than Daughters: Settlement of Daughters' Shares: Daughter for Life: Children Equally: Clause of Accruer: in Default of Children of Daughter upon Trusts of other Shares: Power to Daughters to Bequeath Life Interests to Surviving Husbands: Substitution

**WILLS**—*continued.* PAGE

of Issue of Testator's Deceased Children: on Failure, other Moiety to Wife for Life: Whole to Niece and Children by Reference to Trusts for Testator's Daughters ..... 889

5. Son for Life: Proviso for Cesser on Alienation: Discretionary Trusts of Income: Accumulation: Gift Over of Income of Capital and Accumulations as if Son were Dead: on Death of Son for his Wife and Children: in Default of Children for B. absolutely [or Trusts by Reference] ..... 893

6. Son for Life, Determinable on Bankruptcy, &c. (*short form*): Discretionary Trust of Income after Bankruptcy, &c., of Son ..... 895

7. Life Interest absolutely Determinable on Bankruptcy..... 895

8. Trusts for Several Legatees Successively for their Lives ..... 896

9. General Proviso in Restraint of Anticipation ..... 896

10. General Proviso for Cesser of Life Interests on Bankruptcy or Alienation ..... 896

11. General Proviso for Forfeiture of Reversionary Interests on Bankruptcy or Alienation ..... 897

12. Trust for Three Persons and Survivors for Life: General Testamentary Power to Each to Appoint One-third of Capital: in Default Whole to Survivor ..... 897

13. Trust for Testator's Younger Children at Twenty-one or Marriage ..... 898

14. Trust for Children at Twenty-one or Marriage and Issue of Deceased Children ..... 899

15. Trust for Children in Unequal Shares: Power to Allot Investments ..... 899

16. Trust for Children Unequally (*another form*) ..... 900

17. Trust for Children at Twenty-five, and Issue of Children Dying under Twenty-five ..... 900

18. Vesting of Grandson's Shares Postponed to Twenty-five, if not too Remote..... 900

19. Trust for Issue of Grandchildren ..... 901

20. Substitution of Issue of Legatees Dying in Testator's Lifetime 901

21. Trust in Default of Issue Acquiring Vested Interest, for Wife if Alive and Unmarried: Otherwise for Sister..... 902

22. Trust for Brothers and Sisters of Testator and Children of Deceased Brothers and Sisters ..... 902

23. Trust for Surviving Brothers and Sisters and Issue of Deceased Brothers and Sisters for Life, then for Children or Remoter Issue under Appointment: Cross Limitations: Hotchpot ... 902

24. Trust out of Residue to Pay Annuities to Sisters: Subject thereto, to Apply Income for Maintenance of Children: on Death of Survivor Capital among Children *per Capita:*

**WILLS**—*continued.* PAGE

Power to Accumulate : Surplus Income to Sisters : Ultimate Trusts for Children of Another *per Capita* ..... 903

25. Trust for Brothers and Sisters for Respective Lives, then for Children *per Stirpes* ..... 904

26. Trust as to Moiety (Income or Capital) for Lunatic Brother : Surplus to his Next of Kin : Other Moiety for Sister for Life, then for her Husband for Life : her Issue as Sister Appoints : her Children and Children of Deceased Children at Twenty-one : in Default as Sister generally Appoints ... 905

27. Moiety to Brother for Life : Children as he Appoints : in Default Equally : on Failure upon Trusts of Other Moiety : Other Moiety as to Four-sixths among Children of Deceased Brother for Life, then for Grandchildren as to Two-sixths for Children of Deceased Nephew and Niece at Twenty-one or Marriage : Cross Limitations among the Six parts : on Failure, upon Trusts of Other Moiety ..... 907

28. Trust of One Share for Brother for Life, then to his Children, &c. : on Failure of Children upon Trusts of Other Shares : Another Share for Children of Deceased Brother : on Failure, upon Trusts of Other Shares : Other Shares for Other Brothers and Sisters by Reference to First Share ..... 908

29. Trust for Two Cousins for Life, then for their Children, with Cross Limitation..... 909

30. Trust for Three Nieces for Life, then for their Children or Issue, with Cross Limitations : on Failure to Survivor of Three Nieces ..... 909

31. General Proviso as to Vesting of Shares ..... 910

POWERS AND PROVISIONS RELATING TO REAL AND PERSONAL PROPERTY LIABLE TO CONVERSION, 910—932.

1. Maintenance of Children, &c..... 910

2. Maintenance of Minors ..... 911

3. Maintenance out of Capital ..... 912

4. Maintenance of Infant Children as a Class Irrespective of Shares..... 912

5. Accumulation of Income not Applied for Maintenance ..... 913

6. Accumulations for Infant Tenant for Life..... 913

7. Accumulation of any Surplus Income ..... 914

8. Advancement of Children, &c. ..... 914

9. Advancement, where Life Interests to Cease on Alienation..... 915

10. Advancement by Majority of Trustees ..... 915

11. Advancement out of Daughters' Settled Shares ..... 916

12. Advancement of Minors out of a Mixed Fund ..... 916

**WILLS**—*continued.*

PAGE

13. Power to Trustees to Raise a Sum for Advancement of Son by First Wife ..... 917
14. Powers for Maintenance, Education, and Advancement by Reference to Similar Powers to Children ... ..... 917
15. Appointment of Trustees for Purposes of Sect. 42 of Conv., &c., Act, 1881 : Incorporation of Section by Reference : Accumulations of Surplus Income ..... 917
16. Power to Manage, &c., until Sale : may Depute Powers to Guardians : may Appoint Bailiffs, &c. ..... ..... 919
17. Power to Manage (*short form*) : to Delegate : Rents until Sale 920
18. Power to Lease for Twenty-one Years (*short form*) ..... 921
19. Power to Grant Building, &c., and Mining, &c., Leases (*short form*) ..... ..... ..... 921
20. Power to Lease for Twenty-one Years ..... 921
21. Power to Grant Mining Leases ..... 922
22. Power to Grant Building Leases ..... 923
23. Power to Lease Furnished House until Sold..... 924
24. Power to Grant Licences to Copyhold Tenants to Demise ..... 924
25. Power to Sell Land for Fee Farm Rent..... 924
26. Power to Apportion Fee Farm Rents, &c., on Sales..... 925
27. Powers to Partition : Exchange : Enfranchise .. ..... 926
28. Power to Relinquish or Complete Contracts ..... 926
29. Power to Complete Alterations in Mansion-house and Improve Estate ..... ... 927
30. Power to Lay Out Streets, &c. ..... 928
31. Power to Keep up Establishment for Infant Children : Adult Children may Benefit..... ..... 928
32. Power to Purchase Residence for Wife and Unmarried Daughters : Proviso for Satisfaction of Bequest of Residence 929
33. Power to Permit Widow to Reside in Mansion-house : she to Repair and Insure ... ..... 930
34. Power to Son to Appoint Income to his Wife for Life ..... 931
35. Power to Daughters to Appoint Life Interest to Husbands..... 931
36. Power to Trustees to Settle Shares of Daughters Marrying under Age ..... 932
37. Power to Trustees to Raise and Pay a Sum to Daughter's Husband ..... 932

## DEVISES IN STRICT SETTLEMENT AND PROVISIONS ANCILLARY THERETO, 933—967.

PAGE

1. Devise of Freeholds ..... 933
2. General Power of Appointment to One Person ..... 933
3. General Power of Appointment to Two Persons Jointly and the Survivor ..... 934
4. Limitation of a Rent-charge ..... 934
5. Limitation of a Term of Years ..... 934
6. Limitation of a Life Estate ..... 935
7. The same to a Woman, with Restraint on Anticipation ..... 935
8. Limitation of a Life Interest Terminable on Bankruptcy, with Ulterior Trusts ..... 935
9. Limitation to Sons or Daughters of Tenant for Life Successively in Tail ..... 936
10. Limitations in Tail General by Reference ..... 936
11. Clause Reducing Estates Tail of Persons Born in Testator's Lifetime to Life Estates ..... 937
12. Clause Reducing Estates in Tail Male and in Tail of Persons Born in Testator's Lifetime to Life Estates: Reduction not to Apply to Children *en ventre sa mère* ..... 937
13. Series of Limitations in Strict Settlement: Eldest Son for Life: his First and Other Sons in Tail Male: Other Sons of Testator for Life: their Sons Successively in Tail Male: Sons of Eldest Son in Tail General: Daughters of Eldest Son in Tail General: Sons of Other Sons of Testator in Tail General: Daughters of such Other Sons in Tail General: Testator's Daughter for Life: her Sons in Tail Male: her Sons in Tail General: her Daughters in Tail General: Testator's Other Daughters for Life: Each Daughter's Sons in Tail Male: her Sons in Tail General: her Daughters in Tail General: Testator's Heirs ..... 938
14. Limitations in Strict Settlement: Testator's Sons Successively for Life and their Respective Issue in Tail Male: Testator's Daughters Concurrently for Life and their Respective Issue in Tail Male: Cross Remainders among the Daughters and their Issue: Testator's Children Concurrently in Tail General, with Cross Remainders: Testator's Heirs ..... 939
15. Limitations to Testator's Elder Daughter for Life: her Sons in Tail Male: her Sons in Tail General: her Daughters in Tail Male: her Daughters in Tail General: Testator's Younger Daughter for Life: her Sons in Tail Male: her Sons in Tail General: her Daughters in Tail Male: her Daughters in Tail General: Testator's Heirs ..... 940
16. Limitation to Tenant for Life's Daughters in Tail as Tenants in Common: Cross Remainders in Tail ..... 941
17. The same (*short form*) ..... 942

**WILLS**—*continued.*

PAGE

18. Substitution of Issue of Daughters Dying before Testator ..... 942
19. General Proviso as to Waste and Anticipation ..... 942
20. Proviso as to Repairs of Mansion-house..... ..... 942
21. Devisees to Assume Name and Arms: as to Appointments before Forfeiture ..... 942
22. Trusts of Term to Raise Portions for Testator's Daughters: Advancement: Accruer: Destination of Sum on Failure of Daughter's Issue ..... 944
23. Power to Son to Appoint Pin Money to and to Jointure Wife... 946
24. Power to Son to Charge Portions ..... 946
25. Power to Male Tenants for Life to Jointure and to Charge Portions ..... 947
26. Power to Female Tenants for Life to Appoint Rent-charges to Husbands and to Charge Portions..... 948
27. Power to Appoint Rent-charges to Husbands by Reference..... 949
28. Proviso Limiting Aggregate Amount of Rent-charges ..... 949
29. Proviso Limiting Amount of Portions ..... 949
30. Power to Charge Gross Sum by Will..... 949
31. Shifting Clauses in Strict Settlement in Will, with Provisoes in Case of Previous Exercise of Powers of Jointuring or Charging Portions ..... 950
32. Power to Trustees during Minorities to Apply Rents for Maintenance and Accumulate Surplus ..... 954
33. Appointment of Trustees for Purposes of Settled Land Acts and Sect. 42 of Conv., &c., Act, 1881 ..... 955
34. Destination of Accumulations of Rents and Profits ..... 956
35. Extension of Powers under Settled Land Acts: Introductory Clause ..... 956
36. Notices to Trustees Dispensed with ..... 956
37. Mining Rents not to be Capitalised ..... 957
38. Power to make Long Leases and Fee Farm Grants ..... 957
39. Power for Tenants for Life to Sell or Lease principal Mansion-house, Park, &c. ..... 958
40. Extension of Powers to Exchange and Purchase ..... 958
41. Extension of Powers of Investment and Application of Capital Monies..... 958
42. Power to Raise Money on Mortgage for Purposes not specified in Settled Land Acts: Protection of Mortgagees ..... 958
43. Power to Effect Improvements without any Certificate or Order of Court ..... 959
44. Power for a Sole Trustee to Act..... 960
45. Proviso enabling Tenant for Life to Purchase or Take in Exchange or on Lease any Settled Lands, and to direct Application of Capital Monies in Purchase of his own Lands..... 960

**WILLS**—*continued.*

PAGE

46. Devise of Copyholds to Uses declared of Freeholds ..... 963
47. Bequest of Leaseholds upon Trusts to Correspond with Uses declared of Freeholds ..... 963
48. Renewable Leaseholds upon Trusts for Renewal: to go with Freeholds Devised in Strict Settlement ..... 964
49. Bequest of Chattels as Heirlooms: Inventory: Occasional Examination ..... 965

TRUSTEE CLAUSES, 967—979.

1. Power to Specified Tenants for Life successively to Appoint New Trustees ..... 967
2. Power to Tenants for Life of Will to Appoint New Trustees ... 968
3. Power to Tenants for Life of Realty to Appoint New Trustees. 968
4. Power to Devisees in Common and Survivors to Appoint New Trustees ..... 968
5. Power to Children to Appoint New Trustees ..... 968
6. Power to Appoint New Trustees in respect of Daughters' Shares ..... 969
7. Appointment of New Trustees where distinct Trusts under same Will ..... 969
8. Special Power of New Appointment in regard to Separate Trust Fund ..... 970
9. Recommendation of Friends as Trustees: not Obligatory ..... 970
10. Power to Appoint Separate Trustees of Australian Investments 970
11. Proviso that Trustee Residing elsewhere shall cease to be Trustee ..... 971
12. General Proviso as to Consents to Appointment of New Trustees ..... 971
13. Proviso as to Appointment of New Trustees of Separate Funds 972
14. Trustee's Receipt Clause ..... 972
15. Indemnities to Trustees ..... 972
16. Special Indemnity to Trustees ..... 974
17. Reimbursement of Trustees ..... 974
18. Legacy to Newly-appointed Trustees ..... 974
19. Authority to Executors and Trustees to Deduct Commission on Sums Received ..... 975
20. Power for Trustees to Employ Solicitors, Agents, &c. ..... 975
21. Professional Trustee may Charge for Services ..... 975
22. Power for Trustee Resident or Going Abroad to Delegate Authority: Protection to Purchasers, &c. ..... 975
23. Advice ..... 976

**WILLS**—*continued.*

PAGE

24. Trustees to be Bound by Majority ..... 976
25. Power to Trustees to Determine Questions (*short form*) ..... 977
26. Power to Trustees to Determine Questions on Construction and Administration of Will: Forfeiture Clause ..... 977
27. Power to Compound Debts, &c. ..... 978
28. Proviso as to Remitting Proceeds of Sale, &c., of Property in Colony ..... 978

MISCELLANEOUS CLAUSES, 979—993.

1. Dower Clause ..... 979
2. Legacy to be Refunded on Succeeding to Estate ..... 979
3. Condition as to Release of Claims ..... 980
4. Children to forfeit Benefits unless they Confirm Sale by Testator of Hereditaments in Marriage Settlement ..... 980
5. Provision for Wife conditional on her giving up Life Interest under Marriage Settlement ..... 981
6. Devisee to Produce Title Deeds ..... 982
7. Recital of supposed Illegitimacy of Two Children: to Share with other Children ..... 982
8. Advancements in Lifetime to Children, &c., to be deducted from Shares ..... 983
9. The same (*short form*) ..... 984
10. Advancements in Lifetime of Money of Certain Amount to be brought into Account ..... 984
11. Advancements in Lifetime not to be in Satisfaction ..... 984
12. Advancements in Lifetime and Debts Owing to be deducted from Shares of Residue: Declaration of Advancements already made ..... 984
13. Advancements to be taken as Part of Children's Legacies except as to Married Daughter ..... 985
14. Pecuniary Legacy to Trustees in Lieu of Estate, if Sold by Testator ..... 985
15. Power to Set Apart Debts owing from Sons and Transfer to Trustees of Legacies in Satisfaction: Authority to Trustees of Legacies to Accept Specific Funds and Leave Debts Outstanding ..... 985
16. Power to Testator's Partner to Wind Up Partnership Affairs without Interference of Executors ..... 986
17. Direction as to Lapse of Charges on Lands ..... 987
18. Direction as to Lapsed Shares of Residue ..... 987
19. Lapse for Benefit of Devisee ..... 988
20. Proviso against Lapse of General or Residuary Gift ..... 988

**WILLS**—*continued.* PAGE

21. Proviso against Lapse of Aliquot Share in Residue ..... 988
22. General Provision against Lapse ..... 989
23. Provision where Legatee or Legatee's Husband or Parent is Indebted to Testator ..... 989
24. Proviso as to when Legacies Payable..... 989
25. Legacy Duty Payable out of Residue : Charge of Legacies on Realty ..... 991
26. Annuities and Legacies Free of Legacy Duty ..... 991
27. Legacy Duty on Specific Bequest of Stock Payable out of Residue ..... 991
28. Legacy Duty on Life Interests Payable out of Residue ..... 992
29. Fund for Legacy Duty ..... 992
30. Provision for Abatement if Funds Insufficient to Pay all Legacies ..... 992
31. Proviso as to Payment of Legacies, etc., out of pure Personalty for Purposes of Duty..... 992

## PRECEDENTS.

I. Will giving the Whole of the Testator's Property to his Wife... 994

II. Will giving a Legacy to a Married Niece, and directing a Legacy to be Appropriated or Purchased for an Only Daughter and her Husband successively for Life, and then for Daughter's Children. Residue to Testator's Wife ..... 995

III. Will giving the whole of the Testator's Real and Personal Property to One Person, with Substitution of his Children or Issue ..... 998

IV. Will of a Married Woman under a Power in her Marriage Settlement in favour of her Husband..... 998

V. Will of a Widower with Four Children. Specific and Pecuniary Bequests and Specific Devise of Lands in Mortgage. Residuary Real and Personal Estate to be Converted; and the Produce divided into Four Shares for Benefit of Two Sons and Two Daughters, one Married, the other an Infant. Provision against Improvidence of Younger Son ... 999

VI. Will of a Widower. Devise in Trust for Three Sons for Life, with equitable Remainders in Fee to their Children. Specific Devise in Trust for Two Daughters and their Children. Cross Limitations. Specific Devise to Grandson. Residuary Personalty for surviving Children equally with Substitution of Issue ..... 1001

VII. Will of Widower confirming Marriage Settlement and Ap-

**WILLS**—*continued.* PAGE

pointing among Children by Name equally and directing that Advancements are not to be brought into Hotchpot. Bequest of Annuity to Mother, &c. Gift of Residue to Surviving Children equally ..... 1003

VIII. Will of an Unmarried Man or Woman. Various Provisions for Relations. Gift of Residuary, Real, and Personal Estate to his Trustees as Tenants in Common for their own Use and Benefit ..... 1004

IX. Will of a Spinster, giving Legacies to Servants, &c. Charitable Legacies. Residue among her Five Brothers and Sisters, and Provisions for Family of Deceased Brother by Reference to his Will ..... 1006

X. Will of Widow giving Specific and Pecuniary Legacies and giving the Residue of Real and Personal Estate to Two Sons as Tenants in Common ..... 1008

XI. Will disposing of Residuary Estate in favour of the Testator's Wife and Children ..... 1008

XII. Will of a Farmer directing his Farming Business to be carried on until his Youngest Child attains Twenty-one or marries; the Profits and Income in the meantime for the Maintenance of his Wife and Children. Legacies to Children at Twenty-one or Marriage with Consent. When the Business is discontinued, Life Annuity to Widow and Residue to Children. Full discretionary Powers. Discretionary Power to Convert Real Estate ..... 1009

XIII. Will bequeathing Legacy to Wife for Life; then for Children subject to Power of Selection. Bequest of Coal and Iron Works to be carried on for a stated Period. Son to be admitted into the Concern on his Majority. Profits and Proceeds of Ultimate Conversion to be held on Trusts of Residuary Personalty. General Devise of Real Estate (subject to Life Interest given to Wife in Dwelling-house, &c.) to Eldest Son absolutely. Residue of Personalty to be Invested in Trust (subject to Annuity to Widow) for Sons and Daughters at Twenty-one or Marriage. Settlement of Shares of Daughters. Gift over of Residuary Personalty for benefit of Brothers and Sisters of Testator and their Issue *per Stirpes* ..... 1015

XIV. Will of a Trader giving a Pecuniary Legacy to each of his Children to vest at Twenty-one or on Marriage, and his Real Estate (charged with the Legacies) and the Residue of his Personal Estate to his Widow absolutely. Power for Widow to Retain Legacies during Minorities of Children if she carry on the Testator's Trade and remain Unmarried, paying Interest for the Maintenance of the Children ..... 1017

XV. Will of a Trader, a Married Man. Directions for Carrying on Trade ..... 1018

XVI. Will of a Partner. Bequest of Share in Business to Trustees,

**WILLS**—*continued.*

PAGE

upon Trust to Realise the Same, with Powers to settle Accounts and to leave Capital of Share in Business on Loan: Proceeds of Realisation to be as Residuary Estate. Usual Trusts of Residue for Benefit of Wife and Children ..... 1019

XVII. Will of a Partner who has Married Twice. Directions as to carrying on Partnership Business and Admission of Sons. Proviso for Discontinuance of Business. Proceeds of Realisation of Share in Partnership to Form Part of Residuary Personal Estate. Provisions for Present Wife and for Children by both Marriages ..... 1021

XVIII. Will in favour of Wife, Son, and Daughters. Residuary Personalty (except Stock in the Funds) to Wife. Realty to be Converted. The Bulk of the Property given in Legacies for the Benefit of Children, &c. Annuities to Sisters ..... 1023

XIX. Will bequeathing Specific and Pecuniary Legacies. Residue for Conversion. Income of Residue to Wife during Widowhood. Residue for Children: Son's Shares to vest at Twenty-five. Settlement of Daughters' Shares. Variation by which the Vesting of Grandson's Shares is Postponed until Twenty-five. Provision for Illegitimate Child..... 1024

XX. Will giving Real and Personal Estate in Trust for Sale, the Produce to be Invested for the Wife and Children. Life Interest in One Moiety to the Wife. Capital to Children in Unequal Shares. Daughters' Shares settled, with Cross Limitations. Life Annuities to Sister and Niece, determinable on Alienation ..... 1025

XXI. Will of a Widower, devising Specific Freehold and Copyhold Estates to each of his Three Daughters respectively for Life, with Power to Appoint Life Estates to their Surviving Husbands, and a Power of Selection among their respective Children or more Remote Issue. In default of Appointment, the Estates devised to each Daughter to go to her Children as Tenants in Common in Fee. Cross Executory Limitations between the Several Families. Provision for Indemnity of Testator and his Co-trustee under his Daughter's Marriage Settlement, against a Breach of Trust. The Residue of the Testator's Real and Personal Estates to Form one Fund, to be held upon Trust Similar to the Uses and Trusts Limited of the Real Estates Specifically devised, in such manner as to Compensate for any Inequalities in the Values of the Estates specifically devised. Power of Advancement out of the Real and Personal Estates ..... 1026

XXII. Strict Settlement of Two Estates on Testator's Two Daughters respectively and their Issue, with Cross Remainders and Ultimate Remainder to a Niece and her Issue. Name and Arms Clause. Shifting Limitations.

**WILLS**—*continued.* PAGE

Appointment of Protectors. Money for Debts and Legacies. Heirlooms ..... 1032

XXIII. Will of Realty and Personalty. Town House for Wife's Residence. Realty to Sons successively in Strict Settlement; in default of such issue to be Sold for Benefit of Daughters. Heirlooms. Legacies to Children and their Issue. Residue of Personalty for Wife, and then for Issue as she shall appoint; in default, equally. Power to Settle Part of Daughter's Legacies ..... 1037

XXIV. Real Estate in Strict Settlement. Usual Clauses. Legacies to Daughters and Younger Sons. Residue to Children generally. Power to raise Debts and Legacies by Mortgage of Realty ..... 1040

XXV. Will of a Landed Proprietor. Bequest of Renewable Leaseholds with Provisions for Renewal. Accumulation of Rents. Freeholds and Copyholds in Strict Settlement. Residuary Personalty for Younger Children ..... 1040

XXVI. Will devising Realty to an only Son and his Issue in Strict Settlement ..... 1041

XXVII. Will disposing of the Principal Part of the Testator's Property to the Uses and upon the Trusts of his Marriage Settlement ..... 1042

XXVIII. Will of a Solicitor. Various Trusts for Children. Interest in Partnership Business, Law Books, Papers, &c., bequeathed to a Son (a Partner) ..... 1043

XXIX. Surrender by Husband and Wife of Copyholds belonging to Wife, to such Uses as she shall by Will appoint ..... 1046

XXX. Will of a Married Woman, disposing of Copyholds surrendered to such Uses as she shall appoint (last Precedent), exercising a Power of appointing a Life Interest in Trust Funds to her Husband, and a Power of Selection in favour of her Children and more remote Issue (given her by her Father's Will), and disposing of her Separate Personal Estate and Savings ..... 1047

XXXI. Codicil appointing Additional Executor and Trustee ..... 1049

XXXII. Codicil appointing a new Trustee and Executor in the Room of a Trustee and Executor of the Will, who had died in Testator's Lifetime ..... 1050

XXXIII. Codicil Substituting Two Persons, in lieu of those named in the Will as Trustees and Executors ..... 1051

XXXIV. Codicil made after Marriage, confirming the Will giving an Annuity to the Testator's Wife, and admitting his Children by her to Share in his General Estate with the Children provided for by his Will ..... 1051

XXXV. Codicil revoking Legacies and Annuities and bequeathing others ..... 1052

XXXVI. Codicil made after the Purchase of Real Estates, with

**WILLS**—*continued.* PAGE

directions as to Payment of Legacies, &c., for purposes of Duty ..... 1052

XXXVII. Codicil reviving a Will previously revoked ..... 1053

XXXVIII. Another Form ..... 1053

XXXIX. Will reviving a Will revoked by Marriage ..... 1053

XL. Simple Revocation of a Will ..... 1054

XLI. Memorandum of Alteration and Re-execution of a Will ..... 1054

XLII. Marginal Alteration in a Will ..... 1055

INDEX TO THE PRELIMINARY DISSERTATIONS AND NOTES ..... 685

INDEX TO THE PRECEDENTS ..... 715

# TABLE OF CASES.


A.

PAGE

AARON *v.* Aaron ..... 539
Abbay *v.* Howe ..... 612
Abbiss *v.* Burney ..... 429
Abbott *v.* Massie ..... 525
——— *v.* Streeten ..... 22
Abney *v.* Miller ..... 385, 472, 623
Abraham *v.* Alman ..... 520
Abrey *v.* Newman ..... 614
Absalom *v.* Marks ..... 55
Acey *v.* Simpson ..... 713
Acherley *v.* Vernon ..... 412
Ackerman *v.* Burrows ..... 624
Ackroyd *v.* Smithson ..... 497 (n.)
Adams *v.* Austen ..... 564
——— *v.* Busk ..... 630
Adamson, Re ..... 384 (n.)
Addison *v.* Bush ..... 555
Addy *v.* Grix ..... 373
Adney *v.* Greatrex ..... 652
Adv.-Gen. *v.* Ramsay's Trustees ..... 226
——— *v.* Smith ..... 224 (n.), 227
Agnew *v.* Pope ..... 407
Ainsworth, Re ..... 369
Aird *v.* Quick ..... 820 (n.)
Airly *v.* Bower ..... 569
Aislaby *v.* Rice ..... 578
Aitcheson *v.* Dixon ..... 324
Aiton *v.* Brooks ..... 689
Albert Assurance Association, Re (Blyth's Case) ..... 31
Alchin's Trusts, Re ..... 527
Alcock *v.* Sloper ..... 489
Alderson *v.* Langdale ..... 24
Alexander *v.* Alexander ..... 429, 517, 575, 632
——— *v.* Gardner ..... 70
——— *v.* Thomas ..... 53
Alford *v.* Earle ..... 415
Alger *v.* Parrott ..... 669, 670
Allardice *v.* Onslow ..... 323
Allen, Re ..... 372
——— *v.* Allen ..... 358
——— *v.* Bewsley ..... 409
——— *v.* Callow ..... 464, 615
——— *v.* Jackson ..... 884 (n.)
——— *v.* Macpherson ... 310, 333, 525
——— *v.* Maddock ..... 541
——— *v.* Manning ..... 361
——— *v.* Morrison ..... 28
Allhusen *v.* Whittell ..... 487
Allison, Re ..... 172, 179
Allum *v.* Fryer ..... 512
All Souls' College *v.* Codrington ... 705, 761 (n.)

PAGE

Alten *v.* Farren ..... 26
Alton *v.* Medlicott ..... 712
Alves *v.* Hodgson ..... 4, 34
Ambrose *v.* Hodgson ..... 459
Ames *v.* Hill ..... 40, 42
Amiss, Re ..... 373
Amner *v.* Clark ..... 60
Amphlett *v.* Parke ..... 499, 501
Amson *v.* Harris ..... 611
Anderson *v.* Anderson ..... 342, 419, 637
——— *v.* Dawson ..... 659, 664
Andrew *v.* Andrew ..... 458 (n.), 575, 670, 709
Andrews *v.* Emmot ..... 564
——— *v.* Turner ..... 419
Andros, Re ..... 645 (n.)
Angerstein *v.* Martin ..... 486
Annandale *v.* Brazier ..... 547
——— *v.* Pattison ..... 28, 63, 64
Anon. (Cart. 211) ..... 357
——— (Chitty on Stamps) ..... 173
——— (Cro. Eliz. 9) ..... 512
——— (3 Leon. 11, pl. 27) ..... 512
——— (1 P. Wms. 327) ..... 665 (n.)
——— (Skinn. 182; Co. Litt. 187 a.) 684
——— (2 Vent. 363) ..... 575
Ansley *v.* Cotton ..... 244
Anstee *v.* Nelms ..... 534
Anstruther *v.* Chaloner ..... 313
Anther *v.* Anther ..... 771 (n.)
Appleton *v.* Rowley ..... 609
Apreece *v.* Apreece ..... 516, 712, 794 (n.)
Archbold *v.* Austin Gourlay ..... 577
Archer *v.* Jegon ..... 467
——— *v.* Legg ..... 614
Archer's Case ..... 638
Arkell *v.* Fletcher ..... 562 (n.)
Armitage *v.* Williams ..... 611
Armstrong *v.* Armstrong ..... 634
——— *v.* Clavering ..... 794 (n.)
——— *v.* Eldridge ..... 549
Arnald *v.* Arnald ..... 385
Arnold *v.* Arnold ..... 217, 704 (n.)
——— *v.* Chapman ..... 470
——— *v.* Congreve ..... 443, 623
——— *v.* Ennis ..... 493
——— *v.* Preston ..... 646, 649
Arnold's Trusts, Re ..... 689
Arrow *v.* Mellish ..... 614
Arrowsmith's Trusts, Re ..... 404
Arthur, Re ..... 369
——— *v.* Mackinnon ..... 506
Ashburnham *v.* Ashburnham ..... 712

PAGE

Ashby *v.* Ashby..... 75
——— *v.* Palmer ..... 483
Asher *v.* Whitlock ..... 349
Ashley *v.* Ashley ..... 439, 440 (n.)
——— *v.* Waugh ..... 414
Ashmore, Re ..... 365, 370, 373
Ashton, Re..... 371
——— *v.* Wood ..... 515
Aspinall *v.* Petvin ..... 545, 546, 547
Aston, Re ..... 542
Atcheson *v.* Atcheson ..... 980
Atherton *v.* Crowther ..... 699
Atkins *v.* Hiccocks ..... 583, 588 (n.)
——— *v.* Smith ..... 169
Atkinson, Re ..... 1053 (n.)
——— *v.* Anderson ..... 205, 252
——— *v.* Atkinson ..... 645 (n.)
——— *v.* Fell ..... 47
——— *v.* Turner ..... 584
Atlee *v.* Hook ..... 334
Attenborough *v.* Attenborough ... 442
——— *v.* Commissioners of Inland Revenue 85
Att.-Gen. *v.* Abdy..... 282
——— *v.* Aylesbury (Marquis of) ..... 174, 181
——— *v.* Bagot ..... 247
——— *v.* Baker ..... 276, 284
——— *v.* Bauhns ..... 205
——— *v.* Beatson ..... 217
——— *v.* Bouwens ..... 145, 174
——— *v.* Brackenbury ..... 222, 567
——— *v.* Braybrooke (Lord)... 282
——— *v.* Brown ..... 66
——— *v.* Brunning..... 175, 180
——— *v.* Buller ..... 557
——— *v.* Burnie ..... 205
——— *v.* Bury ..... 623
——— *v.* Campbell... 269, 270 (n.)
——— *v.* Cavendish ..... 229
——— *v.* Cleave ..... 240, 287
——— *v.* Cockerell..... 176, 217
——— *v.* Dardier..... 208 (n.)
——— *v.* Day ..... 352
——— *v.* Delaney ..... 247
——— *v.* Dimond ..... 174
——— *v.* Dowling ..... 284
——— *v.* Dunn ..... 324
——— *v.* Eustace-Cecil (Lord) 288
——— *v.* Fitzgerald ..... 324
——— *v.* Fletcher ..... 680
——— *v.* Floyer ..... 262 (n.), 282
——— *v.* Forbes ..... 216, 217
——— *v.* Gardner ..... 278
——— *v.* Gell ..... 275, 278
——— *v.* Giles..... 238
——— *v.* Gilphin..... 93
——— *v.* Greenhill ..... 436
——— *v.* Hallett..... 290
——— *v.* Hancock ..... 235
——— *v.* Harley ..... 704 (n.)
——— *v.* Hertford... 211, 222, 224, 273
——— *v.* Heywood ..... 201
——— *v.* Higgins..... 175
——— *v.* Hill ..... 507

PAGE

Att.-Gen. *v.* Hinxman ..... 507
——— *v.* Holbrook..... 228, 230
——— *v.* Holford ..... 226, 482
——— *v.* Hope..... 174, 247
——— *v.* Hubbuck ..... 173, 181
——— *v.* Jackson ... 176 (n.), 216, 217, 237, 273, 298
——— *v.* Johnstone..... 472
——— *v.* Jones ..... 176, 184, 214, 224, 305
——— *v.* Kent..... 323, 324
——— *v.* Lightfoot ..... 557
——— *v.* Lilford ..... 290
——— *v.* Littledale ..... 287
——— *v.* Lloyd ..... 408
——— *v.* Lomas ..... 174, 175, 181
——— *v.* Loscombe..... 235
——— *v.* Malkin..... 176, 184, 240
——— *v.* Mangles ..... 226
——— *v.* Manners ..... 231, 232
——— *v.* Maxwell ..... 240
——— *v.* Metcalfe ..... 227
——— *v.* Middleton (Lord) ... 275
——— *v.* Mill ..... 317
——— *v.* Miller ..... 425
——— *v.* Milner ..... 469
——— *v.* Mitchell ..... 280, 286
——— *v.* Montefiore's Executors 272
——— *v.* Munby..... 240
——— *v.* Murray..... 189
——— *v.* Napier ..... 323
——— *v.* Noyes ..... 279
——— *v.* Parnther ..... 330
——— *v.* Picard..... 223, 237, 273
——— *v.* Pottenger..... 323
——— *v.* Poulden ..... 453, 454
——— *v.* Pratt..... 174
——— *v.* Price..... 665
——— *v.* Robins ..... 712
——— *v.* Rowe..... 323
——— *v.* Rushton ..... 288
——— *v.* Sefton (Earl of)..... 290
——— *v.* Sibthorp ..... 281, 509
——— *v.* Simcox..... 227, 260 (n.)
——— *v.* Smythe..... 282
——— *v.* St. Catherine's Hall, Cambridge..... 436
——— *v.* Staff ..... 176, 183
——— *v.* Vigor... 349, 354, 386, 387, 396, 557, 558, 560, 563
——— *v.* Walker..... 176, 184
——— *v.* Ward..... 409
——— *v.* Wilkinson ..... 565
——— *v.* Wood..... 233
——— *v.* Wynford (Lord)..... 274
——— *v.* Yelverton..... 278, 283
Attwater *v.* Attwater ..... 547, 576
Attwood *v.* Alford..... 516
——— *v.* Small ..... 98
Audley's Case..... 214
Audsley *v.* Horn ..... 634
Austen *v.* Graham ..... 330
——— *v.* Taylor ..... 643

PAGE
Avelyn *v.* Ward ..... 578
Avern *v.* Lloyd ..... 440
Awse *v.* Melhuish ..... 692
Ayers *v.* Ayers ..... 367
Ayle's Trusts, Re ..... 645
Ayling, Re ..... 375
Aylwyn's Trusts, Re ..... 617
Ayscough *v.* Savage ..... 613
Aysey *v.* Fearnsides ..... 54
—— *v.* Hill ..... 329
Ayton *v.* Ayton ..... 617 (n.)

B.

Backhouse *v.* Young ..... 480
Bacon *v.* Crosby ..... 627 (n.)
—— *v.* Proctor ..... 454
—— *v.* Simpson ..... 23, 24, 25, 42
Badart's Trusts, Re ..... 269
Baddeley *v.* Leapingwell ..... 695
Badger *v.* Gregory ..... 689
—— *v.* Lloyd ..... 424, 573
Baggott *v.* Meux ..... 849 (n.)
Bagley *v.* Moldard ..... 649, 805 (n.)
Bagwell *v.* Dry ..... 473
Baile *v.* Colman ..... 637
Bailey, Re ..... 337, 366
—— *v.* Tindall ..... 263 (n.)
—— *v.* Wright ..... 659, 664
Bailis *v.* Gale ..... 693
Bain *v.* Lescher ..... 465, 616
Bainbridge *v.* Cream ..... 573
Baines *v.* Ottery ..... 668
Baker *v.* Baker ..... 611
—— *v.* Dening ..... 365
—— *v.* Gibson ..... 659, 663
—— *v.* Gostling ..... 78
—— *v.* Hacking ..... 348
—— *v.* Hall ..... 470
—— *v.* Hanbury ..... 462
—— *v.* Mosely ..... 517
Balday *v.* Parker ..... 31
Baldwin *v.* Alsager ..... 42
—— *v.* Baldwin ..... 407
—— *v.* Karver ..... 616, 617 (n.)
Balfour *v.* Scott ..... 314, 316, 319
Ball's Trusts, Re ..... 661
Balm *v.* Balm ..... 621, 622, 627
Banbury *v.* Lissett ..... 51
—— Union *v.* Robinson ..... 47
Bangham, Re ..... 308 (n.)
Banks *v.* Baroness le Despencer 643, 1035 (n.)
—— *v.* Goodfellow ..... 333
—— *v.* Holme ..... 574 (n.)
Banner *v.* Johnston ..... 51
Barber *v.* Barber ..... 465
Barclay *v.* Maskeleyne ..... 404, 409
Barham *v.* Earl of Thanet ..... 188, 189
Barker, Re ..... 280
—— *v.* Barker ..... 601
—— *v.* Lea ..... 591, 679
—— *v.* Smack ..... 63, 82
Barker's Estate, Re ..... 473
Barker's Will, Re ..... 663
Barksdale *v.* Gilliat ..... 241, 242
Barlow *v.* Broadhurst ..... 41
—— *v.* Orde ..... 314, 645 (n.)
—— *v.* Salter ..... 685
Barnaby *v.* Tassell ..... 311, 614
Barnes *v.* Allen ..... 593, 680, 687
—— *v.* Crowe ..... 410, 412, 541
—— *v.* Grant ..... 517
—— *v.* Rowley ..... 824 (n.)
—— *v.* Vincent ..... 312
Barnett *v.* Tugwell ..... 653
Barraclough *v.* Greenhough ..... 311
Barraud *v.* Archer ..... 298
Barrington *v.* Liddell ..... 454, 456, 457
—— *v.* Hereford ..... 470
—— *v.* Tristram ..... 605, 621, 991 (n.)
Barrow *v.* Mashiter ..... 27
—— *v.* Wadkin ..... 341
Barry *v.* Butlin ..... 333
—— *v.* Crandall ..... 404
—— *v.* Goodman ..... 39
—— *v.* Harding ..... 763 (n.)
Bartholomew *v.* Henley ..... 306
Bartleman *v.* Murchison ..... 617, 620
Bartrum *v.* Caddy ..... 23
Bassett's Estate, Re ..... 504
Bassil *v.* Lister ..... 457
Batchellor, Re ..... 994 (n.)
Bate *v.* Norton ..... 510
—— *v.* Pane ..... 230, 236
Bateman *v.* Hotchkin ..... 454
—— *v.* Phillips ..... 76
Bath (Earl of) *v.* Harvey ..... 355
Bathurst *v.* Errington ..... 629, 632
Batsford *v.* Kebbel ..... 585
Battersbee, Re ..... 542
Baxter *v.* Dyer ..... 389
Bayley *v.* Bishop ..... 580, 824 (n.)
—— *v.* Snelham ..... 653
Bayley's Settlements, Re ..... 628, 631
Baylis, Re ..... 508
—— *v.* Att.-Gen. ..... 508
Bayne *v.* Crowther ..... 516
Beachcroft *v.* Beachcroft ..... 653
Beal *v.* Wyman ..... 509
Beale *v.* Beale ..... 628
Bean, Re ..... 686
Beard *v.* Beard ..... 394
—— *v.* Westcott ..... 421, 422, 437, 446
Beardsley *v.* Baldwin ..... 53
Beaufort (Duke of) *v.* Lord Dundonald ..... 706
Beaumont *v.* Fell ..... 526 (n.)
—— *v.* Oliveira ..... 820 (n.)
Beaulieu (Lord) *v.* Lord Cardigan ..... 620
Beavan, Re ..... 95
Beckett *v.* Harden ..... 403
Beckford *v.* Parnecott ..... 412
Beckwith *v.* Beckwith ..... 686
—— *v.* Howe ..... 371
Bective (Countess of) *v.* Hodgson 452
Bedell *v.* Constable ..... 329

PAGE

Beech *v.* Lord St. Vincent ..... 455
Beeching *v.* Westbrook ..... 36, 73
Beeston *v.* Booth ..... 711
Beevor *v.* Partridge ..... 522
"*Belfort*," *The* ..... 17 (n.)
Bell *v.* Fothergill ..... 385
—— *v.* Holtby ..... 1036 (n.)
—— *v.* Kennedy ..... 324, 325
—— *v.* Phyn ..... 627
Bellairs *v.* Bellairs ..... 884 (n.)
Bellasis' Trusts, Re ..... 634
Bellis' Trusts, Re ..... 558
Bempde *v.* Johnston 314, 317, 319, 322
Bennet *v.* Bennet ..... 816 (n.)
—— *v.* Lowe ..... 476
Bennett *v.* Aburrow ..... 564
—— *v.* Earl of Tankerville ... 392, 637
—— *v.* Hayter ..... 527
—— *v.* Honeywood ..... 626
—— *v.* Wade ..... 386
Benson *v.* Benson ..... 379, 384
—— *v.* Maude ..... 990 (n.)
—— *v.* Whittam ..... 516
Bentinck *v.* Duke of Portland ... 432
Bentley *v.* Blizard ..... 652
Benyon *v.* Maddison ..... 584
Berkeley *v.* Swinburne ..... 577, 617
Bernard *v.* Mountague ..... 609
Bernasconi *v.* Atkinson ..... 529
Bernhard *v.* Minshull, 472, 517, 522, 569
Berry *v.* Berry ..... 606
—— *v.* Usher ..... 498
Bertie *v.* Falkland ..... 524
Bescoby *v.* Pack ..... 763 (n.)
Bestall *v.* Bunbury ..... 335
Best's Settlements, Re ..... 667, 670
Bethel *v.* Blencowe ..... 38, 99
Bethune *v.* Kennedy ..... 492
Bettison *v.* Rickards ..... 512
Betts *v.* Doughty ..... 311
Betty Smith's Trusts, Re ..... 553, 578
Beverley's Case ..... 329
Bevison *v.* Hussey ..... 696
Bibb *v.* Thomas ..... 379
Bibby *v.* Thompson ..... 514
Biddle *v.* Perkins ..... 442
Biddles *v.* Biddles ..... 516
Biggs *v.* Biggs ..... 378
Bill *v.* Kinaston ..... 603, 764 (n.)
Billingsley *v.* Wills ..... 631
Birch *v.* Birch ..... 384
—— *v.* Wade ..... 517
Bird *v.* Harris ..... 670
—— *v.* Hunsdon ..... 553
—— *v.* Maybury ..... 884 (n.)
Birkbeck Freehold Land Society, Re ..... 22
Birkett, Re ..... 505, 507
—— *v.* Vandercrom ..... 334
Birkhead *v.* Bowdoin ..... 380
Birt, Re ..... 369
Biscoe *v.* Perkins ..... 698
Bishop, Re ..... 371
—— *v.* Cappel ..... 662
—— *v.* Curtis ..... 347 (n.)

PAGE

Bishop *v.* Sharpe ..... 328
—— *v.* Wall ..... 335
Bizzey *v.* Flight ..... 538, 543
Black *v.* Jobbing ..... 382
Blackborough *v.* Davis ..... 718
Blackburn *v.* Stables ..... 638, 642
Blacket *v.* Lamb ..... 443
Blackler *v.* Webb ..... 611, 678
Blackman, Re ..... 529
Blackwell, Re ..... 508
—— *v.* Bull ..... 547, 553
—— *v.* McNaughtan ..... 40
—— *v.* Pennant ..... 795 (n.)
Blair, Re ..... 366
—— *v.* Bromley ..... 8
—— *v.* Ormond ..... 64, 76, 87
Blake *v.* Blake ..... 371, 568
—— *v.* Gibbs ..... 770 (n.)
—— *v.* Knight ..... 370
—— *v.* Luxton ..... 358
Blake's Trusts, Re ..... 553
Blakelock *v.* Sharp ..... 613
Blakeney *v.* Blakeney ..... 514
Blamire *v.* Geldart ..... 584
Bland *v.* Lamb ..... 472
—— *v.* Wilkins ..... 470
—— *v.* Williams ..... 592
Blandy *v.* Herbert ..... 67
Blann *v.* Bell ..... 493
Blasson *v.* Blasson ..... 626
Blease *v.* Burgh ..... 621
Bleckley, Re ..... 382
Blewett, Re ..... 373
Blewitt, Re ..... 1035 (n.)
—— *v.* Blewitt ..... 399
Blight *v.* Hartnoll ..... 431, 472
Bliss *v.* Putnam ..... 238, 298
Blodwell *v.* Edwards ..... 343, 655
Blount *v.* Pearman ..... 28, 79
Blower *v.* Morret ..... 712
Blower's Trusts, Re ..... 607
Bloxham *v.* Favre ..... 321
Blundell *v.* Dunn ... 623, 648 (n.), 650
—— *v.* Gladstone ..... 506
Boase *v.* Jackson ..... 28, 79
Boddy *v.* Dawes ..... 990 (n.)
Boehm *v.* Campbell ..... 60
Bolton *v.* Dugdale ..... 51, 54
Bolton's Lease, Re ..... 80
Bond, Re ..... 519
—— *v.* Graham ..... 170, 177
Bone *v.* Pollard ..... 277 (n.)
Bonner, Re ..... 607
Bonser *v.* Kinnear ..... 519 (n.)
Boon *v.* Cornforth ..... 547, 710
Booth *v.* Booth ..... 583, 587
—— *v.* Coulton ..... 493
—— *v.* Dean ..... 795 (n.)
—— *v.* Vicars ..... 668
Bootle *v.* Blundell ..... 330
Boraston's Case ..... 574, 584
Borlase *v.* Borlase ..... 379
Boughey *v.* Moreton ..... 381
Boughton *v.* James ..... 429, 446, 451, 621, 623
Boulcott *v.* Boulcott ..... 385

PAGE

Boulter, Re ..... 848 (n.)
Boulton *v.* Beard ..... 593
Bourne, Re ..... 596
Bousfield *v.* Godfrey ..... 76
Bovey *v.* Smith ..... 313
Bowden *v.* Bowden ..... 493
——— *v.* Laing ..... 515
Bowen *v.* Ashley ..... 28
——— *v.* Fox ..... 36, 39
——— *v.* Lewis ... 636 (n.), 638, 640
Bowers *v.* Littlewood ..... 719
Bowes *v.* Bowes ..... 414
Bowlby *v.* Bell ..... 46
Bowles *v.* Bowles ..... 631, 632
Bowman *v.* Milbancke ..... 504
——— *v.* Nichol ..... 23, 24
——— *v.* Reece ..... 313
Bown, Re ..... 800 (n.)
Bownes *v.* Marsh ..... 63
Bowser *v.* Bradshaw ..... 311
Boyce *v.* Boyce ..... 507
Boyd *v.* Boyd ..... 816 (n.)
—— *v.* Emmerson ..... 48
Boydell *v.* Drummond ..... 44
Boyes *v.* Bedale ..... 645 (n.)
—— *v.* Cook ..... 569
Boyle *v.* Bishop of Peterborough 682
Boys *v.* Boys ..... 493
—— *v.* Bradley ..... 660
Brabazon, Re ..... 581
Brackenbury *v.* Gibbons ..... 429, 595
Braddock, Re ..... 374
Bradford *v.* Belfield ..... 476
——— *v.* Foley ..... 577, 578
——— *v.* Young ..... 311
Bradish *v.* Gee ..... 484
Bradley *v.* Westcott ..... 564
Bradshaw *v.* Bradshaw ..... 529, 530
——— *v.* Melling ..... 609, 614
Brady *v.* Cubit ..... 376 (n.)
Bragger, Re ..... 617
Brain *v.* Brain ..... 390
Brake, Re ..... 526
Brandon *v.* Brandon ..... 657
Branstrom *v.* Wilkinson ..... 585
Bray *v.* Brea ..... 442
—— *v.* Manson ..... 40
Braybrooke (Lord) *v.* Att.-Gen. 263 (n.), 275, 281, 289
——— *v.* Inskip 557, 558
Braythwaite *v.* Hitchcock ..... 10, 75
Bremer *v.* Freeman ..... 320
Brest *v.* Offley ..... 518
Brett *v.* Horton ..... 613
—— *v.* Rigden ..... 459
Brewster, Re ..... 380
Briant, Re ..... 789 (n.)
Brice *v.* Bannister ..... 57
—— *v.* Smith ..... 595
Brickenden *v.* Williams ..... 570
Briden *v.* Hewlett ..... 663
Bridge *v.* Abbott ... 462, 662, 667, 669
Bridges *v.* Strachan ..... 403
Bridgman *v.* Dove ..... 708
Bridgwater *v.* Bolton ..... 693

PAGE

Briggs *v.* Oxford (Lord) ..... 454
——— *v.* Peel ..... 28, 32
——— *v.* Penay ..... 516
——— *v.* Upton ..... 667, 668
——— *v.* Watt ..... 387, 390
Brine *v.* Smith ..... 375
Bristol (Countess of) *v.* Hungerford ..... 498
Bristow *v.* Boothby ..... 427
——— *v.* Bristow...245 (n.), 409 (n.), 991 (n.)
——— *v.* Ward ..... 440
Broad *v.* Bevan ..... 518
Broadhurst *v.* Morris ..... 663
Broadmead *v.* Wood ..... 630
Brocklebank *v.* Johnston ..... 588
Brodie *v.* Barry ..... 313, 315, 317
Bromfield *v.* Crowder ..... 575, 576
Bromhead *v.* Hunt ..... 579
Brook *v.* Brook ..... 697
——— (Lord) *v.* Earl of Warwick 706, 708
Brook's Will, Re ..... 511
Brooke *v.* Haymes ..... 237
——— *v.* Kent ..... 383
——— *v.* Lewis ..... 990 (n.)
Brookes *v.* Davies ..... 95
Brookman's Trust, Re ..... 460
Brooks *v.* Elkins ..... 40, 52
Broome *v.* Monck ..... 352
Broughton *v.* Langley ..... 637
Brouston *v.* Weightman ..... 805 (n.)
Brown *v.* Allen ..... 712
——— *v.* Att.-Gen. ..... 306
——— *v.* Bigg ..... 499
——— *v.* Brown ..... 378, 385, 712
——— *v.* Casamajor ..... 514, 516
——— *v.* De Laet ..... 548
——— *v.* De Winton ..... 52, 55
——— *v.* Dyer ..... 356
——— *v.* Gellatly ..... 487, 488, 493
——— *v.* Groombridge ..... 624
——— *v.* Higgs ..... 472, 554
——— *v.* Kenyon (Lord) ..... 579
——— *v.* Langley ..... 509
——— *v.* Pegg ..... 92 (n.)
——— *v.* Ross ..... 824 (n.)
——— *v.* Savage ..... 17
——— *v.* Smith ..... 323
——— *v.* Wood ..... 658
——— *v.* Wooler ..... 58
Brown's Case ..... 356
Brown and Sibley, Re ..... 441
Browne *v.* Browne ..... 575
——— *v.* Dawson ..... 41
——— *v.* Gibbs ..... 507
——— *v.* Hammond ... 481, 861 (n.)
——— *v.* Hope ..... 460
——— *v.* Paull ..... 515
——— *v.* Savage ..... 3
——— *v.* Stoughton ..... 427, 451
Browne's Will, Re ..... 516
Bruce *v.* Bruce ..... 221, 314, 315 (n.), 319, 323
Brudenell *v.* Boughton ..... 409
Brunsden *v.* Woolredge ..... 665

PAGE

Brunt *v.* Brunt ..... 379
Bryan *v.* Collins ..... 450, 631
——— *v.* Mansion ..... 238
——— *v.* Twig ..... 549
Bryce, Re ..... 365
Bryden *v.* Willett..... 609, 628
Brydges *v.* Duke of Chandos..... 391
Bryon, Re, Drummond *v.* Leigh... 653
Buck *v.* Robson..... 57
Buckell *v.* Blenkhorn ..... 358
Buckland *v.* Barton ..... 564
Buckle *v.* Fawcett ..... 609
Buckley's Estate, Re ..... 913 (n.)
Buckmaster *v.* Harrop..... 353
Buckworth *v.* Thurtle ..... 601
Buffar *v.* Bradford ..... 463, 633
Buggins *v.* Yeates..... 519
Bull *v.* Comberbatch..... 676
——— *v.* O'Sullivan..... 57
——— *v.* Pritchard ..... 590, 429
——— *v.* Vardy ..... 554
Bulling *v.* Ellice ..... 794 (n.)
Bullock *v.* Downes ..... 659, 663
——— *v.* Stones ..... 474, 600
Bulmer *v.* Jay ..... 669
Bunker *v.* Cooke ..... 349, 350, 386
Bunn, Re ..... 586, 797 (n.)
Bunney *v.* Bunney ..... 407
Bunting *v.* Marriott..... 527
Burchet *v.* Durdant..... 623
Burdett *v.* Hopegood ... 344 (n.), 626
Burgess *v.* Burgess ..... 792 (n.)
——— *v.* Robinson..... 982 (n.)
Burgoine *v.* Fox ..... 386
Burgoyne *v.* Showler ..... 375, 384
Burley *v.* Evelyn ..... 440
Burnaby *v.* Equitable Rev. Int. Soc. 811
Burnett *v.* Mann ..... 335, 717
Burrell *v.* Baskerfield ..... 613
——— *v.* Earl of Egremont 409 (n.)
Burridge *v.* Bradyl ..... 713
Burrough *v.* Philcox ..... 554
Burrows *v.* Cottrell ..... 243, 245
Burt *v.* Hellyar..... 672
——— *v.* Sturt..... 453, 456, 457
Burtenshaw *v.* Gilbert..... 381
Burton *v.* Gowell ..... 400 (n.)
——— *v.* Mount ..... 493
——— *v.* Newbury ..... 410, 419
——— *v.* Reevell ..... 42
Busby *v.* Greenslate..... 636
Bushell, Re ..... *Addenda*
Butcher *v.* Butcher ..... 682
Bute (Earl of) *v.* Stuart ..... 518
——— (Marquess of), Re ..... 710
Butler *v.* Bushnell ..... 663
——— *v.* Butler..... 184, 474
——— *v.* Duncombe ..... 628
——— *v.* Greenwood..... 404
——— *v.* Grey ..... 554
——— *v.* Stratton... 609, 610, 611, 666
Butts *v.* Swann..... 52
Buxton *v.* Bedall ..... 44
——— *v.* Buxton ..... 494
——— *v.* Cornish..... 5
Byne *v.* Blackeburn ..... 516

PAGE

Byng *v.* Byng ..... 633
Byrd, Re..... 371, 373
Byrne *v.* Currey ..... 245
Byrom *v.* Thompson..... 25
Bythesea *v.* Bythesea ..... 627
Bywater, Re ..... 311

C.

Cadell *v.* Palmer.....422, 426, 441
Cadge, Re ..... 384
Cadogan *v.* Kennett..... 604
Cafe *v.* Bent ..... 490, 493
Caffrey *v.* Darby ..... 493
Caldecott *v.* Caldecott..... 480, 493
Caldwell *v.* Dawson..... 68
——— *v.* Holme ..... 527
Callow *v.* Lawrence..... 23
Calsha *v.* Cheese ..... 461
Calvert *v.* Seddon..... 246
Calvin *v.* Fraser ..... 310
Camac's Trust, Re ..... 738
Cambridge *v.* Rous ..... 437
Camoys *v.* Blundell ..... 533
Campbell *v.* French ..... 53, 408
——— *v.* Lucy..... 311
——— *v.* Sandys..... 358
Campbell's Trusts, Re ..... 613
Canning (Lord) *v.* Roper ..... 89
Capel *v.* Girdler ..... 351
——— *v.* Roberts ..... 527
Caplin's Will, Re..... 554
Cardross, Re ..... 796 (n.)
Cardwell *v.* Martin ..... 24, 25
Careless *v.* Careless ..... 526
Carey *v.* Askew..... 361, 363
Carlon *v.* Kennedy ..... 54
Carne *v.* Long ..... 436
Carpenter *v.* Bott..... 660
——— *v.* Buller ..... 28, 29
——— *v.* Dunsmure ..... 511 (n.)
Carr *v.* Erroll (Earl of) ..... 425, 596
——— *v.* Living ..... 884 (n.)
——— *v.* Roberts ..... 66, 185, 193, 723
Carrington (Lord) *v.* Payne ..... 406
Carte *v.* Carte ..... 415
Carter *v.* Barnardiston ..... 700
Carthew *v.* Euraglat ..... 554
Cartwright *v.* Cartwright ..... 330
——— *v.* Shepheard ..... 404
——— *v.* Vawdry..... 645, 649
Carver *v.* Bowles ..... 443
——— *v.* Burgess..... 592
Carwardine *v.* Carwardine..... 595
Case *v.* Drosiers ..... 427
Casement *v.* Fulton ..... 373
Casemore, Re..... 369
Casterton *v.* Sutherland ..... 682
Castle *v.* Fox..... 534
Caswall, Ex parte ..... 563
Catchmay *v.* Nicholls ..... 603
Cator *v.* Cator ..... 409 (n.), 634
Catt *v.* Howard ..... 5, 95
Cattell *v.* Gamble ..... 78, 150 (n.)
Cattlin *v.* Browne... 426, 430, 432, 443

PAGE
Cave *v.* Holford ..... 349, 387
—— *v.* Roberts ..... 475, 715 (n.)
Cavendish *v.* Cavendish ..... 704 (n.)
Cawthorne *v.* Holben ..... 27, 84
Cawthron, Re ..... 309
Chadock *v.* Cowley ..... 575
Chadwick *v.* Doleman..... 628, 630
———— *v.* Sills ..... 41
Chadwicke *v.* Clarke..... 36, 37, 38
Chaffers *v.* Abel ..... 582
Challenger *v.* Sheppard ..... 696
Chaloner *v.* Butcher..... 484
Chamberlain *v.* Hutchinson ..... 570
Chamberlayne *v.* Chamberlayne... 638
Chambers *v.* Atkins ..... 514
———— *v.* Brailsford ..... 474
Chamney, Re..... 374
Champion *v.* Plummer ..... 40
Chandler *v.* Pocock ..... 568
Chandos (Marquis of) *v.* Commissioners of Inland Revenue 66, 69, 88
Chanter *v.* Dickinson ..... 38, 45
Chapman *v.* Blissett..... 619
———— *v.* Brown..... 444 (n.), 507
———— *v.* Hart... 562 (n.), 565, 704, 706
Chapman's Case ..... 672
———— Trusts, Re..... 287
Charge *v.* Goodyear..... 607
Charlemont *v.* Spencer..... 335
Charlton *v.* Att.-Gen. ..... 282, 286
Charman *v.* Charman ..... 389
Charter *v.* Charter ..... 530
Chatfield *v.* Bercholt ..... 221
———— *v.* Cox ..... 44
Chatteris *v.* Young ..... 244, 755 (n.)
Cheney's Case (Lord) ..... 524
Cherry *v.* Boultbee ..... 776 (n.)
Cheslyn *v.* Cresswell ..... 473
Chester *v.* Chester ..... 559, 560
—— *v.* Urwick..... 525, 544
Chichester *v.* Bickerstaff ..... 485
Chilcott *v.* Bromley..... 794 (n.)
Chitty *v.* Bishop..... 22, 105 (n.)
———— *v.* Parker ..... 497
Chobury *v.* Beckett..... 400 (n.), 407
Chomeley *v.* Darley..... 39, 58
Cholmondeley, Re ..... 203, 222
———— *v.* Ashburton (Lord) 659
Christian, Re..... 373
———— *v.* Devereux... 185, 792 (n.)
Christie *v.* Commissioners of Inland Revenue ..... 68
Christopher *v.* Christopher... 376 (n.)
Christ's Hospital *v.* Grainger..... 442
Church *v.* Kemble ..... 443
—— *v.* Mundy..... 559, 561
Churchill *v.* Dibben..... 670
Cigala's Settlement, Re ..... 270
City of London *v.* Garway ..... 545
Clark, Re ..... 365, 366, 469
—— *v.* Bulmer ..... 44
—— *v.* Day..... 638
—— *v.* Phillips ..... 465
Clark's Estate, Re ..... 568
———— Trust, Re ..... 436

PAGE
Clarke, Re ..... 365
———— *v.* Blake..... 626
———— *v.* Burgle ..... 390
———— *v.* Butler ..... 404
———— *v.* Chamberlin ..... 1035 (n.), 1036 (n.)
———— *v.* Colls ..... 660
———— *v.* Cripps ..... 379, 380
———— *v.* Franklin ..... 183
———— *v.* Hilton ..... 671
———— *v.* Jones..... 17
———— *v.* Roche ..... 11
———— *v.* Sewell ..... 990 (n.)
———— *v.* Smith ..... 600, 601
Clarke's Trusts, Re.....800 (n.)
Clarkson *v.* Clarkson ..... 382
Clavering *v.* Ellison ... 512, 844 (n.), 982 (n.)
Clay, Re..... 460, 799 (n.)
—— *v.* Crofts ..... 37
—— *v.* Pennington..... 610
—— and Tetley, Re ..... 758 (n.)
Clayton *v.* Burtenshaw ... 29, 32, 43, 72, 100
———— *v.* Gregson ..... 534
———— *v.* Lowe ..... 680
———— *v.* Nugent (Lord) ..... 534
Clegg *v.* Levy..... 34
Clench *v.* Cudmore ..... 329
Clere's Case (Sir Edward) ..... 563
Clergy Society, Re..... 527
Clerk *v.* Blackstock ..... 23
Clifford *v.* Clifford ..... 567
Clifton *v.* Goodburn..... 650
Clive *v.* Clive..... 833 (n.)
Cloberry *v.* Lampen..... 581
Clowes *v.* Clowes ..... 472
———— *v.* Hilliard..... 662
Clulow's Trusts, Re 452, 453, 456, 471
Coales, Re ..... 215, 217
Coates *v.* Perry..... 69, 84
Cock *v.* Cooke ..... 307
Cockerell *v.* Earl of Essex ..... 244
Coe's Trust, Re ..... 804 (n.)
Coghlan's Case ..... 330
Colberg, Re ..... 381
Cole *v.* Fitzgerald..... 709
—— *v.* Parkin ..... 25
—— *v.* Scott..... 350, 414, 771 (n.)
—— *v.* Sewell ..... 425, 442
—— *v.* Wade..... 407 (n.), 513, 666
Coleman *v.* Seymour ..... 629, 630
———— and Jarrom, Re ... 464(n.), 799 (n.), 853 (n.)
Coles, Re..... 307
—— *v.* Trecothick ..... 367 (n.)
Colley, Re ..... 308
Colley's Trusts, Re ..... 465
Collier *v.* McBean..... 641
———— *v.* Squire ..... 670
Collingwood *v.* Pace ..... 340, 658
———— *v.* Stanhope..... 629
Collins *v.* Collins ..... 490
———— *v.* Wakeman..... 497, 498, 500
Collins' Trusts, Re ..... 659
Colman, Re ..... 372

PAGE
Colpoys *v.* Colpoys ..... 533, 525 (n.)
Colshead, Re ..... 403
Colston *v.* Morris ..... 980 (n.)
Colter *v.* Sayer ..... 376 (n.)
Colvin *v.* Fisher ..... 381
Combe *v.* Hughes ..... 452, 634
——— *v.* Trist ..... 234
Commercial Bank, Re, Fernande's Exors. Case ..... 178
Commissioners of Charitable Donations *v.* Devereux 218
——————— of Inland Revenue *v.* Glasgow, &c., Rail. Co.... 69
——————— *v.* Harrison 263 (n.), 289
Compton *v.* Bloxham ..... 792
Conduitt *v.* Soane ..... 764 (n.)
Congreve *v.* Congreve ..... 621
——— *v.* Gordon's Executors... 323
——— *v.* Palmer ..... 613
Coningham *v.* Mellish ..... 478
Connor, Re ..... 344, 650, 654, 655
Conolly *v.* Farrell ..... 515, 738
Conron *v.* Conron ..... 758 (n.)
Constabadie *v.* Constabadie ..... 515
Constantine *v.* Constantine ..... 511
Cook *v.* Colehan ..... 53
——— *v.* Cook ..... 609
——— *v.* Gregson ..... 187
Cooke, Re ..... 380
——— *v.* Bowen ..... 616
——— *v.* Cholmondley ..... 330
——— *v.* Cooke ..... 683
——— *v.* Farrand ..... 506, 507
——— *v.* Gerrard ..... 476, 559
——— *v.* Horne ..... 54
——— *v.* Stationers' Co., The ... 471
Coombes, Re ..... 369
Coope *v.* Arnold ..... 643
Cooper, Re ..... 308 (n.), 335
——— *v.* Beckett ..... 371
——— *v.* Bockett ..... 384
——— *v.* Cooper ..... 593
——— *v.* Day ..... 245, 409, 409 (n.)
——— *v.* Denison ..... 658
——— *v.* Laroche ..... 432
——— *v.* Macdonald ... 589, 939 (n.)
——— *v.* Mantill ..... 522
——— *v.* Trewby ..... 298
Cooper and Allen's Contract ..... 288
Cooper's Trusts ..... 471
Cope *v.* Wilmot ..... 506
Coppin *v.* Coppin... 313, 459 (n.), 713
——— *v.* Ferryhough ..... 386, 413
Coppock *v.* Bower ..... 6
Corbishley's Trusts, Re ..... 817 (n.)
Corbyn *v.* French ..... 461
Corder *v.* Drakeford ..... 10 (n.), 29
Corlass, Re ..... 609
Cormack *v.* Copons ..... 634
Cornewall *v.* Cornewall ..... 708
Corn Exchange, Winchester, *v.* Gillingham ..... 63
Cornish *v.* Searell ..... 40
Cornwallis (Earl), Re... 261 (n.), 274

PAGE
Corrick *v.* Errington ..... 468
Cort *v.* Winder ..... 615
Cory *v.* Davis ..... 39
Cosnaham, Re ..... 315
Coster *v.* Cowling ..... 29, 149 (n.)
Cotter *v.* Layer ..... 392
Cotton *v.* Cotton ..... 462, 667
——— *v.* Heath ..... 439, 603
——— *v.* Scarancke ..... 609, 658, 664
Cottrell *v.* Cottrell ..... 402
Coulthurst *v.* Carter ..... 577
Counden *v.* Clerke ..... 672
Courtier *v.* Oram ..... 599
Courtney *v.* Taylor ..... 62
Courtroy *v.* Vincent ..... 241
Coventry *v.* Coventry ..... 451
Coward, Re ..... 334
Cowie *v.* Halsall ..... 24
——— *v.* Stirling ..... 54
Cowley (Earl), Re ..... 258 (n.)
Cowper *v.* Scott ..... 581, 722
Cox *v.* Bailey ..... 42
Coyte, Re ..... 539
Crabtree *v.* Bramble ..... 483, 484
Cradock *v.* Owen ..... 723
Craigie *v.* Lewin ..... 221, 323
Cramp *v.* Playfoot ..... 507
Cranmere's Case ..... 468
Cranswick *v.* Pearson ..... 549
Cranvel *v.* Sanders ..... 397
Crawford *v.* Trotter ..... 634
Crawley *v.* Crawley ..... 453 (n.), 488
Crawshaw *v.* Crawshaw ..... 473
Cray *v.* Willis ..... 680
Cremorne *v.* Antrobus ..... 708
Cresswell *v.* Cheslyn ..... 399
——— *v.* Cresswell ..... 465
Crewe *v.* Dicken ..... 97
Crickett *v.* Dolby... 582 (n.), 799 (n.)
Cridge *v.* Sherborne ..... 54
Crisp *v.* Anderson ..... 76
Critchett *v.* Taynton ..... 605
Crockett *v.* Crockett ..... 634
Croft *v.* Pawlett ..... 375
——— *v.* Slee ..... 470, 564
Crofts *v.* Middleton ..... 643
Cromek *v.* Lumb ..... 686
Crompe *v.* Barrow ..... 440
Crone *v.* Odell ..... 513, 613
Crook *v.* Hill ..... 654, 655
——— *v.* Whitley ..... 607
Crooke *v.* Brooking ..... 543, 606
——— *v.* De Vandes ..... 462, 680
Cropton *v.* Davies ..... 555
Crosbie *v.* Macdonall ... 410, 411, 415
——— *v.* Wadsworth ..... 46
Crosley *v.* Clare ..... 609, 611, 623
Cross *v.* Cross ..... 627
Crossland, Re ..... 589
Crossman *v.* Brown ..... 511
——— *v.* The Queen ..... 201
Crotty *v.* Hodges ..... 24
Crow *v.* Robinson ..... 274
Crowder *v.* Clowes...245 (n.), 409, 548
——— *v.* Stone ..... 682, 691
Crowe *v.* Crisford ..... 491

PAGE

Crowley *v.* Vittey ..... 25
Crowther *v.* Solomons ..... 76
Crozier *v.* Crozier ..... 512, 598, 639
Cruse *v.* Barley ..... 500, 581
Crutchley *v.* Mann ..... 34
Cruwys *v.* Colman 553, 661, 662, 673
Cuddon *v.* Cuddon ..... 261 (n.)
Cullen *v.* Att.-Gen. ..... 247
Culley *v.* Taylerson ..... 349
Culpepper *v.* Ashton ..... 499
Cunningham, Re ..... 373
——— *v.* Murray ..... 474, 612
Cunynhame's Settlement, Re, ... 436
Curling *v.* Thornton ..... 319
Curnick *v.* Tucker ..... 522
Currie *v.* Bircham ..... 170, 177
——— *v.* Bowyer ..... 392
Curry *v.* Edensor ..... 43
Cursham *v.* Newland ..... 610, 686
Curtis *v.* Curtis ..... 621
——— *v.* Hutton ..... 313
——— *v.* Lakin ..... 451
——— *v.* Price ..... 699
——— *v.* Rickards ..... 52
——— *v.* Rippon ..... 520
Custance *v.* Bradshaw, 173, 174, 180, 181
Cuthbert *v.* Lemprière ..... 512

D.

DAGLIE *v.* Fryer ..... 490
Daines *v.* Heath ..... 63, 82, 99
Daintry *v.* Daintry ..... 550
Dalhousie (Countess of) *v.* Macdonnall ..... 321
Dallow, Re ..... 369, 539
Dalrymple *v.* Hall ..... 660
Dalton *v.* Whittem ..... 45
Daly, Re ..... 322
Dalzell *v.* Welsh ..... 610
Dancer *v.* Crabb ..... 382, 384
Dand *v.* Thompson ..... 563
D'angibau, Re ..... 796 (n.)
Daniel, Re ..... 539
——— *v.* Luker ..... 175
——— *v.* Nockolds ..... 398
——— *v.* Warren ..... 489
Danvers *v.* Earl of Clarendon ..... 662
Darley *v.* Darley ..... 386, 405
——— *v.* Langworthy ..... 386, 405
Darlow *v.* Edwards ..... 795 (n.)
Da Silva, Re ..... 308, 309
Davenhill *v.* Fletcher ..... 713
Davenport *v.* Hanbury ..... 610
Davenport's Trusts, Re ..... 651
Davers *v.* Dewes ..... 472, 717
Davidson *v.* Cooper ..... 25
——— *v.* Dallas ... 615, 616, 686
——— *v.* Foley ..... 469
Davie *v.* Beversham ..... 355
Davies, Re ..... 369, 371
——— *v.* Davies ..... 810 (n.)
——— *v.* Fowler ..... 991 (n.)
——— *v.* Thorns ..... 565

PAGE

Davies *v.* Wilkinson ..... 51
Davies' Trusts, Re ..... 565, 567, 569
Davis *v.* Bennet ..... 512
——— *v.* Bennett ..... 613
——— *v.* Davis ..... 381, 506, 555
——— *v.* Elmes ..... 228
——— *v.* Fisher ..... 592
——— *v.* Gibbs ..... 562
——— *v.* Kemp ..... 463
——— *v.* Norton ..... 578
——— *v.* Wilkinson ..... 58
——— *v.* Williams ..... 28
Dawkins *v.* Tatham ..... 241
Dawson, Re ..... 432, *and Addenda*
——— *v.* Bourne ..... 633
——— *v.* Dawson ..... 653
——— *v.* Hearn ..... 516, 824 (n.)
——— *v.* Killett ..... 580
——— *v.* Medhurst ..... 87
——— *v.* Oliver Massey ..... 622
——— *v.* Small ..... 507
Day *v.* Croft ..... 245 (n.), 409 (n.)
——— *v.* Day ..... 549, 828 (n.)
——— *v.* Trig ..... 510
——— *v.* Turnell ..... 272
Deacon *v.* Colquhoun ..... 277 (n.)
Dean *v.* Puckey ..... 639
Deardon *v.* Binns ..... 28, 63
Dearly *v.* Mazarine ..... 334
De Beauvoir, Re ..... 260 (n.)
——— *v.* De Beauvoir 675, 676
De Bonneval *v.* De Bonneval ..... 322
Deerhurst (Lord) *v.* Duke of St. Albans ..... 433
Defries *v.* Littlewood ..... 44
De Lacherois *v.* De Lacherois ..... 354
Delamere *v.* Robello ..... 528
De Lancey, Re ..... 279
——— *v.* Reg. ..... 207 (n.), 279
De la Saussaye, Re ..... 401 (n.), 411
Dellar's Estate, Re ..... 778 (n.)
Dempsey *v.* Lawson ..... 402
Dench *v.* Dench ..... 384 (n.)
Denn *v.* Bagshaw ..... 577
——— *v.* Diamond ..... 69
——— *v.* Gaskin ..... 692
——— *v.* Kemeys ..... 510
——— *v.* Moor ..... 694
——— *v.* Slater ..... 694
Denny *v.* Barton ..... 306
Dent *v.* Pepys ..... 509
De Rosaz, Re ..... 525
Deval *v.* Dickins ..... 636
De Vera Maraver, Re ..... 314
Devery *v.* Barton ..... 400
Devisme *v.* Mello ..... 616, 627
——— *v.* Mellish ..... 664
Dew *v.* Clark ..... 331, 332
Dewar *v.* Brooke ..... 797 (n.)
De Windt *v.* De Windt ..... 683
D'Eyncourt *v.* Gregory ..... 710
Dickens, Re ..... 539, 542
——— *v.* Marshall ..... 692
Dickinson *v.* Blissett ..... 333
——— *v.* Dickinson ..... 771 (n.)
Dickson, Re ..... 375

PAGE

Dickson *v.* Cass ..... 63
Diggles, Re, Gregory *v.* Edmondson..... *Addenda*
Dilke, Re ..... 369
Dillon *v.* Harris..... 540, 541
Dimes *v.* Scott ..... 486, 488
Dimond *v.* Bostock 464, 616, 900 (n.)
Dingwell *v.* Askew ..... 391
Dinmore, Re ..... 369
Diplock *v.* Hammond ..... 57
Ditchbonan *v.* Fearn ..... 330
Ditcher *v.* Kenrick ..... 75
Dix *v.* Reed ..... 792 (n.)
Dixon *v.* Dawson ..... 497
—— *v.* Dixon ..... 515, 668, 671
—— *v.* Robinson ..... 63
—— *v.* Yates ..... 70
Dobson, Re..... 309
Dock *v.* Lacy..... 613
Dodd *v.* Wake ..... 429
Dodds *v.* Dodds..... 639
Dodson *v.* Hay ..... 588, 681
Doe *v.* Allen..... 525, 526, 692, 694
—— *v.* Amos..... 42
—— *v.* Applin ..... 640
—— *v.* Barford..... 376 (n.)
—— *v.* Bartle ... 559, 561, 1046 (n.)
—— *v.* Beauclerk..... 597
—— *v.* Biggs..... 511, 698
—— *v.* Brabant..... 467
—— *v.* Bragg ..... 83
—— *v.* Burville..... 556
—— *v.* Cartwright ..... 36, 37
—— *v.* Challis ..... 438
—— *v.* Clarke ..... 476, 626, 692, 693
—— *v.* Clayton..... 695
—— *v.* Coleman ..... 695
—— *v.* Collins ..... 532
—— *v.* Collis..... 639
—— *v.* Cooper ..... 640
—— *v.* Cross ..... 214
—— *v.* Cundall..... 695
—— *v.* Dacre ..... 572
—— *v.* Danvers..... 529
—— *v.* Davies ..... 511
—— *v.* Davy ..... 413
—— *v.* Day ..... 33
—— *v.* Edwards ..... 40
—— *v.* Evans ..... 184, 408, 541
—— *v.* Eve ..... 693
—— *v.* Ewart ..... 574 (n.)
—— *v.* Eyre ..... 599
—— *v.* Fawcett..... 693
—— *v.* Featherstone ..... 513, 637
—— *v.* Field ..... 697, 699
—— *v.* Finch..... 348
—— *v.* Fossick ..... 476, 477, 559, 561
—— *v.* Frankis..... 9 (n.), 40
—— *v.* Freeman ..... 75
—— *v.* Frost..... 596
—— *v.* Fuller ..... 39
—— *v.* Gallini ..... 644
—— *v.* Govier ..... 30, 90
—— *v.* Gray ..... 92 (n.)
—— *v.* Greening ..... 524, 532
—— *v.* Gunning ..... 28

PAGE

Doe *v.* Gutteridge ..... 92 (n.)
—— *v.* Gwillin..... 693
—— *v.* Hale ..... 349
—— *v.* Hallet ..... 624
—— *v.* Hardy ..... 525
—— *v.* Harris ..... 97, 379
—— *v.* Harvey ..... 637
—— *v.* Hicks..... 407
—— *v.* Hirst ..... 10, 25
—— *v.* Hiscocks ..... 529, 535
—— *v.* Holmes ..... 694, 696
—— *v.* Huthwaite ..... 529, 530, 533
—— *v.* Jenkins..... 556
—— *v.* Jersey (Earl of) ..... 532, 535
—— *v.* Joinder ..... 527
—— *v.* Joinville ..... 673, 678
—— *v.* Houghton..... 25
—— *v.* Landaff (Bishop of) ..... 394
—— *v.* Larder ..... 82, 88
—— *v.* Lawson..... 662
—— *v.* Lawton..... 696
—— *v.* Lewis..... 66, 696
—— *v.* Lucan ..... 562 (n.)
—— *v.* Ludlam..... 563
—— *v.* Luxton ..... 358
—— *v.* Lyford ..... 524, 528
—— *v.* Maple ..... 82, 88, 90, 91
—— *v.* Marchant ..... 402, 404, 413
—— *v.* Moore ..... 575
—— *v.* Morgan ..... 526
—— *v.* Needs..... 526, 537
—— *v.* Nevill ..... 512
—— *v.* Nowell ..... 575
—— *v.* Over ..... 664
—— *v.* Owens ..... 694
—— *v.* Oxenden ..... 524, 532
—— *v.* Palmer ..... 384 (n.)
—— *v.* Parkin ..... 528
—— *v.* Parratt ..... 683, 693
—— *v.* Pedgriph ..... 38
—— *v.* Perks..... 380
—— *v.* Perratt ..... 426
—— *v.* Phillips ..... 29, 74
—— *v.* Rawding ..... 596
—— *v.* Roberts ..... 562 (n.)
—— *v.* Robinson ..... 636
—— *v.* Rouse..... 529, 533
—— *v.* Royle..... 614
—— *v.* Scarborough (Earl of) ... 427
—— *v.* Scott ..... 469, 477
—— *v.* Sheffield ... 417, 463, 475, 500, 615, 627
—— *v.* Shipphard..... 578
—— *v.* Simpson ..... 627 (n.), 700
—— *v.* Smith ..... 40, 80, 82, 672
—— *v.* Snaith ..... 88
—— *v.* Stagg..... 97
—— *v.* Stenlake ..... 512, 637
—— *v.* Steward..... 844 (n.)
—— *v.* Taylor ..... 528
—— *v.* Thompson..... 355
—— *v.* Tidbury ..... 32
—— *v.* Tofield ..... 356
—— *v.* Tom ..... 91
—— *v.* Tomkinson ..... 348, 358
—— *v.* Tucker ..... 692

PAGE
Doe v. Vardill ..... 313
—— v. Vaughan ..... 439, 680
—— v. Vernon ..... 528
—— v. Wainwright ..... 688
—— v. Walbank ..... 698
—— v. Waller ..... 351, 414, 771 (n.)
—— v. Ward ..... 403
—— v. Warner ..... 89
—— v. Weatherby ..... 561
—— v. Webb ..... 556
—— v. Webber ..... 627 (n.)
—— v. Westlake ..... 526, 528
—— v. Weston ..... 73
—— v. Wetton ..... 555, 596
—— v. Wiggins ..... 42
—— v. Wilkinson ..... 577, 578
—— v. Wilson ..... 285, 356
—— v. Wood ..... 165
—— v. Wright ..... 692
Doglioni v. Crispin ..... 314
Dolphin v. Robins ..... 322
Domvile v. Winnington ..... 311
Donaldson v. Beckett ..... 99
Donovan v. Needham ..... 799 (n.)
Dorchester (Lord) v. Earl of Effingham ..... 643
Dore v. Staple ..... 376 (n.)
Dorin v. Dorin ..... 650, 651, 653
Dormer v. Bishop Burnet ..... 705
Doucet v. Geoghegan ..... 323, 324
Doughty v. Bull ..... 483
Douglas v. Congreve ... 244, 487, 637, 771 (n.)
——— v. Cooper ..... 310
——— v. Douglas ..... 322, 324
——— v. Fellows ..... 526, 527, 533
Dover v. Alexander ..... 646, 650, 653
Dow v. Lawson ..... 661
Dowding v. Smith ..... 611
Dowling v. Dowling ..... 555
——— v. Tyrell ..... 990 (n.)
Down v. Down ..... 848 (n.)
Downe v. Richardson ..... 23, 26
Dowset v. Sweet ..... 511, 529, 527
Doyley v. Att.-Gen. ..... 664
Drake v. Att.-Gen. ..... 175, 183, 222
Drakeford v. Wilkes ..... 544
Drant v. Brown ..... 8, 36, 99
—— v. Vause ..... 353
Draper v. Hitch ..... 312
Drew v. Barry ..... 636
—— v. Killick ..... 547
Drewett v. Pollard ..... 456
Drinkwater v. Falconer ..... 415
Driver v. Frank ..... 632
——— v. Thompson ... 335, 1046 (n.)
Drummond v. Drummond ... 313, 316
——— v. Leigh ..... 805 (n.)
——— v. Parish ..... 364
Drury v. Macauley ..... 50
Drybutter v. Hodges ..... 306
Duane, Re ..... 524
Dubber v. Trollope ..... 638
Duck v. Braddyl ..... 3, 11, 79, 97
Dudson, Re ..... 1035 (n.)
Duffield v. Duffield ..... 403, 477
Duffield v. Elwes ..... 199
Dufour v. Periera ..... 310
Dugdale, Re ..... 897 (n.)
——— v. Dugdale ..... 611, 659
——— v. Meadows 278, 295, 296 (n.)
Du Hourmelin v. Sheldon ..... 341
Duke, Re ..... 585
—— v. Andrews ..... 37
—— v. Doidge ..... 628
Dumper v. Dumper ..... 200 (n.)
Duncan v. Watts ..... 712
Dundee, Magistrates of, v. Morris 505
Dungannon (Lord) v. Smith ..... 432
Dunn, Re ..... 305
Dunne v. Dunne ..... 369, 844 (n.)
Duplessis v. Att.-Gen. ..... 340
Durant v. Prestwood ..... 718
Durham (Countess of), Re ... 539, 541
Durnell v. Corfield ..... 333
Durour v. Motteux ..... 501
Durrant v. Friend ..... 650, 651
Dutton, Re ..... 382, 436
Dyer v. Dyer ..... 545, 547
—— v. Green ..... 99
Dyke v. Brewer ..... 77
——— v. Walford ..... 723

## E.

Eager v. Furnivall ..... 480
Eagles v. Le Breton ..... 666
Eales v. Cardigan (Earl of) ..... 549
—— v. Conn ..... 426, 427
—— v. Drake ..... 461
—— v. England ..... 518
Eames v. Hacon ..... 313 (n.)
Earl, Re ..... 315
—— v. Wilson ..... 654
Earl's Trust, Re ..... 413
Earle v. Bellingham ..... 799 (n.)
——— v. Wilson ..... 343
Early v. Benbow ..... 410
——— v. Collins ..... 51
East v. Twyford ..... 639
Eaton v. Hewitt ..... 573
Eccles v. Cheyne ..... 481
Eden v. Eden ..... 491
Edgar v. Blick ..... 36, 99
Edgworth v. Edgworth ..... 578
Edmunds v. Edmunds ..... 496
——— v. Tessey ..... 650, 652, 653
Edwards v. Jones ..... 505
——— v. Fincham ..... 333
——— v. Freeman ..... 717, 721
——— v. Hammond ..... 575
——— v. Salloway ..... 462
——— v. Tuck ..... 453, 456, 457
——— v. Warwick (Countess of) ..... 484
Egerton v. Brownlow ..... 642 (n.)
——— v. Jones ..... 574 (n.)
Eggleston v. Speke ..... 398
Eilbeck v. Wood ..... 395
Elborne v. Goode ..... 453

PAGE
Ellen Abd-ul-Messih *v.* Chukri Fabra ..... *Addenda*
Elliot *v.* Dearsley ..... 861
Elliott, Re ..... 334
——— *v.* Davenport 459, 666, 775 (n.)
——— *v.* Smith ..... 458 (n.)
Ellis, Re ..... 372
—— *v.* Ellis ..... 58
—— *v.* Houston ..... 645
—— *v.* Mason ..... 52
—— *v.* Maxwell ..... 449, 450, 453
—— *v.* Smith ..... 365
Ellison *v.* Airey ..... 617, 630
Elms *v.* Elms ..... 381
Elmsley *v.* Young ..... 657
Elton *v.* Eason ..... 639
—— *v.* Elton ..... 584
Elwes, Re ..... 258 (n.)
Emerson, Re ..... 366
——— *v.* Boville ..... 376 (n.)
Emery *v.* England ..... 629
Emmerson *v.* Heelis ..... 32, 40
Emmet's Estate, Re ..... 617, 621
Emms *v.* Smith ..... 353
Enohin *v.* Wyllie ... 178, 313, 313 (n.)
Euston (Earl of) *v.* Henry Seymour (Lord) ..... 364
Evans, Re ..... 227
——— *v.* Charles ..... 670
——— *v.* Davies ..... 652
——— *v.* Evans ..... 519 (n.), 564
——— *v.* Hellier ..... 452, 457
——— *v.* Jones ..... 472, 617
——— *v.* Massey ..... 343, 654
——— *v.* Pratt ..... 33
——— *v.* Roberts ..... 44
——— *v.* Rosser ..... 884 (n.)
——— *v.* Scott ..... 581
——— *v.* Underwood ..... 53
——— *v.* Walker ..... 440
Evelyn *v.* Evelyn ..... 719
Everett *v.* Everett ..... 351, 771 (n.)
Ewin, Re ..... 174, 216
Ewing *v.* Orr-Ewing ..... 313
Exmouth (Viscount), Re ..... 710
Eyre *v.* Marsden ... 453, 456, 457, 691
—— *v.* Shaftesbury (Countess of) 329, 753 (n.)

F.

Fairfax *v.* Heron ..... 692, 694, 696
Falkland *v.* Litton ..... 560
Falkner *v.* Butler ..... 442, 607
Fancourt *v.* Thorne ..... 10, 39, 55, 87
Fane *v.* Fane ..... 512
Farmer *v.* Francis ..... 439
Farncombe's Trusts, Re ..... 626
Farrer *v.* Barker ..... 627
——— *v.* St. Catherine's College, Cambridge ... 246, 382, 407, 409 (n.)
——— *v.* Winterton ... 394, 850 (n.)
Farwell *v.* Seale ..... 239
Fary, Re ..... 380
PAGE
Faulds *v.* Jackson ..... 370, 371
Faulkner *v.* Daniel ..... 427
——— *v.* Faulkner ..... 545
Fawkes *v.* Gray ..... 980 (n.)
Fearne *v.* Young ..... 485, 488
Featherstone's Trusts, Re ..... 616
Fell *v.* Biddulph ..... 464 (n.)
Fells *v.* Read ..... 604
Feltham *v.* Cartwright ..... 42
——— *v.* Feltham ..... 582 (n.)
Fenn *v.* Death ..... 606
Fenton *v.* Farringdon ..... 409 (n.)
Fenwick, Re ..... 377, 1054 (n.)
Ferguson *v.* Dunbar ..... 686
—— *v.* Ferguson ..... 476
——— *v.* Ogilby ..... 704 (n.)
Ferraris (Countess) *v.* Hertford (Marquis of) ..... 537, 539, 541, 542
Festing *v.* Allen ..... 429
Fetherston *v.* Fetherston ... 638, 639
Fielden *v.* Ashworth ..... 659, 666
Fielder *v.* Ray ..... 4, 43, 45
Fielding *v.* Walshaw ..... 306
Finch, Re ..... 428
—— *v.* Finch ..... 378
—— *v.* Lane ..... 576
Findon *v.* Findon ..... 627
Finlason *v.* Tatlock ..... 674
Finney *v.* Grice ..... 94
——— *v.* Tootell ..... 709
Finney's Estate, Re ..... 558
Firebrace *v.* Firebrace ..... 321
Fisher *v.* Calvert ..... 57
—— *v.* Popham ..... 371
—— *v.* Webster ..... 424, 624
Fishmonger's Co. *v.* Dimsdale ... 98
Fishwick *v.* Milnes ..... 41
Fisk *v.* Att.-Gen. ..... 505, 507
Fitch *v.* Weber ..... 498
Fitzgerald, Re, Adolph *v.* Dolman 820 (n.)
——— *v.* Field ..... 409
Fitzhenry *v.* Bonner ..... 556
Fitzroy, Re ..... 377
——— *v.* Howard ..... 562
Fleetwood, Re ..... 543
Fleming *v.* Brook ..... 704
Fletcher, Re ..... 584
——— *v.* Ashburner ... 174, 181, 482
——— *v.* Fletcher ..... 215
Flower, Re ..... 441
Floyer *v.* Bankes ... 276, 280, 285, 432
Flynn *v.* Jenkins ..... 614
Foley *v.* Burnell ..... 604, 764 (n.)
—— *v.* Parry ..... 517
—— *v.* Percival ..... 351
Follett *v.* Pettman ..... 402
Fonnereau *v.* Fonnereau ..... 586
——— *v.* Poyntz ..... 533
Foot *v.* Stanton ..... 329
Forbes *v.* Ball ..... 518, 553, 661, 665
——— *v.* Forbes ..... 324
——— *v.* Steven ... 172, 173, 179, 180, 221
Ford *v.* Batley ..... 516, 824 (n.)
—— *v.* De Pontes ..... 393

PAGE

Ford *v.* Ford ..... 562
—— *v.* Fowler ..... 508
—— *v.* Rawlins..... 584
—— *v.* Ruxton..... 241
—— and Hembling's Case... 376 (n.)
Fordyce *v.* Bridges ..... 554
Forman *v.* Jeyes ..... 63
Forrest *v.* Whiteway ..... 683
Forset's Case..... 340
Forster *v.* Forster..... 636
Forsyth *v.* Jervis ..... 9, 40
Fortescue *v.* Abbott... ..... 575
Foster *v.* Ley ..... 208, 228, 244
——— *v.* Romney ..... 440, 573
Fowler *v.* Blackwell..... 695
——— *v.* Fowler ..... 507
——— *v.* Hunter ..... 514
Fox *v.* Fox..... 592
Francis *v.* Collier ..... 406
Frank *r.* Stovin ..... 639
Franks, Ex parte ..... 334
Fraser *r.* Bunn ..... 39
——— *v.* Pigott ..... 653
Freeland *v.* Pearson..... 461, 481
Freeman *v.* Chandos (Duke of)... 561
——— *v.* Fairlie ..... 792 (n.)
——— *v.* Freeman ..... 401 (n.)
——— *v.* Parsley ..... 611
Freke *v.* Lord Carbery ..... 220, 312, 449
Freme *v.* Clement..... 481, 570
French *v.* Caddell..... 574 (n.)
——— *v.* Patten ..... 23, 25
Frenche's Case ..... 398
Frere *v.* Peacock ..... 330
Frith, Re ..... 373
——— *v.* Rotherham..... 82
Froggett *v.* Wardall..... 404
Frogley *v.* Phillips ..... 608, 663
Frogmorton *v.* Holiday ..... 694
Fry *v.* Fry ..... 403
—— *v.* Capper ..... 443
Fryer *v.* Morland..... 276, 287
——— *v.* Bulton..... 485
——— *v.* Rankin..... 769 (n.)
Fuller *v.* Chamier..... 638
——— *v.* Fuller..... 459, 468
Fullerton *v.* Watts ..... 391


G.


GABB *v.* Prendergast ..... 650
Gale *r.* Gale ..... 568
Gally, Re ..... 321
Gann *v.* Gregory ..... 311
Garbutt *v.* Watson ..... 44
Gardiner *r.* But..... 681
——— *v.* Courthorpe ..... 382
Gardiner's Estate, Re ..... 626
Gardner *v.* James..... 621
——— *v.* Sheldon ..... 545, 550
——— *v.* Walsh ..... 24
Garland *v.* Beverley..... 529
Garnons *v.* Swift ..... 10

PAGE

Garrick *v.* Lord Camden ... 657, 659, 664
Gaskell *v.* Holmes..... 464
Gaskin *v.* Rogers ..... 343, 771 (n.)
Gatenby *v.* Morgan ..... 598
Gatti, Re ..... 321
Gatty *v.* Fry ..... 57
Gayre *v.* Gayre ..... 705
Gaynor, Re..... 315
Gaze *v.* Gaze ..... 370
Geary *v.* Physic..... 53
Gentry, Re..... 384, 398
George *v.* Surrey ..... 53
Gerrard *v.* Lauderdale..... 89
Gibbs *v.* Bott..... 488
——— *v.* Fisher..... 614
——— *v.* Hale ..... 473
——— *v.* Montfort (Lord) ... 351, 413
——— *v.* Rumsey ..... 497, 500
Gibson's Trusts, Re ..... 405, 465
Gilbert, Re..... 584
——— *v.* Bennett ..... 884 (n.)
——— *v.* Boorman..... 621, 625
Giles *v.* Warren..... 378, 383
Gill, Re ..... 539, 541
—— *v.* Bagshaw ..... 508
—— *v.* Shelley..... 651, 652
Gillam *v.* Taylor ..... 665
Gillman *v.* Daunt..... 588 (n.). 621
Gillow *v.* Bourne ..... 399
Gilmore *v.* Severn..... 621
Gingell *v.* Perkins..... 66
Gittings *v.* M'Dermott..... 461, 674
Gladstone *v.* Tempest ..... 306
Glanville *v.* Glanville ..... 576
Gleech *v.* Torrington ..... 795 (n.)
Glendenning *v.* Glendenning 769 (n.)
Glenorchy (Lord) *v.* Bosville..... 642
Gloucester (Corp. of) *v.* Wood ... 409, 514
Glover, Re ..... 365
——— *v.* Spendlove ..... 560
Glynn *v.* Oglander ..... 307
Goblet *v.* Beechey ..... 407, 534
Godden *v.* Crowhurst ..... 804 (n.)
Godfrey *v.* Davis ..... 619, 646, 651
——— *v.* Godfrey ..... 515
Goldie *v.* Murray ..... 331
Gooch *v.* Gooch..... 625
Gooden *v.* Dotterell ..... 241
Goodenough *v.* Tremamondo ..... 490
Goodinge *v.* Goodinge ..... 665
Goodman's Trusts, Re... 204, 313 (n.), 645 (n.), 715 (n.), 723
Goodright *v.* Forrester..... 349
——— *v.* Glazier..... 401
——— *v.* Harwood..... 401
——— *v.* Hoskins ..... 555
——— *v.* Jones ..... 572
——— *v.* Stocker ..... 695
——— *v.* Wright ..... 459
Goodson *v.* Forbes..... 28
Goodtitle *v.* Billington..... 595
——— *v.* Edmonds ..... 692, 694
——— *v.* Knott ..... 477, 499
——— *v.* Maddern ..... 694

PAGE
Goodtitle *v.* Meredith ..... 413
——— *v.* Miles ..... 559
——— *v.* Otway ..... 387
——— *v.* Southern ..... 848 (n.)
——— *v.* Whitby ..... 555
——— *v.* Wood ..... 348
Goodwin's Trust, Re ..... 651, 654
Goodwyn *v.* Goodwyn ..... 692
Goodyear *v.* Simpson ..... 48
Gorbell *v.* Davison ..... 663
Gordon *v.* Adolphus ..... 573
——— *v.* Atkinson ..... 680
——— *v.* Gordon... 311, 343, 653, 654
——— *v.* Hoffman ..... 407
——— *v.* Reay ..... 411
Gore *v.* Gore ..... 600
Goring *v.* Howard ..... 438
Gorst *v.* Lowndes ..... 454
Gosling *v.* Gosling... 439, 451, 588 (n.)
Gough *v.* Boult ..... 506
Gould *v.* Coombs ..... 40, 57
Gove *v.* Gawen ..... 375
Gowan, Re, Gowan *v.* Gowan ..... 100
Gower *v.* Gower ..... 710
Gowling *v.* Thompson ..... 513
Grace Marshall's Case ..... 506
Grafftey *v.* Humpage ..... 670
Graham *v.* Graham ..... 404
Grandison *v.* Pitt ..... 706
Grant *v.* Grant ..... 608
——— *v.* Lynam ... 564 (n.), 665, 674
Grant's Case ..... 575
Gravenor *v.* Hallam ..... 470, 471
——— *v.* Watkins ..... 511, 697
Graves *v.* Hicks ..... 643
Gray *v.* Milner ..... 52, 54
Grayson *v.* Atkinson ..... 365
——— *v.* Clarkson ..... 496
Greave's Settlement Trusts, Re... 568
Greaves *v.* Simpson ..... 638
Green *v.* Britten ..... 403, 490
——— *v.* Croft ..... 229
——— *v.* Davies ..... 17, 75
——— *v.* Gascoyne ..... 452, 453
——— *v.* Howard ..... 666
——— *v.* Jackson ..... 500
——— *v.* Marsden ..... 674
——— *v.* Proude ..... 305
——— *v.* Pertwee ..... 473
——— *v.* Smith ..... 351
——— *v.* Stephens ..... 354, 556
——— *v.* Symonds ..... 704
——— *v.* Tribe ..... 411, 419
——— *v.* Ward ..... 555
Greenhill *v.* Greenhill ..... 351, 355
Greenwood *v.* Roberts ..... 432
——— *v.* Rothwell ..... 639
Greenwood's Case ..... 331
Greet *v.* Greet ..... 439
Gregory *v.* Fraser ..... 6
——— *v.* Henderson ..... 698
——— *v.* H. M.'s Proctor ..... 367
——— *v.* Smith ..... 673
Gregory's Will, Re ..... 529
Gregson's Trusts, Re ..... 525
Greig *v.* Martin ..... 508

PAGE
Greisbach *v.* Freemantle ..... 174, 181
Grenfell *v.* Commissioners of Inland Revenue ..... 35
Gresley *v.* Moulsey ..... 349
Greves, Re ..... 541
Greville *v.* Browne ..... 861 (n.)
Grey *v.* Smith ..... 95
Grey's Settlements, Re ..... 800 (n.)
Grieve *v.* Grieve ..... 633
Grieves *v.* Rawley ..... 608, 658
Grifferth *v.* Badham ..... 663
Griffin *v.* Ferard ..... 307
——— *v.* Griffin ..... 399, 400
Griffith *v.* Blunt ..... 429
Griffiths *v.* Evan ..... 517, 639, 672
——— *v.* Griffiths ..... 374
——— *v.* Gale ..... 480
——— *v.* Pownall ..... 432
——— *v.* Pruen ..... 792 (n.)
——— *v.* Weatherby ..... 34, 51
——— *v.* Vere ..... 449, 451
Grimani *v.* Draper ..... 331
Grimstone *v.* Bruce (Lord) ..... 982
Gryll's Trust, Re ..... 662, 667
Gude *v.* Mumford ..... 243
Guest *v.* Willasey ..... 413
Guidot *v.* Guidot ..... 354, 482
Guillamore (Lord) *v.* O'Grady ... 524
Gulliver *v.* Ashby ..... 424, 425
——— *v.* Wickett ..... 597
Gully *v.* Cregoe ..... 522
——— *v.* Davis ..... 562
Gundry *v.* Pinniger ..... 660, 662
Gurney *v.* Gurney ..... 342
Gwillim *v.* Gwillim ..... 370
Gwynne *v.* Muddock ..... 675

## H.

Habergham *v.* Vincent ... 213, 305, 538, 542
Hackvale, Re ..... 369
Haddock *v.* Trotman ..... 333
Hadgett *v.* Commissioners of Inland Revenue ..... 27
Hadow *v.* Hadow ..... 515
Haggar *v.* Neatby ..... 506
Haigh *v.* Brookes ..... 6
Haines *v.* Haines ..... 379
Hakewill, Re ..... 539
——— *v.* Jaggar ..... 97
Haldane *v.* Eckford ..... 324
Hale *v.* Att.-Gen. ..... 665
——— *v.* Hale ..... 430, 431
——— *v.* Hasted ..... 310
——— *v.* Pew ..... 447
——— *v.* Tokelove ..... 385, 411
Hales *v.* Freeman ..... 236, 241, 298
Haley *v.* Bannister ..... 449, 450, 451
Halford *v.* Staines ..... 453, 456
Hall *v.* Bainbridge ..... 77
——— *v.* Dunch ..... 388
——— *v.* Chandless ..... 25, 26
——— *v.* Fisher ..... 528

PAGE
Hall *v.* Hewer ..... 629, 630
—— *v.* Luckup ..... 628
—— *v.* Warren ..... 330
—— *v.* Waterhouse ..... 335
Hall's Estate, Re ..... 616
Hallen *v.* Runder ..... 45
Halliday *v.* Hudson ..... 498
Halpin, Re ..... 307
Halse *v.* Peters ..... 83
Halstead *v.* Searle ..... 510
Halton *v.* Foster ..... 658, 660
—— *v.* May ..... 827 (n.)
Hamilton *v.* Dallas ..... 323
—— *v.* Mills ..... 676
—— *v.* Spottiswoode ..... 52, 58
—— *v.* West ..... 637, 639
Hamlet, Re, Stephen *v.* Cunningham ..... *Addenda*
Hamley *v.* Gilbert ..... 515
Hammond, Re ..... 369, 371
—— *v.* Foster ..... 22
—— *v.* Hammond ..... 460
Hampshire *v.* Pierce ..... 508, 530
Hampton *v.* Holman ..... 440, 447
Ham's Trust, Re ..... 662
Hanbury *v.* Cockrell ..... 598
—— *v.* Spooner ..... 792 (n.)
Hannaford *v.* Hannaford ..... 556
Hannam, Re ..... 380
Hanson *v.* Graham ..... 585, 797 (n.)
Harbin *v.* Masterman ..... 452
Harcourt *v.* Morgan ..... 773 (n.)
Harding *v.* Glyn ... 518, 553, 664, 665
—— *v.* Harding ..... 287
Hardwick *v.* Thurston ..... 461, 462
Hardwicke *v.* Hardwicke ..... 528
Hardy, Re, Walls *v.* Borwick ... 712, 792 (n.)
Hare *v.* Hare ..... 404
—— *v.* Nasmith ..... 315
Harkness *v.* Bayley ..... 389
Harland *v.* Trigg ..... 519, 673
Harley *v.* Mitford ..... 610
Harmood *v.* Oglander ... 386, 390, 391
Harrington (Countess of) *v.* Atherton ..... 486
—— (Countess of) *v.* Harrington (Earl of) ... 710
Harris, Re ..... 383, 542
—— *v.* Birch ..... 85, 86
—— *v.* Burrell ..... 379
—— *v.* Cutler ..... 354
—— *v.* Davis ..... 399, 431
—— *v.* Lloyd ..... 615, 646, 648
—— *v.* Newton ..... 659
—— *v.* Poyner ..... 490
—— *v.* Pugh ..... 699
Harrison, Re ..... 370, 484
—— *v.* Borwell ..... 209 (n.)
—— *v.* Elvin ..... 373
—— *v.* Foreman ..... 579
—— *v.* Grimwood ..... 439, 592
—— *v.* Harrison ..... 373, 640
Harper, Re ..... 333
Hart, Re ..... 366
—— *v.* Durand ..... 645, 651, 652
PAGE
Hart *v.* Hart ..... 76
—— *v.* Tribe ..... 516
Hartley, Re, Stedman *v.* Dunster 660, 795 (n.)
—— *v.* Tribber ..... 652
—— *v.* Warren ..... 25
Harvey, Re, Peck *v.* Savory *Addenda*
—— *v.* Harvey ... 489, 513, 581, 615, 664
—— *v.* Stracey ..... 443, 618
Harvey's Estate, Re, Godfrey *v.* Harben ..... 849 (n.)
Harwood *v.* Baker ..... 329
—— *v.* Goodright ..... 401
—— *v.* Goodtitle ..... 350
Haussoullier *v.* Hartsinck ..... 51, 54
Hatfield *v.* Minet ..... 816 (n.)
Hatton, Re ..... 374
—— *v.* Finch ..... 285
Haughton *v.* Harrison ..... 615, 619
Havergal *v.* Havergal ..... 465
Hawes *v.* Wyatt ..... 395
Hawker *v.* Hawker ..... 701
Hawkins *v.* Clutterbuck ..... 49, 73
—— *v.* Luscombe ..... 699
—— *v.* Warren ..... 9, 37
Hawksley *v.* Barrow ..... 335
Hawley *v.* Cutts ..... 773 (n.)
Hawthorn *v.* Shedden ..... 567
Hay *v.* Coventry (Earl of) ..... 439
Hayes, Re ..... 364
—— *v.* Foorde ..... 641
—— *v.* Hayes ..... 421, 440 (n.)
Haygarth's Trusts, Re ..... 248, 300
Haynes *v.* Haynes ..... 353
—— *v.* Hill ..... 541
Hayward, Ex parte ..... 52
Haywood *v.* Bibby ..... 84, 85
Head *v.* Head ..... 721
Hearle *v.* Greenbank ..... 334
Hearn *v.* Barber ..... 722
Heasman *v.* Pearse ..... 425, 426, 609, 1038 (n.)
Heath *v.* Dendy ..... 713
—— *v.* Heath ..... 586, 596
—— *v.* Lewis ..... 884 (n.)
—— *v.* Sampson ..... 323
Heath's Settlement, Re ..... 610
Heathcote, Re ..... 541
Heathe *v.* Heathe ..... 615, 680
Hebblethwaite *v.* Cartwright ..... 624
Hedges *v.* Hedges ..... 199
Hegarty *v.* Milne ..... 36
Hele *v.* Gilbert ..... 708
Hellier *v.* Hellier ..... 401
Henchman *v.* Att.-Gen. ..... 470
Heneage *v.* Hunloke ..... 628, 629
Henderson *v.* Farbridge ..... 305
—— *v.* Green ..... 675
Henfrey *v.* Henfrey ..... 402
Henniker (Lord) *v.* Att.-Gen. ... 223
Hensler, Re, Jones *v.* Hensler ... 480
Hensman *v.* Pearse ..... 443
Hepburn *v.* Skirving ..... 351
Herbert *v.* Herbert ..... 364
—— *v.* Reid ..... 532, 794 (n.)

PAGE

Hernando *v.* Sawtell ..... 313
Heron *v.* Granger ..... 43
—— *v.* Heron ..... 712
—— *v.* Stokes ..... 311
Herrick *v.* Franklin ..... 675
Herring *v.* Barrow ..... 358
Hertford *v.* Lowther ... 704, 990 (n.)
Hervey-Bathurst *v.* Stanley...982 (n.)
Heseltine *v.* Heseltine ..... 706
—— *v.* Siggers ..... 46, 70
Hewet *v.* Ireland ..... 624
Hewitt *v.* Morris ..... 486
Heylyn *v.* Heylyn ..... 354
Heywood *v.* Heywood ..... 449
Hibbert *v.* Hibbert ..... 609, 664, 653
Hick *v.* Moss ..... 395
Hickman *v.* Bacon ..... 354
Hicks *v.* Keat ..... 208 (n.), 238
Hiern *v.* Mill ..... 86
Hill, In the goods of ..... 364
—— *v.* Atkinson ..... 232, 233, 234, 235
—— *v.* Chapman ..... 615
—— *v.* Cock ..... 475, 497
—— *v.* Crook ..... 653, 654
—— *v.* Halford ..... 51
—— *v.* London (Bishop of) ..... 478
—— *v.* Patten ..... 25
—— *v.* Ramm ..... 40, 42
Hills *v.* Worley ..... 467
Hinchcliffe *v.* Hinchcliffe ..... 404
—— *v.* Westwood ..... 668
Hind *v.* Selby ..... 491
Hinde *v.* Whitehouse ..... 70
Hindmarsh, Re ..... 384 (n.)
—— *v.* Charlton ..... 373
Hinxman *v.* Poynder ..... 517
Hinckley *v.* Simmons ..... 328
Hinves *v.* Hinves ..... 486, 491
Hipkin *v.* Wilson ..... 390
Hippesley *v.* Homer ..... 524
Hirschfield *v.* Smith ..... 24
Hiscocks *v.* Hiscocks ..... 529
Hixon *v.* Wytham ..... 305
Hoare *v.* Osborne ..... 465
—— *v.* Parker ..... 604
Hobart *v.* Suffolk (Countess of)... 478
Hobbs *v.* Knight ..... 380
Hobgen *v.* Neale ..... 609
Hobson *v.* Blackburn ..... 309, 506
—— *v.* Neale ..... 228
Hodges *v.* Green ..... 390
—— *v.* Hodges ..... 849 (n.)
Hodgkinson *v.* Wood ..... 390
Hodgson *v.* Fox ..... 776 (n.)
—— *v.* Halford ..... 438, 441, 599
—— *v.* Smithson ..... 600
Hogg *v.* Cook ..... 608
—— *v.* Lashley ..... 305, 314
Holden *v.* Ramsbottom ..... 761 (n.)
Holder *v.* Howell ..... 407
Holdfast *v.* Pardoe ..... 512
Holgate *v.* Jennings ..... 493
Holland *v.* Duffin ..... 6
Hollingworth *v.* Grasett ..... 792 (n.)
Hollinrake *v.* Lister ..... 982 (n.)

PAGE

Holloway *v.* Clarkson ..... 636
—— *v.* Holloway ..... 662, 674
—— *v.* Radcliffe ..... 659, 668
Holman *v.* Johnson ..... 34
Holmes *v.* Barker ..... 351
—— *v.* Coghill ..... 415
—— *v.* Cradock ..... 575, 577
—— *v.* Custance ..... 528
—— *v.* Jacques ..... 54
—— *v.* Prescott ..... 477
—— *v.* Sexsmith ..... 6
Holmesdale *v.* West ..... 407 (n.)
Holt *v.* Frederick ..... 720
—— *v.* Sindrey ..... 650, 653
—— *v.* Winchester ..... 860 (n.)
Holyland *v.* Lewin ..... 481
Homer *v.* Homer ..... 528, 528 (n.)
Hone's Trust, Re ..... 480
Hood *v.* Clapham ..... 493
Hooley *v.* Jones ..... 374
Hooper, Ex parte ..... 628
—— *v.* Williams ..... 55
Hope *v.* Gloucester (Mayor, &c., of) ..... 436
—— *v.* Liddell ..... 557
—— *v.* Potter ..... 508
Hopkins *v.* Hopkins ..... 445
—— *v.* Ramage ..... 358
Hopkins' Trusts, Re ..... 610
Horn *v.* Coleman ..... 239
Horne *v.* Redfearne ..... 52, 58
Horne's Settled Estate ..... 918 (n.)
Horner's Estate, Re, Pomfret *v.* Graham ..... 686
Horridge *v.* Ferguson ..... 611
Horseman *v.* Abbey ..... 619, 620
Horsefall, Re ..... 557
—— *v.* Hay ..... 39, 45, 71, 73
Horsepool *v.* Watson ..... 669
Horsford, Re ..... 367, 383
Horton *v.* Horton ..... 547, 552
—— *v.* Whittaker ..... 578
Horwood *v.* West ..... 518, 522
Hoskin's Trusts, Re ..... 239
Hoste *v.* Blackman ..... 564
Hotham *v.* Sutton ..... 707
Houghton *v.* Franklin ..... 824 (n.)
—— *v.* Kœnig ..... 80
House *v.* Way ..... 490, 493
Houston *v.* Hughes ..... 698
Howard, Re ..... 402
—— *v.* Mills ..... 654
—— *v.* Prince ..... 185
—— *v.* Wilson ..... 794 (n.)
Howarth *v.* Dewell ..... 516
Howden, Re ..... 542
Howe *v.* Dartmouth (Lord) ..... 485, 872 (n.)
—— *v.* Howe ..... 493
—— (Earl) *v.* Lichfield (Earl of) ..... 265 (n.)
—— *v.* Medcraft ..... 386
Howell, Re ..... 369
Howes *v.* Herring ..... 579
Hoy *v.* Master ..... 521
Hubbard *v.* Alexander ..... 524

PAGE
Hudlestone *v.* Gouldsbury ... 763 (n.)
Hudson, Re ..... 549, 604
——— *v.* Cook ..... 353
——— *v.* Parker... 370, 371, 374, 375
——— *v.* Revett ..... 26, 69, 84
Hudspeth *v.* Yarnold ..... 37
Hughes *v.* Breeds ..... 44
——— *v.* Budd..... 4, 36, 43, 45
——— *v.* Clark ..... 80
——— *v.* Empson ..... 494
——— *v.* Hughes ..... 621
——— *v.* King ..... 63
——— *v.* Sayer ..... 627
——— *v.* Turner..... 400, 414
Hugo, Re ..... 308, 309
——— *v.* Williams ..... 512, 637
Hulme *v.* Heygate ..... 413
——— *v.* Hulme ..... 600
Humberston *v.* Humberston 444 (n.)
Humberstone *v.* Jones ..... 92 (n.)
——— *v.* Stanton..... 467
Humble *v.* Mitchell ..... 46
——— *v.* Shore ..... 418, 473
Hume *v.* Edwards ..... 712, 722
——— *v.* Rendell ..... 311
——— *v.* Richardson ..... 487, 488
Humphery *v.* Humphery..... 568
Humphrey *v.* Tayleur ..... 463
Humphreys *v.* Briant ..... 57
——— *v.* Green ..... 310
——— *v.* Hort ..... 525
——— *v.* Humphreys..... 553
Humphries, Re, Smith *v.* Millidge 653
Hunloke *v.* Gell ..... 565
Hunt, Re ..... 524, 539
——— *v.* Dorsett ..... 513
——— *v.* Scott ..... 489
——— *v.* Stephens..... 185
Hunter *v.* Bullock..... 507
Hunt-Foulston *v.* Furber ... 882 (n.)
Huntley's Case ..... 683
Hussey *v.* Berkeley ..... 609
Hutcheson *v.* Hammond..... 470, 499
——— *v.* Jones..... 619, 620
Hutchings, Re ..... 800 (n.)
Hutchins *v.* Scott..... 10
Hutchinson *v.* Barron..... 771 (n.)
——— *v.* Heyworth ..... 57
——— and Tennant, Re ... 522, 673
Hutchinson's Trusts, Re..... 613
Hutton *v.* Simpson ..... 546
Huxley *v.* O'Connor..... 85
Hyde *v.* Hyde ..... 328, 382
——— *v.* Parratt ..... 603
Hyne *v.* Dewdney ..... 39

I.

Ibbetson, Re ..... 383
Ibbitson's Estate ..... 483
Ickeringill's Estate, Re ..... 569
Ilchester (Earl of), Ex parte ... 382, 397, 398, 411

PAGE
Illingworth *v.* Cooke ..... 508
Ilott *v.* Genge ..... 370
Ince, Re..... 410
Incledon *v.* Northcote ..... 629 (n.)
Incorporated Society *v.* Richards 560
*Indian Chief* (*The*)..... 324, 325
Ingilby *v.* Amcotts ..... 346 (n.), 348
Ingle *v.* Richards ..... 353
Ingle's Trusts, Re..... 528, 529
Inglesant *v.* Inglesant..... 370, 371
Ingoldby *v.* Ingoldby ..... 541
Inland Revenue Commissioners *v.* Glasgow & S. W. Ry. Co. ..... 69
Innes *v.* Jackson ..... 390
——— *v.* Mitchell ..... 712
Irvin *v.* Ironmonger..... 826 (n)
Irvine *v.* Sullivan..... 521, 543
Isaac *v.* Hughes ..... 605
Isaacson *v.* Van Goor ..... 553
Israel *v.* Benjamin ..... 54, 63
——— *v.* Israel ..... 40
Ive *v.* King ..... 681
——— *v.* Rodin ..... 377 (n.)
Izaac *v.* Defriez..... 665
Izard *v.* Hurst ..... 415
Izod *v.* Izod ..... 554
Izon *v.* Butler ..... 228, 775 (n.)

J.

Jack *v.* Featherstone ..... 426
Jackson, Re, Spiers *v.* Ashworth 465, 616
——— *v.* Dover ..... 625
——— *v.* Forbes..... 217
——— *v.* Hamilton ..... 505
——— *v.* Hogan ..... 693
——— *v.* Hullock ..... 415, 470
——— *v.* Jackson ..... 582
——— *v.* Kelly ..... 472
——— *v.* Noble ..... 598
——— *v.* Stophurd..... 47
Jacob, Re ..... 384 (n.)
——— *v.* Lindsay...5, 8 (n.), 75, 94, 95
Jacobs *v.* Hart ..... 25
——— *v.* Jacobs ..... 674
Jacob's Will, Re ..... 588 (n.)
Jagger *v.* Jagger ..... 449
James, Re ..... 380
——— *v.* Catherwood ..... 34
——— *v.* Dean ..... 356
——— *v.* Richardson ..... 623
——— *v.* Shore..... 32
——— *v.* Smith ..... 608
——— *v.* Wynford (Lord)... 432, 674
Jansen *v.* Jansen ..... 410
Jardine *v.* Payne ..... 4
Jarvis *v.* Wilkins ..... 51
Jauncey *v.* Sealey..... 170, 177
Jeacock *v.* Falkener..... 532
Jeaffreson's Trusts, Re..... 676
Jebb *v.* M'Kurnan ..... 48
Jee *v.* Audley ..... 431, 432

PAGE
Jeffery *v.* Honywood ..... 633, 634
Jeffery's Trusts, Re ..... 554
Jeffreys *v.* Boosey ..... 267 (n.)
——— *v.* Connor ..... 627
Jenkins *v.* Blizard ..... 41
——— *v.* Gaisford ..... 366
——— *v.* Jenkins ..... 695
Jenkinson, Re ..... 276, 278, 283
Jennings *v.* Bond ..... 238
——— *v.* Gallimore ..... 667
——— *v.* Looks ..... 580
Jervis *v.* Wolferstan ..... 460
Jerningham *v.* Herbert ..... 507
Jesson *v.* Wright ..... 513, 637
Jessop *v.* Watson ..... 717
Jeyes *v.* Savage ..... 627
Jobson's Case ..... 660
Johnson *v.* Baker ..... 190
——— *v.* Ball ..... 543
——— *v.* Beale ..... 665
——— *v.* Beattie ..... 322
——— *v.* Child ..... 712
——— *v.* Cope ..... 513
——— *v.* Curry ..... 563
——— *v.* Foulds ..... 590
——— *v.* Johnson ..... 480, 485
——— *v.* Routh ..... 486
Johnson's Trusts, Re ..... 710
Johnston, Re, Cockerell *v.* Essex (Earl of) ..... 710
——— *v.* Rowlands ..... 519
Jolliffe *v.* East ..... 682
Jones, Re ..... 368
——, Re, Green *v.* Gordon ..... 568
——— *v.* Bedley ..... 544
——— *v.* Colbeck ..... 663
——— *v.* Curry ..... 565
——— *v.* Flint ..... 44
——— *v.* Goodchild ..... 720, 723
——— *v.* Godrich ..... 333
——— *v.* Greatwood ..... 516
——— *v.* Hancock ..... 504
——— *v.* Henley ..... 794 (n.)
——— *v.* Higgins ..... 493
——— *v.* Howells ..... 185
——— *v.* Jones ..... 26, 884 (n.)
——— *v.* Mackilwain ..... 587
——— *v.* Maggs ..... 453, 456
——— *v.* Mitchell ..... 476, 500
——— *v.* Morgan ..... 574 (n.), 636
——— *v.* Nicholay ..... 215, 306
——— *v.* Newman ..... 526
——— *v.* Randall ..... 549
——— *v.* Ryder ..... 7, 46 (n.)
——— *v.* Sefton ..... 704
——— *v.* Simpson ..... 54
——— *v.* Southall ..... 461
——— *v.* Tucker ..... 565
Jones' Trusts, Re ..... 609
Jordan *v.* Adams ..... 637, 638
Josephs *v.* Pebrer ..... 40
Jubber *v.* Jubber ..... 505, 514
Judd *v.* Judd ..... 589
Judkin's Trusts, Re ..... 910 (n.)
Jull *v.* Jacobs ..... 575
Jupp, Re ..... 684 and *Addenda*

## K.

PAGE
Kamf *v.* Jones ..... 443
Kavanagh *v.* Morland ..... 640
Kaye, Re ..... 753 (n.)
Keable *v.* Payne ..... 6
Keane *v.* James ..... 9
Kearsley *v.* Woodcock ..... 804 (n.)
Keating *v.* Keating ..... 369
Keay *v.* Bolton ..... 675
Keene *v.* Parsons ..... 48 (n.)
Keigwin *v.* Keigwin ..... 370, 384 (n.)
Kell *v.* Charmer ..... 534
Kellett *v.* Kellett ..... 461, 499, 554, 600
Kelly *v.* Duffy ..... 561
——— *v.* Hammond ..... 651
——— *v.* Powlet ..... 708
Kemble *v.* Church ..... 329
Kendall *v.* Kendall ..... 707
Kenebel *v.* Scrafton ..... 376 (n.), 646
Kening *v.* Att.-Gen. ..... 247
Kennedy *v.* Kennedy ..... 506
——— *v.* Kingston ..... 554, 682
Kennell *v.* Abbott ..... 500
Kenrick *v.* Beauclerk (Lord) ..... 698
Kent *v.* Tapley ..... 773 (n.)
Kermode *v.* Macdonald ..... 403
Kerr *v.* Clinton ..... 512
Kershaw *v.* Cox ..... 25
Kevern *v.* Williams ..... 623
Kew *v.* Rouse ..... 681
Key *v.* Key ..... 578
Keylway *v.* Keylway ..... 716
Kilcher, Re ..... 373
Kilner *v.* Leach ..... 659
Kilpatrick *v.* Kilpatrick ..... 314
Kilpin *v.* Kilpin ..... 230
Kilvert's Trusts ..... 527
Kilvington *v.* Gray ..... 486, 505
Kimberley *v.* Tew ..... 627
Kinch *v.* Ward ..... 637
King *v.* Bennett ..... 632
——— *v.* Burchell ..... 639
——— *v.* Cleaveland ..... 668
——— *v.* Denison ..... 478, 558
——— *v.* Foxwell ..... 322, 325
——— *v.* Isaacson ..... 589
——— *v.* Melling ..... 637, 638
——— *v.* Ringstead (Inhabitants of) ..... 547
——— *v.* Rumball ..... 575
——— *v.* Turner ..... 355, 356
——— *v.* Withers ..... 593
King's Proctor *v.* Daines ..... 307
Kinsella *v.* Caffrey ..... 555
Kircudbright (Lord) *v.* Kircudbright (Lady) ..... 720, 721
Kirk *v.* Eddowes ..... 538
Kirke *v.* Kirke ..... 384, 398
Kitchen *v.* Myers ..... 608
Knight, Re ..... 215, 307
——— *v.* Barber ..... 36, 39, 46
——— *v.* Boughton ..... 522
——— *v.* Cameron ..... 584
——— *v.* Clements ..... 25, 26
——— *v.* Crockford ..... 26

PAGE
Knight *v.* Gould ..... 465
——— *v.* Knight ..... 586, 990 (n.)
——— *v.* Selby ..... 696
Knill *v.* Williams ..... 23
Knollys *v.* Alcock..... 392
Knotsford *v.* Gardiner..... 562
Knowles, Re ..... 475, 625
Knox *v.* Hotham ..... 516
—— *v.* Wells ..... 592

L.

Lacey *v.* Hill ..... 356, 979 (n.)
Lacon *v.* Mertins ..... 353
Lacroix, Re ..... 321
Laing *v.* Cowan ..... 567
Lainson *v.* Lainson ..... 469
Lake *v.* Ashwell ..... 98
Laker *v.* Hordern..... 651, 653
Lambart, Re ..... 380
Lambe *v.* Eames ..... 515
Lambell *v.* Lambell..... 378
Lambert's Estate, Re, Stanton *v.* Lambert..... 996 (n.)
Lampet's Case ..... 603
Lamplier *v.* Despard ..... 704 (n.)
Lancashire *v.* Lancashire ..... 506
Lansdowne (Marquis of), Re..... 542
Lane *v.* Goudge..... 585
—— *v.* Stanhope..... 562 (n.)
—— *v.* Wilkins ..... 416
Lanesborough (Lady) *v.* Fox..... 424
Langdale (Lady) *v.* Briggs ..... 351, 982 (n.)
Langden *v.* Wilson ..... 39
Langenew *v.* Bean ..... 510
Langford *v.* Little ..... 386
——— *v.* Pitt ..... 350
Langham *v.* Nenny ..... 564
Langman *v.* Holmes..... 81
Langston *v.* Langston..... 524, 632
——— *v.* Pole ..... 509
Lant *v.* Pearce ..... 92 (n.)
Lantsbury *v.* Collier ..... 442
Larkins *v.* Larkins ..... 463
Lasbury *v.* Newport..... 662
Lashbrook *v.* Cock ..... 680
Lasseur *v.* Tyrconnel ..... 171, 178
La Terrière *v.* Bulmer..... 486, 488
Latham *v.* Rutley..... 41
Lawless *v.* Shaw ..... 523
Lawrance *v.* Boston..... 83
Lawrence *v.* Hooker ..... 76
——— *v.* Wallace ..... 395
Lawrie *v.* Bankes..... 523
Leach *v.* Bates ..... 370
—— *v.* Leach..... 461, 515, 615
Leacroft *v.* Maynard ... 245 (n.), 409
Leadbeater *v.* Cross..... 578
Leak *v.* Macdowell ..... 670
Leake *v.* Robinson...429, 431, 437, 608, 583, 585, 591, 616, 622, 627, 799 (n.)
Leaman *v.* Woods..... 355
Leaver *v.* Spurling ..... 982 (n.)

PAGE
Lechmere *v.* Lavie ..... 522
Lee *v.* Busk ..... 555
Lee *v.* Pain 464, 534, 616, 624, 900 (n.)
—— *v.* Stone ..... 689
Leeds *v.* Burrows..... 47
—— (Duke of) *v.* Munday ..... 557
Leeming *v.* Sherratt ... 593, 686, 691
Lees *v.* Mosley ..... 639
—— *v.* Lancashire ..... 39, 58
Le Farrant *v.* Spencer..... 708 (n.)
Lefevre *v.* Freeland..... 567
Legatt *v.* Sewell ..... 637
Leigh *v.* Banner ..... 44, 45
——— *v.* Byron ..... 652
—— *v.* Leigh ..... 464, 516, 616, 660
Leighton *v.* Leighton ..... 816 (n.)
——— *v.* Price ..... 662
Lemage *v.* Goodban..... 401 (n.)
Le Marchant *v.* Commissioners of Inland Revenue 263 (n.), 289
——————— *v.* Le Marchant ... 522
Lemayne *v.* Stanley..... 365
Lempriere *v.* Valpy ..... 564
Lenden *v.* Blackmore ..... 616
Lenox *v.* Lenox ..... 578
Leonard *v.* Sussex (Earl of) ..... 642
Lepine *v.* Bean ..... 653
Leslie *v.* Devonshire (Duke of)... 509
Lester *v.* Garland..... 454
Le Suenn *v.* Le Suenn..... 322
Lethieullier *v.* Tracy ..... 578
Levy *v.* Solomon ..... 645 (n.)
Lewin *v.* Cox..... 684
Lewis, Re ..... 373, 378
——, Re, Foxwell *v.* Lewis ..... 484
—— *v.* Lane ..... 355
—— *v.* Lewis ..... 712
—— *v.* Llewellyn ..... 564
—— *v.* Matthews ..... 558
—— *v.* Morris..... 659
—— *v.* Waters ..... 573
Lewis Bowles' Case ..... 643
Leyburn *v.* Warrington ..... 26
Leykariff *v.* Ashford ..... 23
Liddard *v.* Liddard ..... 505 (n.), 517
Liddiard *v.* Gale ..... 42
Lightfoot *v.* Burstall ..... 473
Lilford (Lord) *v.* Att.-Gen. ..... 291
——————— *v.* Kirk ..... 351
Limbrey *v.* Gurr ..... 507
Limerick (Countess of), Re ..... 542
Limmer Asphalte Paving Co. *v.* Commissioners of Inland Revenue..... 68
Lincoln (Lady) *v.* Pelham... 629, 630, 677
Lincoln's Case (Earl of)..... 387
Lindgren *v.* Lindgren ..... 533
Lindsay *v.* Lindsay ..... 309
Lindsell *v.* Thacker ..... 558
Lingen *v.* Souray ..... 354, 484
Linley *v.* Clarkson ..... 28
Lister *v.* Smith..... 308 (n.), 524
—— *v.* Tidd ..... 609 (n.)
Little *v.* Slackford ..... 52

PAGE
Littleton's Case..... 557
Livesey *v.* Harding ..... 556
——— *v.* Livesey ..... 629, 632
Llewellyn's Trusts 488, 492 (n.), 493
Lloyd *v.* Branton ..... 409
—— *v.* Carew..... 421, 643
—— *v.* Heathcote..... 62, 89
—— *v.* Loaring ..... 504
—— *v.* Lloyd..... 473, 884 (n.)
—— *v.* Mansel ..... 42
—— *v.* Tench..... 717, 719
Locke *v.* Dunlop..... *Addenda*
—— *v.* Foote ..... 387
—— *v.* James..... 383, 398
Locker *v.* Bradley ..... 616, 617
Lockhart *v.* Hardy ..... 516
Logan *v.* Bell ..... 376 (n.)
———*v.* Fairlie ..... 176, 217
Lomax *v.* Holmden ..... 632
Londesborough (Lord) *v.* Somerville ..... 246, 990 (n.)
London & Brighton Ry. Co. *v.* Fairclough..... 26
London (City of) *v.* Garway ..... 545
Long *v.* Aldred..... 412 (n.)
—— *v.* Blackall ..... 422, 667
—— *v.* Watkinson ..... 460, 670
—— *v.* Wilkinson ..... 799 (n.)
Longchamp *v.* Fisk ..... 333
Longdon *v.* Simson ..... 451
Longhead *v.* Phelps ..... 437
Longmore *v.* Elcum 515, 738, 884 (n.)
Lonford *v.* Little ..... 380
Lopez *v.* De Tastet ..... 63
Lord *v.* Bunn ..... 804 (n.)
—— *v.* Colvin ..... 176, 184
—— *v.* Lord ..... 799 (n.)
Lord-Advocate *v.* Ailsa (Marquis of) ..... 258 (n.)
———————— *v.* Fife (Earl of) 276
———————— *v.* Macdonald ... 287
———————— *v.* Roberts' Trustees ..... 270
Loring *v.* Thomas..... 607
Loscombe *v.* Wintringham..... 527
Louch *v.* Peters..... 241, 242
Love *v.* L'Estrange..... 585
Loveacres *v.* Blight ..... 680
Loveday *v.* Hopkins..... 676
Lovegrove, Re ..... 310
Lovejoy *v.* Carter..... 606
Lovelace's Settlement, Re... 268, 279, 280, 286
Lovell *v.* Hill..... 51
—— *v.* Knight ..... 564, 564 (n.)
Lovelock *v.* Franklyn ..... 10, 29, 32
Low *v.* Burron ..... 636
—— *v.* Smith ..... 675
Lowe *v.* Davies..... 638
——*v.* Fairlie..... 176
Lowndes *v.* Stone..... 508, 657, 660
Lowry, Re ..... 307
Lowther *v.* Condon ..... 580
——— *v.* Lowther..... 604
Lucas *v.* Beach ..... 38
—— *v.* Brandreth ..... 659

PAGE
Lucas *v.* Cuddy..... 608
—— *v.* Goldsmid ..... 638, 672, 674
Luffman, Re ..... 375
Lugar *v.* Harman..... 669, 678
Lushington *v.* Boldero..... 403
Luther *v.* Kirby ..... 388
Lutwyche *v.* Lutwyche ..... 722
Luxford *v.* Cheeke ..... 573
Lyall *v.* Lyall ..... 270
Lyburn *v.* Warrington..... 67
Lyddon *v.* Ellison..... 629
Lysaght *v.* Edwards..... 353, 558
Lytton *v.* Lytton ..... 574 (n)
Lywood *v.* Kimber ..... 608 (n.)

M.

McCabe, Re..... 383
McCall *v.* Taylor ..... 52
Macclesfield (Earl of) *v.* Davis... 604
McCormick *v.* Grogan..... 525, 544
McDermott *v.* Wallace ..... 549
Macdonald *v.* Brice ..... 452
———— *v.* Irvine ..... 486
McGachen *v.* Dew ..... 493
McGowan *v.* Smith ..... 57
McGregor *v.* McGregor ..... 609
Machel *v.* Newman ..... 667
Mackell *v.* Winter ..... 591
Mackenzie *v.* Forbes..... 221
———— *v.* Mackenzie..... 349, 669
Mackett *v.* Mackett..... 515
McLachlan *v.* Taitt ..... 593
Maclean's Trusts, Re ..... 282
Macleod *v.* Commissioners of Inland Revenue ..... 68
McMahon *v.* Rawlings..... 170, 177
Maconbrey *v.* Jones..... 629, 630
McPherson *v.* McPherson ..... 487
McVicar, Re ..... 377
Madden *v.* Ikin..... 589
Maden *v.* Taylor ..... 556
Maddison *v.* Alderson ..... 310
———— *v.* Andrews ..... 682
Maddock, Re..... 873
———— *v.* Legg..... 609
Madison *v.* Chapman ..... 577
Madway *v.* Croft ..... 331
Magistrates of Dundee *v.* Morris 505
Maguire, Re ..... 527
Mahon *v.* Savage ..... 665
Mahoney *v.* Duggan..... 247
Maitland *v.* Adair...228, 459, 658, 664, 775 (n.)
———— *v.* Chalie ..... 627
Major *v.* Williams ..... 385
Malcolm *v.* Martin ..... 677
Malim *v.* Keighley ..... 518, 605, 677
Mallabar *v.* Mallabar..... 479, 499, 500
Maltass *v.* Maltass ..... 323, 324
Manfield *v.* Dugard ..... 575
Manly *v.* Lakin..... 305
Mann *v.* Fuller..... 407
——— *v.* Godbold ..... 10

PAGE

Mann *v.* Lang ..... 185
Manning *v.* Purcell ..... 311
Manning's Case..... 603
Mannox *v.* Greener ..... 758 (n.)
Manton *v.* Tabois ..... 704 (n.)
Mapp *v.* Elcock..... 722 (n.)
Maraver, Re ..... 314
Marc *v.* Rouy..... 61
Marcus, Re ..... 794 (n.)
Marks *v.* Marks..... 421
Marine Investment Co. *v.* Haviside ..... 76
Marjoribanks *v.* Hovenden... 306, 307
Markham *v.* Ivatt..... 472
Marlborough (Duke of) *v.* Godolphin (Earl of) ..... 438, 439, 461
Marnell *v.* Walton ..... 306
Marrett *v.* Sly ..... 504
Marryat *v.* Townly ..... 680
Marsden *v.* Kent ..... 495
Marsh, Re ..... 684
——— *v.* Marsh..... 367, 385, 664
Marshall, Ex parte ..... 558
——————— *v.* Bousfield ..... 642
——————— *v.* Hill ..... 695
——————— *v.* Powell ..... 38, 40
Marsden, Re ..... 306
Marson *v.* Short ..... 44
Marston *v.* Fox..... 376 (n.)
Martin, Re ..... 309, 334, 373
——— *v.* Drinkwater..... 245 (n.)
——— *v.* Holgate ..... 609
——— *v.* Laverton ..... 558
——— *v.* Long..... 603
——— *v.* Scannell ..... 554
——— *v.* West..... 409 (n.)
Marwood *v.* Turner ..... 385
Mashan *v.* Dawson ..... 178
Maskelyne *v.* Russell ..... 494 (n.)
Mason *v.* Bateson ..... 508
——— *v.* Bradley ..... 24
——— *v.* Limbery..... 517
Mason's Will, Re ..... 480
Massey *v.* Hudson..... 575
——— *v.* Nanney..... 69
——— *v.* Sherman ..... 516
Master *v.* Miller ..... 23, 24
Masters *v.* Masters ..... 534, 526 (n.)
Masterman *v.* Maberley ..... 215, 306
Matheson *v.* Ross ..... 3, 4, 9, 10, 71, 95
Matthew *v.* Osborne..... 355
Matthews *v.* Bowman ..... 407
——————— *v.* Keble ..... 452, 455, 456
——————— *v.* Paul..... 621, 631
——————— *v.* Venables..... 395
Matson *v.* Booth ..... 25
——— *v.* Swift..... 173, 180
Mattinson *v.* Tanfield ..... 659
Maud *v.* Maud ..... 522
Maugham *v.* Hubbard... 8 (n.), 75, 95
——————— *v.* Mason ..... 498
Maw *v.* Harding ..... 717, 719
Maxee *v.* Shute..... 306
Maxwell *v.* Commissioners of Inland Revenue ..... 271

PAGE

Maxwell *v.* Wettenhall ..... 990 (n.)
May *v.* Smith ..... 39, 41
——— *v.* Wood..... 583
Maybank *v.* Brooks ..... 460
Mayd, Re ..... 309
Mayer *v.* Gowland ..... 392
Mayfield *v.* Robinson ..... 42
Mayott *v.* Mayott..... 607
Mead, Re ..... 374
Meads *v.* Wood ..... 573
Measure *v.* Gee..... 637
Medley *v.* Wood ..... 310
Meering *v.* Duke ..... 43
Megson *v.* Hindle..... 805 (n.)
Mehrtens *v.* Andrews ..... 489
Meinertzagen *v.* Walters..... 816 (n.)
Melanotte *v.* Teesdale ..... 40, 42
Mellish *v.* Mellish..... 638
Meluish *v.* Milton..... 310, 525
Mentney *v.* Petty..... 717
Mercer, Re..... 539, 540
Meredith, Re..... 400
——————— *v.* Farr ..... 653
——————— *v.* Heneage ..... 521
——————— *v.* Meredith ..... 616, 639
——————— *v.* Treffry ..... 631
Mereteith *v.* Campbell..... 335
Merlin *v.* Blagrave ..... 429
Merrick's Trusts, Re ..... 432
Merson *v.* Blackmore ..... 694
Meseena *v.* Carr ..... 523
Mestayer *v.* Biggs..... 64
Metham *v.* Devon (Duke of)..... 644, 647 (n.), 652, 654, 655
Meyer *v.* Townshead ..... 461
——— *v.* Simonson ..... 488
Michell *v.* Michell ..... 704 (n.)
Micklethwait, Re..... 262 (n.), 271
——————— *v.* Micklethwait ... 676
Middleton, Re ..... 383
——————— *v.* Losh ..... 456
——————— *v.* Messenger..... 616
——————— *v.* Spicer ..... 723
——————— *v.* Swain ..... 696
Midland Ry. Co., Re ..... 351, 534
Miles *v.* Harford ..... 438
Millard *v.* Bailey ..... 506, 534
Millen *v.* Dent ..... 9, 33
Miller *v.* Brown ..... 336, 412 (n.)
——— *v.* Eaton..... 663
——— *v.* James..... 315
——— *v.* Miller..... 199
——— *v.* Travers ..... 530, 537, 524
Mills, Re ..... 383, 568
——— *v.* Mills ..... 488, 493
——— *v.* Osborne ..... 494 (n.)
——— *v.* Seward ..... 637
Milne *v.* Gilbart ..... 659
Milnes *v.* Aked ..... 614
Milroy *v.* Milroy ..... 676
Milsom *v.* Awdry..... 686, 691
Minet *v.* Gibson ..... 55
Minchell *v.* Lee..... 613
Minshull *v.* Minshull ..... 637
Misa *v.* Currie ..... 57
Miskelly, Re ..... 310

PAGE
Mitchell *v.* Gard ..... 310
——— *v.* Thomas ..... 333
Mitcheson, Re ..... 384
Mitford *v.* Reynolds ..... 507
Moffat *v.* Burnie ..... 680
Mogg *v.* Mogg 344 (n.), 616, 623, 625
Mohun *v.* Mohun ..... 504
Molineux *v.* Molineux..... 538
Mollett *v.* Wackerbath..... 25
Molton *v.* Hutchinson..... 564
Monck *v.* Monck (Lord)... ..... 415
Monkhouse *v.* Holme ..... 584
Monmouthshire Canal Co. *v.* Kendall ..... 81
Montague *v.* Jeffries ..... 394
Montefiore *v.* Guedalla ..... 816 (n.)
Montgomerie *v.* Woodley ..... 588
Montgomery, Re ..... 306
——— *v.* Montgomery..... 635 (n.), 640
Montresor *v.* Montresor ..... 704 (n.), 769 (n.)
Monypenny *v.* Bristow ..... 414, 438
——— *v.* Dering..... 446, 555
Moodie *v.* Reid..... 364 (n.)
Moody *v.* King ..... 601
——— *v.* Walters..... 578
Moone *v.* Heaseman..... 694
Moor *v.* Raisbeck ... 393, 606, 850 (n.)
Moore, Re ..... 522
——— *v.* Budd ..... 323
——- *v.* Cleghorn ..... 696
——— *v.* Darell and Budd ..... 320
——— *v.* Garwood ..... 37
——— *v.* King ..... 371, 373
——— *v.* Moore..... 704 (n.)
——— *v.* Parker ..... 424, 641
Morde *v.* Ormonde (Lord) ..... 426
Morgan, Ex parte..... 557
——— Re ..... 307, 602
——— *v.* Gronow ..... 441, 442
——— *v.* Morgan...453 (n.), 487, 493
——— *v.* Pike..... 89
——— *v.* Surmen ..... 560
——— *v.* Thomas ..... 639, 640
Morley *v.* Bird ..... 463
——— *v.* Hall ..... 40
——— *v.* Rennaldson..... 884 (n.)
Morley's Will, Re..... 558
Morrant *v.* Gough..... 697
Morrell *v.* Morrell..... 364
——— *v.* Fisher ..... 528
Morris *v.* Cox..... 28, 49
——— *v.* Dixon ..... 46 (n.)
Morse *v.* Faulkner ..... 356
——— *v.* Lee ..... 52, 58
——— *v.* Livie ..... 244
——— *v.* Lord Ormond ..... 574
——— *v.* Morse..... 634
Mortgage Insurance Corp. *v.* Commissioners of Inland Rev. *Addenda*
Mortimer *v.* Mortimer..... 663
——— *v.* West..... 556, 649, 652
Moses *v.* Crafter ..... 185
Moss *v.* Cooper ..... 543
Mostyn *v.* Champneys..... 559

PAGE
Mounsey *v.* Blamire..... 524, 675
——— *v.* Stephenson ..... 64
Mountain *v.* Bennett ..... 333
Mower v. Orr..... 480
Mowlem, Re ..... 477
Mudge *v.* Adams ..... 334
Mules *v.* Jennings..... 228
Mullet *v.* Hutchinson ..... 39
Mullins *v.* Smith ..... 793 (n.)
Mundy, Re..... 306
Munro *v.* Munro ..... 321, 325
Munroe *v.* Douglas ..... 323, 324
Murray *v.* Addenbrook ..... 439
Murthwaite *v.* Jenkinson..... 698
Musgrave *v.* Down ..... 306

N.

Nash *v.* Coates..... 637, 698
——— *v.* Duncombe ..... 6
Napier *v.* Napier ..... 564
Napper *v.* Sanders ..... 578
Neale *v.* Swind ..... 76
Neighbour *v.* Thurlow..... 555
Nettleton *v.* Stephenson 452, 453, 454
Nevill *v.* Nevill..... 634
Neville *v.* Fortescue..... 490
Newborough *v.* Shröder ..... 70
Newburgh (Earl of) *v.* Countess of Newburgh..... 524
Newell *v.* Weeks ..... 310
Newman *v.* Bateson..... 990 (n.)
——— *v.* Lade ..... 404
——— *v.* Newman ..... 429
Newns, Re ..... 307
Newton *v.* Barnardine..... 549
——— *v.* Clarke ..... 372
——— *v.* Marsden..... 884 (n.)
Newton's Trusts, Re..... 670, 675
Nicholl *v.* Nicholl..... 444
Nicholls *v.* Cross ..... 80
——— *v.* Haviland..... 461, 659
——— *v.* Hawkes ..... 697
——— *v.* Nicholls ..... 308 (n.)
——— *v.* Osborn..... 708
——— *v.* Savage..... 658
——— *v.* Sheffield ..... 425
Nicholson *v.* Smith..... 36 (n.)
——— *v.* Wilson ..... 668
——— *v.* Wordsworth ..... 97
Nickisson *v.* Cockill..... 820 (n.)
Nisbett's Trustees *v.* Learmouth 238
Nixon *v.* Albion Marine Insurance Co. ..... 22
Noel *v.* Henley (Lord) ..... 470, 499
——— *v.* Hurley ..... 273
Norcott *v.* Gordon..... 713
Norfolk's Case (Duke of)..... 421
Norman *v.* Kynaston ..... 403
Norman's Trusts, Re ..... 660
Norrington, Re ..... 496
Norris *v.* Frazer..... 525, 544
——— *v.* Norris..... 703
——— *v.* Solomon..... 52
North, Re ..... 379

PAGE
Northey *v.* Burbage ..... 615
Northampton Gaslight Co. *v.* Parnell..... 48
——— Gaslight Co. *v.* St. John ..... 175
Norton *v.* Ellam ..... 53
——— *v.* Johnstone..... 452
Nosworthy, Re ..... 308 (n.)
Notley *v.* Webb ..... 40
Nowlan *v.* Nelligan ..... 517
Noyes, Re ..... 375
Nunn's Trusts, Re..... ..... ..... 529

O.

OATES *v.* Jackson..... 633
Occleston *v.* Fullalove..... 654, 656
Oddie *v.* Brown ..... 453, 455, 506
Odell *v.* Crone ... .. ..... 616
O'Donnell *v.* O'Donnell ..... 534
Odye *v.* Cookney .....9, 95
Ogle, Ex parte ..... 493
—— *v.* Knipe ..... 763 (n.)
—— *v.* Morgan ..... 794 (n.)
Oke *v.* Heath ..... 467
Oldfield *v.* Preston ..... 276
Oldham *v.* Litchfield ..... 544
Olding, Re ..... 371
Olliver, Re ..... 373
Olney *v.* Bates ..... 461, 481, 861 (n.)
O'Mahoney *v.* Burdett..... 598
Ommanney *v.* Bingham ..... 319
Ongley *v.* Peale..... 509
Onions *v.* Tyrer..... 382, 398
Onslow *v.* South ..... 581
Oppenheim *v.* Henry ..... 617
Orange *v.* Pickford ..... 358
Ord, Re ..... 351
Orford *v.* Churchill ..... 606, 607
——— *v.* Cole ..... 41
Orme *v.* Young ..... 95
Orpen, Re ..... 776 (n.)
Orton's Trust, Re ..... 614
Osborne, Re ..... 314
Osmond *v.* Tyndall ..... 649
Oswald, Re .....400, 524
Outhwaite *v.* Luntley ..... 24
Overhill's Trust, Re ..... 651
Owen *v.* Bryant ..... 652
——— *v.* Owen ..... 473

P.

PACKHAM *v.* Gregory ..... 617
Page *v.* Donovan ..... 369
—— *v.* Leapingwell ... 476, 499, 500
—— *v.* Page ..... 463, 473
—— *v.* Soper..... 636
Paget's Settled Estates, Re... 856 (n.)
Paine *v.* Hyde ..... 982 (n.)
——— *v.* Wagner ..... 611
Paine's Trust, Re ..... 969 (n.)
Palin *v.* Hills ..... 460, 669, 671
Palmer *v.* Craufurd ..... 824 (n.)

PAGE
Palmer *v.* Cruttwell ..... 614
——— *v.* Flower ..... 523
——— *v.* Holford.. ..... 430, 451
——— *v.* Pratt..... 51, 53
——— *v.* Simmonds ..... 505
——— *v.* Whitmore..... 183
Papillon *v.* Voice ..... 642
Parfitt *v.* Hember..... 445, 615
Parke, Re ..... 404
Parker, Re 480, 585, 607, 797 (n.), 864 (n.)
——— *v.* Ayres ..... 510
——— *v.* Birks ..... 627 (n.)
——— *v.* Biscoe ..... 414
——— *v.* Bolton ..... 518, 642
——— *v.* Dubois ..... 40
——— *v.* Hodgson ..... 580
——— *v.* Marchant 704 (n.), 769 (n.), 794 (n.)
——— *v.* Stanyland ..... 44
——— *v.* Tootal ..... 550
Parkin *v.* Hodgkinson..... 575
Parkman & Moss, Re ..... 558
Parnell, Re..... 753 (n.)
Parr, Re ..... 583
Parry, Re, Leak *v.* Scott..... 658
——— *v.* Deere ..... 12, 79
——— *v.* Roberts ..... 844 (n.)
——— *v.* Daggs, Re ..... 512
Parsons *v.* Cooke ..... 634
——— *v.* Freeman ..... 391
——— *v.* Justin ..... 625
——— *v.* Lanoe ..... 308, 309
——— *v.* Middleton ..... 52
——— *v.* Parsons ..... 529, 674
Partington *v.* Att.-Gen. ..... 184, 185
Partridge *v.* Baylis ..... 583
Pascall, Re ..... 539
Paske *v.* Ollatt ..... 333
Pasmore *v.* Huggins..... 605
Pass *v.* Dundas ..... 974 (n.)
Patch *v.* Shore ..... 306, 307, 569
Patching *v.* Barnett..... 533
Paterson *v.* Rolland ..... 681
Patience *v.* Main ..... 324
Paton *v.* Shepherd ..... 709
Patten, Re ..... 321, 323, 325
Pattison *v.* Pattison ... 554, 611, 617
Paul *v.* Children ..... 651
—— *v.* Compton... 518, 616, 621, 625
—— *v.* Meek ..... 80, 149 (n.)
Pawlett (Lady) *v.* Pawlett (Lord) 580
Pawsey *v.* Lowdall ..... 638
Paxton *v.* Macreight ..... 325
Payne *v.* Webb ..... 611
Pay's Case ..... 600
Peach *v.* Phillips ..... 389
Peacock *v.* Monk..... 305, 1046 (n.)
——— *v.* Stockford ..... 614
——— *v.* Pares ..... 628
Pearce *v.* Carrington ..... 626
——— *v.* Cheslyn ..... 11, 98
——— *v.* Edmeades ... 549, 589, 614
——— *v.* Vincent ..... 663
Peard *v.* Kekewich ..... 430
Pearks *v.* Moseley..... 431

PAGE
Pearman *v.* Pearman ..... 592
Pearsall *v.* Simpson ..... 575 578
Pearse, Re ..... 369, 370, 374
——— *v.* Graham ..... 481
——— *v.* Pearse ..... 174
Pearson *v.* Garrett ..... 53
——— *v.* Pearson ..... 371, 990 (n.)
Peat *v.* Chapman ..... 463, 473
Peate *v.* Dicken ..... 31
Pechell *v.* Hilderley ..... 321
Peck *v.* Halsey ..... 505
Peckham *v.* Peckham ..... 755 (n.)
Pedley *v.* Dodds ..... 528
Pedroth's Will, Re ..... 505
Peilon *v.* Brooking ..... 313
Pells *v.* Brown ..... 595, 596
Pemberton *v.* Pemberton ..... 381
——— *v.* Vaughan ..... 42
Pennant *v.* Kingscote ..... 375
Penniford *v.* Hamilton ..... 37
Penny *v.* Turner ..... 554
Penticost *v.* Ley ..... 533
Percival *v.* Percival ..... 595
Percy's Executors *v.* The Queen... 183, 190
Perkins *v.* Baynton ..... 680, 681
——— *v.* Goodwin ..... 656
——— *v.* Micklethwaite ..... 416
——— *v.* Potts ..... 48
——— *v.* Walker ..... 388
Perrin *v.* Blake ..... 635
Perring *v.* Blake ..... 78
Perrott *v.* Perrott ..... 382
Perry *v.* Meadowcroft ..... 84
——— *v.* Merritt ..... 507
——— *v.* White ..... 614, 683
Petchell, Re ..... 401 (n.)
Peto *v.* Reynolds ..... 52
Pettinger *v.* Ambler ..... 569
Pett's Case ..... 716, 717
Pewtner, Re ..... 542
Peyton, Re ..... 257 (n.), 279
——— *v.* Hughes ..... 615
Phelps, Re ..... 541
Philbrick's Trusts, Re ..... 239
Philips *v.* Philips ..... 545
Phillips, Re ..... 453 (n.)
——— *v.* Barker ..... 525
——— *v.* Commissioners of Inland Revenue ..... 68
——— *v.* Evans ..... 662
——— *v.* Garth ..... 657, 659, 666
——— *v.* Im Thurm ..... 55
——— *v.* Morrison ..... 69, 88
——— *v.* Phillips ..... 355
Philps' Will, Re ..... 662, 674
Phiney *v.* Phiney ..... 722
Phipard *v.* Mansfield ..... 556
Phipps *v.* Ackers ..... 576
——— *v.* Anglesea (Earl of) ..... 401
——— *v.* Mulgrave (Lord) ..... 580
Phipson *v.* Turner ..... 445
Pickard *v.* Att.-Gen. ..... 273
Picken *v.* Matthews ..... 429, 623
Pickering *v.* Pickering ..... 486, 490
Pickersgill *v.* Rodger ..... 480
PAGE
Pickford *v.* Barr ..... 449
Pick's Settlements, Re ..... 260 (n.)
Pickup *v.* Atkinson ..... 490
Pickup's Trusts, Re ..... 605
Pickwick *v.* Gibbes ..... 990 (n.)
Piercey, Re ..... 372
Pierpoint *v.* Gower ..... 63, 82
Pierson *v.* Garnet ..... 517, 609, 628
——— *v.* Vickers ..... 637
Pigg *v.* Clarke ..... 673, 674
Pigott, Re ..... 211
——— *v.* Waller ..... 413
Pike *v.* Fitzgibbon ..... 849
Pilcher *v.* Randall ..... 514
Pilkington *v.* Boughey ..... 517
Pinbury *v.* Elkin ..... 593
Pinder *v.* Pinder ..... 662
Pinède's Settlement, Re ..... 570
Pinner *v.* Arnold ..... 44
Pinney *v.* Hunt ..... 311
Pipon *v.* Pipon ..... 319
Pitt *v.* Jackson ..... 445, 446, 641
——— *v.* Pitt ..... 322
——— *v.* Shew ..... 45
Pitt's Will, Re ..... 761 (n.)
Planché *v.* Fletcher ..... 34
Platt *v.* Att.-Gen. ..... 324
——— *v.* Routh ..... 183, 203 (n.), 222
Playne *v.* Scriven ..... 373
Plenty *v.* West ..... 402, 512
Pleydell *v.* Pleydell ..... 676
Podmore *v.* Gunning ..... 543
Polden *v.* Bastard ..... 842 (n.)
Pollock, Re ..... 816 (n.)
Ponsford *v.* Walton ..... 7
Poole *v.* Terry ..... 580
Pooley *v.* Brown ..... 61
——— *v.* Godwin ..... 12, 76, 83
Pope *v.* Pope ..... 507
——— *v.* Whitcombe ..... 661
Popham *v.* Aylesbury (Lord) ..... 704
Portal & Lamb, Re ..... 771 (n.)
Porter, Re ..... 308, 309
——— *v.* Baddeley ..... 492 (n.)
——— *v.* Fox ..... 432, 465
——— *v.* Tournay ..... 708
Porter's Trusts, Re ..... 674
Portland (Countess of) *v.* Prodger 334
Pothecary *v.* Pothecary ..... 210 (n.)
Potinger *v.* Wightman ..... 321
Potter *v.* Commissioners of Inland Revenue ..... 68
——— *v.* Dudeney ..... 484
——— *v.* Potter ..... 412
Potter's Trusts, Re ..... 461
Powdrell *v.* Jones ..... 979 (n.)
Powell *v.* Divett ..... 25
——— *v.* Edmunds ..... 31, 33
——— *v.* Howells ..... 556
——— *v.* Merritt ..... 723
——— *v.* Mouchet ..... 400
——— *v.* Norwood ..... 55
——— *v.* Powell ..... 383, 411, 614
Power *v.* Hayne ... 825 (n.), 827 (n.)
Powis *v.* Burdett ..... 628
——— *v.* Copson ..... 442

PAGE
Prater, Re ..... 770 (n.)
Pratt *v.* Jackson ..... 708 (n.)
—— *v.* Matthew ..... 650, 654
—— *v.* Pratt ..... 407
Prendergast *v.* Prendergast ..... 486
Prescott *v.* Barker ..... 563
President of the United States *v.* Drummond ..... 323
Preston *v.* Eastwood ..... 17
—— *v.* Melville ... 313 (n.), 492 (n.)
Preussing *v.* Ing ..... 54 (n.), 63
Prevost *v.* Clarke ..... 517
Price *v.* Dewhurst ..... 176, 313, 320
—— *v.* Hall ..... 595
—— *v.* Lockley ..... 513
—— *v.* Page ..... 525
—— *v.* Strange ... 669, 670, 714 (n.)
—— *v.* Jenkins ..... 199
Pride *v.* Bubb ..... 325
—— *v.* Fooks ..... 453, 505, 577, 738 (n.)
Pridie *v.* Field ..... 244
Priestman *v.* Thomas ..... 311
Pring *v.* Pring ..... 543
Proby *v.* Landor ..... 525, 544
Proctor *v.* Bishop of Bath and Wells ..... 437
Proud *v.* Turner ..... 720
Prudential Mutual Assurance Association *v.* Curzon ..... 13, 63
Pruen *v.* Osborne ..... 609
Pryce *v.* Newbolt ..... 529
Pryor *v.* Pryor ..... 373
Puddephat, Re ..... 375
Pulsford *v.* Hunter ..... 585
Pulteney *v.* Darlington ..... 482, 485
Pusey *v.* Pusey ..... 604
Pycroft *v.* Gregory ..... 678
Pye, Ex parte ..... 796 (n.)
—— *v.* Linwood ..... 593, 617
Pyle *v.* Partridge ..... 38, 40, 81, 85
Pym *v.* Harrison ..... 697
Pyne *v.* Franklin ..... 634
Pyot *v.* Pyot ..... 660, 664

Q.

Quick *v.* Leach ..... 577
Quilhampton *v.* Going ..... 538, 543
Quin *v.* King ..... 91
Quinn *v.* Butler ..... 398

R.

PAGE
R. (*see* Reg.) *v.* Amersham ..... 49
— *v.* Aylesbury ..... 49
— *v.* Boys ..... 340
— *v.* Bradford ..... 49
— *v.* Burbach ..... 49
— *v.* Castle Martin ..... 76
— *v.* Chester (Bishop of) ..... 17
— *v.* Clifton ..... 50
— *v.* Enderby ..... 42
R. *v.* Eton College ..... 32
— *v.* Fakenham ..... 50
— *v.* Fowle ..... 6
— *v.* Gillson ..... 6
— *v.* Gompertz ..... 6
— *v.* Hall ..... 6
— *v.* Hawksworth ..... 5
— *v.* Holy Trinity (Inhabitants of), Kingston-upon-Hull 5, 75
— *v.* Ide ..... 49, 50
— *v.* Leighton ..... 49
— *v.* Llangunnor ..... 49
— *v.* Long Buckby ..... 76
— *v.* Louth (Inhabitants of) ... 28, 49
— *v.* Merthyr ..... 5
— *v.* Nether Knutsford ..... 49
— *v.* Pendleton ..... 4, 5
— *v.* Pooley ..... 6
— *v.* Portsea ..... 48 (n.)
— *v.* Preston ..... 20
— *v.* Quainton ..... 50
— *v.* Rawden ..... 5
— *v.* Reculist ..... 5
— *v.* Reeks ..... 32
— *v.* Ridgwell ..... 69
— *v.* St. Matthew ..... 50
— *v.* St. Paul's ..... 43
— *v.* Petrox ..... 48 (n.)
— *v.* Shinfield ..... 49
— *v.* Skeffington (Inhabitants of) 2 (n.), 49
— *v.* Walton ..... 49
— *v.* Wantage ..... 49
— *v.* Wortley ..... 43
Radcliffe *v.* Bulkeley ..... 606
Raffenel, Re ..... 324
Raikes *v.* Ward ..... 515, 884 (n.)
Raine, Re ..... 310
Ralph *v.* Carrick ..... 547, 553, 609
Ramsbottom *v.* Davis ..... 28
———— *v.* Morley ..... 40
———— *v.* Tunbridge ..... 40
Ramsay *v.* Shelmerdine ..... 399, 465
Ramsay's Settlements, Re ..... 285
Rancliff (Lord) *v.* Lady Parkins 375
Randall, Re ..... 442
——— *v.* Bookey ..... 478
——— *v.* Russell ..... 709
——— *v.* Tuchin ..... 693
Randfield *v.* Randfield ..... 512
Ranelagh *v.* Ranelagh ..... 555, 686
Ranking's Settlement, Re ..... 659
Rashleigh *v.* Masters ..... 354
Ravens *v.* Taylor ..... 403
Ravenscroft *v.* Jones ..... 816 (n.)
Raw, Re, Morris *v.* Griffiths ..... 483
Rawlings, Re ..... 370
Rawlins *v.* Burgiss ..... 391
——— *v.* Richards ..... 401
Rawlinson *v.* Rawlinson ..... 710
Rayman *v.* Gold ..... 552
Rayner *v.* Mowbray ..... 664, 666
Read, Re ..... 315
—— *v.* Devaynes ..... 792 (n.)
—— *v.* Gooding ..... 592
—— *v.* Snell ..... 461, 627

PAGE
Read *v.* Steadman ..... 723
—— *v.* Willis ..... 615
Reade *v.* Reade ..... 682, 683
Reay *v.* Rawlinson ..... 673, 697
Redding, Re ..... 365
Reed *v.* Deere ..... 4, 25
—— *v.* Gooding ..... 429
—— Wilmott ..... 30, 90
Rees *v.* Rees ..... 367
Reeves *v.* Baker ..... 522
Reg. (*see* R.) *v.* Commissioners of Stamps 210 (n.)
— *v.* — —— Ostell's Case ..... 188
— *v.* — ——Wallace's Case ..... 187
— *v.* Hockworthy ..... 79
— *v.* Houseman ..... 94
— *v.* Kelk ..... 81
— *v.* North Owram ..... 49
— *v.* Overton ..... 94
Regan, Re ..... 370
Reid, Re ..... 321
—— *v.* Hoare ..... 628
—— *v.* Reid ..... 506, 554
Rein *v.* Lane ..... 117
Remon *v.* Hayward ..... 42
Repington *v.* Roberts ..... 660
Reynell *v.* Reynell ..... 641
Reynolds, Re ..... 410, 419
——— *v.* Peto ..... 52, 54
——— *r.* Thrupp ..... 310
Rhodes, Re ..... 817 (n.)
——— *v.* Whitehead ..... 595
Richards *v.* Baker ..... 603
——— *v.* Patterson ..... 506
——— *v.* Queen's Proctor ..... 402
——— *v.* Richards ..... 53
Richardson *v.* Barry ..... 397, 398
——— *v.* Harrison ..... 554
——— *v.* Martyr ..... 51
——— *v.* Watson ..... 506, 534
Rickabe *v.* Garwood ..... 611
Rickett *v.* Guillemard ..... 467, 691
Ricketts *v.* Turquand ..... 535
Rider *v.* Wager ..... 389, 393
Ridgway *v.* Ridgway ..... 592
——— *v.* Woodhouse ..... 471, 599
Ridley, Re ..... 436
Ridout *v.* Dowding ..... 512
——— *v.* Pain ..... 476
Rigden *v.* Vallier ..... 680, 682
Right *v.* Banks ..... 355, 356
—— *v.* Compton ..... 692, 695
—— *r.* Creber ..... 641
—— *v.* Day ..... 596
—— *v.* Price ..... 367 (n.)
—— *v.* Sidebotham ..... 692
—— *v.* Smith ..... 698
Riley *v.* Baltinglass ..... 388
Rimell *v.* Simpson 209 (n.), 741 (n.)
Ring *v.* Hardwick ..... 442
—— *v.* Jarman ..... 275, 278
Ringrose *v.* Bramham ..... 623 (n.)
Riordan *v.* Banon ..... 543
Ripley *v.* Waterworth 357, 362, 670
PAGE
Rippiner *v.* Wright ..... 76
Rivers's Case ..... 510, 650, 652
Roach *v.* Haynes ..... 405
Roadfield *v.* Roadfield ..... 343
Roberts, Re ..... 440, 446
——— *v.* Cooke ..... 472
——— *v.* Dixwell ..... 642
——— *v.* Edwards ..... 676
——— *v.* Kuffin 704 (n.), 773 (n.)
——— *v.* Peake ..... 51
——— *v.* Phillips ..... 373
——— *v.* Roberts ..... 308, 309
——— *v.* Round ..... 382
Robertson, Re ..... 309
——— *v.* Fraser ..... 681
——— *v.* Showler ..... 39
——— *v.* Smith ..... 307
Robins *v.* Dolphin ..... 313
Robinson, Re ..... 307
——— *v.* Gildart ..... 820
——— *v.* Grey ..... 698
——— *v.* Hardcastle 437, 440, 444
——— *v.* Macdonell ..... 3
——— *v.* Ommanney ..... 310
——— *v.* Robinson 483, 636, 638
——— *v.* Smith ..... 668
——— *v.* Taylor ..... 497, 498
——— *v.* Touray ..... 25
——— *v.* Waddelow ..... 508, 673
——— *v.* Wheelwright ... 505 (n.)
——— *v.* Wood ..... 599
Robson *v.* Hall ..... 33
Roddy *v.* Fitzgerald 554, 637, 639, 640
Roderick *v.* Hovil ..... 17
Rodwell *v.* Phillips ..... 44
Roe *v.* Avis ..... 559
—— *v.* Bacon ..... 693
—— *v.* Bedford ..... 636
—— *v.* Bell ..... 562
—— *v.* Blackett ..... 695
—— *r.* Bolton ..... 692
—— *v.* Daw ..... 692
—— *v.* Fludd ..... 475
—— *v.* Grewe ..... 639
—— *v.* Jones ..... 348
—— *v.* Quartley ..... 678
—— *r.* Reade ..... 557
—— *v.* Summerset ..... 552
—— *v.* Vernon ..... 549
—— *v.* Wegg ..... 354
Roffey *v.* Greenwall ..... 53
Rogers, Ex parte ..... 555
——— *v.* Goodenough ..... 411
——— *r.* James ..... 85
——— *v.* Pittis ..... 410
——— *v.* Rogers ..... 478
Romilly *v.* James ..... 550, 595
Rook *v.* Att.-Gen. ..... 611, 659
Rooke *v.* Denn ..... 564
——— *v.* Rooke ..... 476, 561
Roose, Re, Evans *v.* Williamson 770 (n.)
Roots *v.* Dormer ..... 32, 43
Roper *v.* Constable ..... 398
——— *v.* Radcliffe ..... 398
——— *v.* Roper ..... 634, 713

PAGE
Rose, Re ..... 380
—— v. Bartlett ..... 562
—— v. Clarke ..... 76
—— v. Rose ..... 473
Ross v. Ewen ..... 364 (n.)
—— v. Ross ..... 562 (n.), 609, 614
Rosslyn's Trusts, Re ..... 449
Rouse v. Jackson ..... 441
Routledge v. Dorril 442, 446, 885 (n.)
Rowbotham v. Dunnett ..... 544
Rowe v. Rowe..... 489, 1015 (n.)
Rowland v. Morgan ..... 710
——— v. Tierney ..... 429
Rowley v. Adams ..... 493
——— v. Eyton ..... 413, 414
——— v. Merlin ..... 384
Royal Liver Friendly Society, Re 93
Royle v. Hamilton ..... 610
Rudge v. Winnal ..... 770 (n.)
Rudland v. Crozier ..... 522
Rudstone v. Anderson..... 385
Ruff v. Webb..... 52
Ruscombe v. Hare ..... 390
Rushbrook v. Hood ..... 30, 88
Russel v. Buchanan ..... 576
Russell v. Clowes ..... 472
——— v. Dickson ..... 409 (n.)
——— v. Jackson..... 544
——— v. Powell ..... 55
Rutland (Duke of) v. Rutland (Duchess of) ..... 716
Rutty v. Benthall..... 10
Ryall v. Hannam ..... 532
Ryves v. Ryves..... 681

S.

SABERTON v. Skeels ..... 668, 669
Sabine v. Gonte and Church ..... 306
Sackville West v. Holmesdale (Lord) ..... 643
Sainsbury v. Matthews ..... 44
Sale v. Moore ..... 421
Salkeld v. Vernon ..... 605
Salmon v. Tidmarsh..... 634
Salt v. Chattaway..... 501
Saltown (Lord) v. Adv.-Gen. ... 275, 280
Salusbury v. Denton ... 505 (n.), 554
Sammon, Re..... 208 (n.), 211
Sampson v. Sampson ..... 506, 566
Sandeman v. Mackenzie..... 629, 630
Sanders v. Franks ..... 671
——— v. Kiddell ..... 242, 243, 244
Sanders' Trusts, Re ..... 660
Sanderson v. Bayley..... 607
——— v. Symonds..... 25
Sanderson's Trust, Re, ..... 506, 522
Sanford v. Raikes..... 311, 532
Sansbury v. Read..... 631
Sarel v. Sarel..... 614
Saumarez v. Saumarez..... 476
Saunders, Re..... 364
——— v. Lowe..... 548
Saunders v. Vautier..... 586
Savage, Re..... 382
——— v. Carroll ..... 630
——— v. Lane..... 212
——— v. Robertson ..... 651
——— v. Tyers..... 555
Savory, Re..... 365
Sawrey v. Rumney ..... 407
Sawtell v. London ..... 25
Sawyer, Ex parte..... 26
Say v. Creed ..... 660
Sayer v. Sayer ..... 705
Sayers' Trust..... 432
Scalthorpe v. Tipper ..... 495
Scammell v. Wilkinson ..... 334
Scanlan, Re ..... 752 (n.)
Scarborough (Earl of) v. Saville 425
Scarisbrick v. Skelmersdale ..... 451
Scatterwood v. Edge ..... 459
Schloss v. Stiebel..... 761 (n.)
Schofield v. Heap..... 816 (n.)
Scoley v. Walsby ..... 94
Scorell v. Boxall ..... 44
Scotney v. Lomer..... 585
Scott v. Harwood..... 615, 616
——— v. Jones ..... 6
——— v. Josselyn ..... 506
——— v. Key ..... 522
——— v. Parker..... 68
——— v. Scott ..... 383
Scruby v. Fordham ..... 379
Seale v. Barter ..... 633
——— v. Seale ..... 505, 642
Sealy v. Stawell ..... 643
Seaman v. Woods..... 351
Seaward v. Willack ..... 446
Selwood v. Mildmay ..... 533
Sergeant, Re, Masters v. Walley 660
Sergison, Ex parte ..... 557
Serres' Estate, Re ..... 795 (n.)
Sewell's Estate, Re ..... 491, 493
Seymor's Case ..... 594
Seymour v. Nosworthy ..... 400
——— v. Kilbee ..... 555
Seymour's Case (Sir E.)..... 381
——— Trusts, Re ..... 669
Shaftesbury (Earl of) v. Marlborough (Duke of) 245, 409 (n.)
——— (Earl of) v. Russell 604
——— (Earl of) v. Shaftesbury (Countess of) 706
Shaftesbury's Case (Earl of)..... 329
Shand v. Kidd ..... 613
Shard v. Shard ..... 260 (n.)
Sharman, In the goods of ..... 343
——— v. Sanders..... 43
Sharp v. St. Sauveur ... 337, 340, 341
——— v. Sharp ..... 693
Sharpe v. Crispin..... 322, 323
——— v. Sharpe ..... 557
Shaw, Re ..... 378
——— v. Gould ..... 645 (n.)
——— v. Jakeman..... 25
——— v. MacMahon..... 464 (n.), 465
——— v. Rhodes ..... 454

PAGE

Sheath *v.* York ..... 376 (n.)
Sheffield *v.* Kennett ..... 592, 628
Sheldon, Re, Nixon *v.* Sheldon ... *Addenda*
——— *v.* Sheldon ..... 306, 538, 540
Shellard, Ex parte ..... 57
Shelley *v.* Bryer ..... 607
——— *v.* Shelley ..... 517, 710
Shelley's Case ..... 635 *et seq.*
Shelton *v.* Watson ..... 642
Shenton *v.* James ..... 50
Shepherd *v.* Hall ..... 49, 73
——— *v.* Ingram ..... 615
——— *v.* Wheble ..... 42
Sheppard *v.* Gibbons ..... 680
Shergold *v.* Shergold ..... 306
Sherman *v.* Smith ..... 581
Sherratt *v.* Bentley ..... 511, 512
——— *v.* Mountfort ..... 608
Sheriff *v.* Axe ..... 792
Shipperdson *v.* Tower ..... 833 (n.)
Shipton *v.* Thornton ..... 28
Shirley *v.* Ferrers ..... 274, 603
Shirt *v.* Westby ..... 990 (n.)
Shore *v.* Wilson ..... 534
Short *v.* Smith ..... 383, 463
Shove *v.* Pinke ..... 394
Shovelton *v.* Shovelton ..... 522
Shrivel *v.* Payne ..... 52
Shuldam *v.* Smith ..... 577, 624
Shun *v.* Hobbs ..... 588
Shuttleworth *v.* Greaves 460, 463, 615
Sibley *v.* Cook ..... 460
——— *v.* Fisher ..... 26
——— *v.* Perry ..... 609
Sibley's Trusts, Re ..... 613
Sibree *v.* Tripp ..... 52
Sibthorpe, Re ..... 542
——— *v.* Moxom ..... 459 (n.), 775 (n.)
——— *v.* Moxton ..... 459 (n.)
Sidebotham *v.* Watson ..... 513
Sidgreaves *v.* Brewer ..... 543
Sidmouth *v.* Sidmouth ..... 200 (n.), 277 (n.)
Sidney Beauclerk (Lord) *v.* Mead 405
——— *v.* Shelley ..... 469, 470
——— *v.* Sidney ..... 415
——— *v.* Vaughan ..... 582 (n.)
Silcox *v.* Bell ..... 607
Sillick *v.* Booth ..... 691
Silvey *v.* Howard ..... 693
Simmonds, Re ..... 373
Simmons *v.* Pitt ..... 453
——— *v.* Rudall ..... 473
Simon *v.* Barber ..... 527
Simpson *v.* Ashworth ..... 482
——— *v.* Hornsby ..... 547
——— *v.* Vickers ..... 982 (n.)
——— *v.* Walker ..... 395
Sims *v.* Doughty ..... 511
Sinclair *v.* Hare ..... 309
Singleton *v.* Barrett ..... 75
——— *v.* Gilbert ..... 618
——— *v.* Singleton ..... 615
——— *v.* Tomlinson ..... 539

PAGE

Sitwell, Ex parte, Re DruryLowe's Settlement ..... 289
——— *v.* Bernard ..... 486
Skair, Re ..... 539
Skinner *v.* Ogle ..... 413, 419, 480
Skottowe *v.* Young ..... 204, 645 (n.)
Skrine *v.* Elmore ..... 43
Skrymisher *v.* Northcote ..... 418, 473
Slack *v.* Dakyns ..... 441, 442
Slade *v.* Fooks ..... 607
Slanning *v.* Style ..... 708, 764 (n.)
Slater *v.* Dangerfield ..... 609, 639
Sleeman *v.* Wilson ..... 755 (n.)
Slingsby *v.* Grainger ..... 848
Smart *v.* Nokes ..... 7
Smee *v.* Brye ..... 366
Smeeton *v.* Collier ..... 62
Smith, Re ..... 308, 309
——— Lord *v.* Hayward ..... 606
——— *v.* Adams ..... 979 (n.)
——— *v.* Adkins ..... 358
——— *v.* Anderson ..... 241, 242
——— *v.* Attersoll ..... 543
——— *v.* Butcher ..... 676
——— *v.* Campbell ..... 656, 664
——— *v.* Cator ..... 451
——— *v.* Claxton ..... 483
——— *v.* Conder ... 538, 539, 820 (n.)
——— *v.* Dearmer ..... 414
——— *v.* Evans ..... 365
——— *v.* Harris ..... 366
——— *v.* Horsefall ..... 609
——— *v.* Jackson ..... 622 (n.)
——— *v.* King ..... 478
——— *v.* Liddiard ..... 607
——— *v.* Lucas ..... 811 (n.)
——— *v.* Nightingale ..... 54
——— *v.* Palmer ..... 662, 668
——— *v.* Pybus ..... 513
——— *v.* Ridgway ..... 529
——— *v.* Smith ... 429, 432, 580, 722
——— *v.* Spencer ..... 574, 601
——— *v.* Streatfield ..... 613
——— *v.* Surman ..... 44
——— *v.* Tebbitt ..... 331, 332
——— *v.* Tracey ..... 717
——— *v.* Triggs ..... 355, 356
——— *v.* Wilson ..... 534
Smith's Case ..... 541
——— Estate, Re ..... 558
——— Trust, Re ..... 269, 465, 616
——— Betty ..... 553, 578
——— Will, Re ..... 593
Smither *v.* Willock ..... 599
Snaith *v.* Mingay ..... 33, 34, 60
Snape *v.* Nevill ..... 512
Snell *v.* Dee ..... 581
Snelson *v.* Corbett ..... 708 (n.)
Snow *v.* Poulden ..... 576
——— *v.* Teed ..... 674
Soar *v.* Dolman ..... 383
Soares *v.* Glyn ..... 55
Socket *v.* Wray ..... 669
Sol.-Gen. *v.* Law Reversionary Society ..... 259 (n.), 275, 287, 289
Somerville *v.* Lethbridge ... 421, 446

PAGE

Somerville *v.* Somerville (Lord) 314, 316, 319, 321, 324, 325
Sonley *v.* Clockmakers' Co. ..... 339
Sottomayor *v.* De Barros..... 324
South *v.* Finch ..... 45
—— *v.* Williams ..... 228, 459 (n.), 775 (n.)
Southampton (Lord) *v.* Hertford (Marquis of) ..... 456
Southern *v.* Wollaston..... 429, 430
Southgate *v.* Bohn ..... 43, 45
Sowerby's Trusts, Re ..... 460 (n.)
Sparks *v.* Restal ..... 555
Sparrow *v.* Hardcastle..... 386
Spawforth *v.* Alexander ..... 94
Speakman, Re ..... 466, 461
———— *v.* Speakman..... 430
Spence *v.* Handford ..... 676
Spencer *v.* Duckworth..... 990 (n.)
——— *v.* Spencer ..... 629
——— *v.* Wilson..... 616
Sperling, Re ..... 373
Spicer *v.* Burgess ..... 26
—— *v.* Spicer..... 695
Spink *v.* Lewis ..... 662
Spooner's Trusts, Re..... 569
Sprackling *v.* Rainer ..... 625
Spragge *v.* Stone ..... 376 (n.)
Sprigge *v.* Sprigge ..... 379
Spring *v.* Biles ..... 354
Spurway *v.* Glynn ..... 990 (n.)
Squire, Ex parte, Re Gouldwell... 7
Stackpoole *v.* Howell ..... 792
———— *v.* Stackpoole..... 446
Stafford *v.* Clarke..... 48
——— *v.* Horton..... 533
——— *v.* Stafford ..... 335
Stammers *v.* Elliot ..... 777 (n.)
Stamp *v.* Cooke..... 657, 664
——— *v.* Gaby ..... 349
Stamper *v.* Pickering ..... 824 (n.)
Standen *v.* Macnab ..... 563
——— *v.* Standen ..... 653
Standley's Estate, Re ... 646 (n.), 664
Stanford *v.* Stanford ..... 573
Stanhope's Trusts, Re ..... 465, 616
Stanley *v.* Barnes..... 314, 315, 319
——— *v.* Stanley ..... 596, 716
——— *v.* Wise..... 617
Stansfield, Re ..... 466
Stapleton *v.* Cheele ..... 581
———— *v.* Conway ..... 708
Starkey *v.* Brooks..... 478
Starr *v.* Newberry..... 663
Stavers *v.* Barnard ..... 606
Stead *v.* Liddiard ..... 30
—— *v.* Mellor ..... 517, 523
—— *v.* Newdigate ..... 484
Steadmen *v.* Duhamel..... 60
Stearne *v.* Mills..... 185
Steele, Re ..... 413
Steer, Re..... 324
Stephens *v.* Hyde..... 614
———— *v.* Lowe..... 23, 42
———— *v.* Stephens ..... 422, 477
———— *v.* Taprell ..... 380

PAGE

Stephenson *v.* Abingdon ..... 607, 609
———— *v.* Gallan ..... 615
Stevens *v.* Bagwell ..... 312
——— *v.* Hale..... 548
——— *v.* Hill ..... 51
Steven's Trusts, Re ..... 674
Stevens' Will, Re ..... 558
Stewart, Re ..... 539
——— *v.* Jones ..... 466, 461
——— *v.* Stewart ..... 720
Strickland *v.* Aldridge..... 525, 544
Still *v.* Hoste..... 510, 526
Stockdale *v.* Bushby..... 511
———— *v.* Nicholson ..... 669
Stockil *v.* Punshon ..... 541
Stockwell *v.* Ritherden ..... 379
Stoddart *v.* Nelson ..... 607
Stoessiger *v.* South Eastern Rail. Co. 52
Stokes *v.* Cheek..... 824 (n.)
—— *v.* Heron ..... 407, 512
Stone *v.* Evans ..... 461
—— *v.* Greening ..... 528
—— *v.* Stone ..... 493
Stonelake *v.* Babb..... 34
Stonor's Trusts, Re ..... 995 (n.)
Storer *v.* Prestage..... 824 (n.)
Storrs *v.* Benbow ..... 432, 625
Stott *v.* Hollingworth ..... 486
Stow *v.* Davenport ..... 241, 273
Stracey, Re ..... 310
Stratton *v.* Best..... 682
Stretch *v.* Watkins ..... 586, 588
Stringer *v.* Gardiner..... 533
Strode *v.* Falkland (Lady)... 351, 524, 560
——— *v.* Russell ..... 508
Strong *v.* Teat ..... 559 (n.)
Strother *v.* Barr ..... 5, 75
Strutt *v.* Robinson ..... 98
Stuart *v.* Bruce ..... 680
—— *v.* Cockerell ..... 440
Stubbs *v.* Sargon ..... 522, 542
Stuckley's Settlement, Re ..... 100
Sturge *v.* Dimsdale ..... 712
Sturge and Great Western Rail. Co. ..... 466, 627
Sturgess *v.* Pearson ..... 579
Sturton *v.* Whellock..... 383
Sugden *v.* St. Leonards (Lord) 379, 382
Sumner *v.* Partridge..... 601
Sunderland, Re..... 539
Surman *v.* Surman ..... 506
Sutcliffe *v.* Cole..... 471
Sutherland *v.* Cooke..... 493
Sutton *v.* Ennis..... 826 (n.)
——— *v.* Toomer ..... 4, 10
Swabey *v.* Swabey ..... 224
Swabie *v.* Goldie ..... 614
Swain *v.* Burton ..... 462
Swaine *v.* Kinnerley ..... 651, 652
Swan *v.* Holmes..... 614
Sweeting *v.* Halse..... 4
———— *v.* Sweeting ..... 223
Sweetland *v.* Sweetland ..... 369
Swete *v.* Pidsley ..... 540
Swift *v.* Roberts ..... 345

PAGE
Swift *v.* Swift ..... 176
Swinford, Re ..... 371
Sybray *v.* White ..... 48
Sydenham *v.* Tregonwell..... 470
Sykes, Re ..... 384
——— *v.* Sykes..... 399, 427, 463
Sympson *v.* Turner ..... 699

T.

Taafe *v.* Conmee ..... 615
——— *v.* Ferrall..... 561
Tagart *v.* Hooper ..... 382 (n.)
Talbot *v.* Jevers..... 453
——— *v.* Stainforth ..... 184
Tanner *v.* Elworthy..... 564 (n.)
Tannière *v.* Pearkes..... 614
Tapley *v.* Eagleton ..... 529
Tarling *v.* Baxter ..... 70
Tarleton *v.* Bruton ..... 446
Tarn *v.* Commercial Bank of Sydney ..... 311
Tate *v.* Austen ..... 712
——— *v.* Clarke ..... 639
——— *v.* Hilbert ..... 199
Tatnell *v.* Hankey ..... 267 (n.)
Taylor, Re ..... 361
——————— Taylor *v.* Ley ... 660, 662
Taylor's Estate, Re ..... 188
——————— Tomlin *v.* Underhay ..... 820 (n.)
Taylor *v.* Bacon..... 514
——— *v.* Beverley ..... 669
——— *v.* Clark..... 487
——— *v.* Dening ..... 365
——— *v.* Frobisher ..... 592
——— *v.* George ..... 517
——— *v.* Hibbert..... 486
——— *v.* Hoggarth ..... 723
——— *v.* Lake ..... 17
——— *v.* Lambert ..... 580
——— *v.* Langford ..... 604
——— *v.* Meads ..... 335, 358
——— *v.* Moseley..... 24
——— *v.* Parry..... 26
——— *v.* Popham..... 982 (n.)
——— *v.* Steele..... 46 (n.) 89
——— *v.* Taylor ..... 816 (n.)
——— *v.* Webb..... 504
Teague's Settlement, Re..... 436
Tebbs *v.* Carpenter ..... 493
Tebbutt *v.* Ambler ..... 94
Tee *v.* Ferris ..... 544
Tempest *v.* Tempest..... 342
Temple (Earl) *v.* Chandos (Duchess of)..... 389
Tench *v.* Cheese ..... 452
Tennant *v.* Crawford ..... 54
Tennent *v.* Tennent..... 562
Tenny *v.* Agar ..... 550
Terry's Will, Re ..... 673
Tetlow *v.* Ashton ..... 675
Tewart *v.* Lawson..... 455
Teynham (Lord) *v.* Webb ..... 629
Tharp, Re ..... 312, 335
PAGE
Theed's Settlement, Re ..... 630
Thellusson *v.* Woodford 421, 422, 447
Thicknesse *v.* Legg ..... 627
Thomas *v.* Bird ..... 27
——— *v.* Evans ..... 400
——— *v.* Hole..... 663, 666
——— *v.* Jones ..... 359, 569
——— *v.* Ketteriche ..... 719
——— *v.* Montgomery ..... 229
——— *v.* Thomas ..... 442, 885 (n.)
——— *v.* Wilberforce ..... 592
Thomason *v.* Moses ..... 509
Thompson, Re, Machell *v.* Newman..... 462
Thompson *v.* Att.-Gen..... 219
——————— *v.* Beasley ..... 609 (n.)
——————— *v.* Browne ..... 212, 306
——————— *v.* Burra ..... 979 (n.)
——————— *v.* Grant ..... 557
——————— *v.* Hempenstall ..... 410
——————— *v.* Lawley (Lady) ..... 562
——————— *v.* Pettit ..... 70
——————— *v.* Robinson..... 607
——————— *v.* Thompson ..... 505
Thompson's Trusts, Re 509, 628, 660, 676
Thorn *v.* Croft ..... 93
Thorncroft *v.* Lashmar ..... 309
Thorne, Re..... 309, 364
——— *v.* Watkins ..... 318
Thornton *v.* Curling..... 319
——————— *v.* Ellis ..... 486
Thorold *v.* Thorold ..... 306
Thorowgood *v.* Collins..... 680
Thorp *v.* Owen ..... 505, 516
Thorpe *v.* Bestwick ..... 342
Thrupp *v.* Collett..... 794 (n.)
Thrustout *v.* Cunningham ..... 388
Thursby *v.* Thursby ..... 491
Thwaites *v.* Foreman ..... 712
Thynne *v.* Protheroe ..... 185
——— *v.* Glengall (Earl of) 816 (n.)
Tibbet *v.* Voules ..... 392
Tibbets *v.* Tibbets..... 518
Tickner *v.* Old ..... 492 (n.)
——— *v.* Tickner ..... 390
Tidwell *v.* Ariel..... 461
Tiffin *v.* Longman..... 666
Timewell *v.* Perkins..... 707
Timins *v.* Stockhouse ..... 613
Tinte *v.* Bermingham ..... 629
Titcomb *v.* Butler..... 621, 622
Toll *v.* Lee..... 71, 72
Tollemache *v.* Coventry (Earl of) 435
Toller *v.* Attwood..... 637
Tomkins *v.* Savoury..... 40
——— *v.* Tomkins..... 555
Tomkyns *v.* Ladbroke ..... 305
Tomlin *v.* Hatfield ..... 611
Tootal's Estate, Re ..... 493
——— Trusts, Re ..... 324
Tootell, Ex parte ..... 51
Toovey *v.* Bassett ..... 695
Toplis *v.* Baker ... 459 (n.), 775 (n.)
Torret *v.* Frampton ..... 680
Tourton *v.* Flower ..... 176

PAGE

Townley *v.* Bolton ..... 413, 549
——— *v.* Watson ..... 383 (n.)
Townshend *v.* Townsend ..... 740
——— *v.* Windham ..... 794 (n.)
Townsend's Estate, Re ..... 477
Tozer, Re ..... 380
Tracey *v.* Butcher ..... 589
Trafford *v.* Ashton ..... 631
——— *v.* Berrige ..... 707
Travers *v.* Blundell ..... 848 (n.)
——— *v.* Travers ..... 670
Travis *v.* Collins ..... 76
Treeby, Re ..... 384 (n.)
Tregonwell *v.* Sydenham ..... 433, 469
Trethewy *v.* Helyar ..... 670
Trevanion, Re ..... 373
——— *v.* Vivian ..... 474
Tribe *v.* Tribe ..... 333, 372
Trickey *v.* Trickey ..... 452
Trimleston (Lord) *v.* D'Alton ... 524
Trimmer *v.* Danby ..... 826 (n.)
Trinity House, Hull *v.* Beadle ... 81
Triquet *v.* Thornton ..... 484
Trott *v.* Buchanan ..... 758 (n.)
—— *v.* Trott ..... 369
Trower *v.* Butts ..... 626
Truro (Lady), Re ..... 539
Tucker, Re ..... 556, 573
——— *v.* Thurstan ..... 389
Tuckerman *v.* Jeffries ..... 549
Tuffnell *v.* Page ..... 363
Tulk *v.* Houlditch ..... 982 (n.)
Tupper *v.* Tupper ..... 398
Turner, Re ..... 382
——— *v.* Hudson ..... 615
——— *v.* Martin ..... 229, 460 (n.)
——— *v.* Power ..... 799
——— *v.* Turner ..... 763 (n.)
Turvin *v.* Newcome ..... 451
Tweedale *v.* Tweedale ..... 890 (n.)
Twopenny *v.* Peyton ..... 804 (n.)
Tyer *v.* Bell ..... 176
Tyndall *v.* Wilkinson ..... 611
Tyrone (Earl of) *v.* Marquis of Waterford ..... 634

U.

Udney *v.* Udney ..... 321, 325
Ulrich *v.* Litchfield ..... 511, 512, 524
Underwood *v.* Swain ..... 982 (n)
Unsworth *v.* Speakman ..... 466
Uppington *v.* Bullen ..... 349
Upton *v.* Brown ..... 661
Urquhart *v.* Urquhart ..... 663
Usticke *v.* Bawden ..... 382 (n)
——— *v.* Peters ..... 512
Utterton *v.* Robins ..... 541

V.

Vachel *v.* Vachel ..... 603
Vachell *v.* Jeffereys ..... 722
Vagnor's Case ..... 309

PAGE

Vaisey *v.* Reynolds ..... 769 (n.)
Van *v.* Barnett ..... 483
Vanderplank *v.* King ..... 430, 446
Van Hagen, Re ..... 570
Vandiest *v.* Fynmore ..... 183
Van Straubenzee *v.* Monk ..... 539
Varlo *v.* Fadden ..... 454
Vaughan *v.* Buck ..... 493
——— *v.* Marquis of Headfort 634
Vaughton *v.* Brine ..... 36, 38
Vaux *v.* Henderson ..... 466, 662, 674
Vawdry *v.* Geddes ..... 591
Vawser *v.* Jeffery ... 387, 388, 392, 395
Vawsley *v.* Geddes ..... 423
Venables *v.* Morris ..... 699
Venning *v.* Leckie ..... 44
Vernon *v.* Jones ..... 389
Vesey *v.* Vesey ..... 402, 409
Vickers *v.* Scott ..... 486
Villareal *v.* Mellish ..... 753
Vincent *v.* Cole ..... 4, 5
——— *v.* Newcombe ..... 491
Viner *v.* Francis ..... 464, 615, 616, 900 (n.)
Vinter *v.* Pix ..... 711
Viscount Exmouth, Re ..... 710
Vollans *v.* Fletcher ..... 37

W.

Waddington *v.* Bristow ..... 45
Wade *v.* Nazer ..... 411
Wade Gery *v.* Handley ..... 452
Wagstaff *v.* Wagstaff ... 350, 771 (n.)
Wainman *v.* Field ..... 472
Wainewright *v.* Wainewright ..... 548
Wainwright *v.* Elwell ..... 355
Wake *v.* Varah ..... 689
Waite *v.* Littlewood ..... 689
—— *v.* Templer ..... 461
Walcot *v.* Botfield ..... 844 (n.)
Walcott *v.* Ochterlony ..... 398
Waldegrave *v.* Tebbs ..... 543
Wale *v.* Commis. of Inland Revenue ..... 92
Walker, Re ..... 369
——— *v.* Armstrong ..... 387
——— *v.* Banks ..... 567
——— *v.* Camden (Marquis of) 662, 668
——— *v.* Giles ..... 30, 80
——— *v.* Mackie ..... 565
——— *v.* Makin ..... 668
——— *v.* Main ..... 467
——— *v.* Mower ..... 590
——— *v.* Remmett ..... 81
——— *v.* Shore ..... 488, 493, 617
Wall *v.* Bright ..... 558
—— *v.* Tomlinson ..... 627
Wallace *v.* Att.-Gen ..... 267
Waller *v.* Childs ..... 527
Wallis *v.* Broadbent ..... 8
——— *v.* Freestone ..... 442
——— *v.* Hodson ..... 717
——— *v.* Taylor ..... 669, 671

PAGE

Wallop's Trust, Re ..... 268
Walmsley *v.* Brierly ..... 62
Walpole *v.* Lord Cholmondley 410, 524
——— (Lord) *v.* Lord Orford ... 310, 410, 411
Walsh *v.* Peterson ..... 578
——— Wallinger ..... 553
Walton *v.* Hastings ..... 24
——— *v.* Walton ..... 722
Warbrick *v.* Varley ..... 241
Ward *v.* Bird ..... 640
——— *v.* Grey ..... 634
——— *v.* Lant ..... 720
——— *v.* St. Paul ..... 755 (n.)
Warde *v.* Warde ..... 354, 820
Warden, Re ..... 370
Ware *v.* Rowlands ..... 663, 675
Waring *v.* Coventry ..... 442
——— *v.* Lee ..... 608
——— *v.* Waring ..... 332, 493
Warner *v.* Hawes ..... 389
——— *v.* Hone ..... 680
——— *v.* Warner ..... 649
Warner's Settled Estates, Re ..... 278, 294, 296, 296 (n.)
Warren *v.* Howe ..... 68
Warrender *v.* Warrender ..... 322
Warrick *v.* Hawkins ..... 409 (n.)
Warrington *v.* Early ..... 24, 54
——— *v.* Furbor ..... 43
——— *v.* Warrington ..... 684
Warwick *v.* Bruce ..... 44
Watkins, Re ..... 539
——— *v.* Vince ..... 43
——— *v.* Williams ..... 507
Watling *v.* Horwood ..... 31
Watson *v.* Foxon ..... 556
——— *v.* Hayes ..... 586
——— *v.* Macguire ..... 89
——— *v.* Pearson ..... 97
——— *v.* Wand ..... 25
——— *v.* Watson ..... 617, 816 (n.)
——— *v.* Young ..... 438
Watson's Trusts, Re ..... 592, 627, 661
Watt *v.* Watt ..... 658, 659, 664
——— *v.* Wood ..... 456
Watts, Re ..... 330
——— *v.* Watts ..... 394
Weakley *v.* Rugg ..... 554, 627
Weale *v.* Olive ..... 697
Weatherall *v.* Shornburgh ... 452, 453
Webb *v.* Byng ..... 535
——— *v.* Honnor ..... 565
——— *v.* Jonas ..... *Addenda*
——— *v.* Kelley ..... 515
——— *v.* Sadler ..... 669, 670
——— *v.* Temple ..... 388
——— *v.* Webb ..... 454
——— *v.* Wools ..... 522
Webb's Case ..... 508
Webber *v.* Stanley ..... 528
Webster, In the goods of ..... 186 (n.)
——— *v.* Boddington ..... 432
——— *v.* Hale ..... 990 (n.)
——— *v.* Parr ..... 599
Weddall *v.* Capes ..... 97

PAGE

Weeds *v.* Bristow ..... 608
Weeks *v.* Maillardet ..... 26
Weigull *v.* Broome ..... 562
Weld *v.* Acton ..... 402
——— *v.* Bradbury ..... 615
Weldon *v.* Hoyland ..... 614
Wellard *v.* Moss ..... 4, 94
Wellington *v.* Wellington ... 574 (n.)
Wellman *v.* Bowring ..... 670, 671
Wells *v.* Wells ..... 407, 607, 609
Wells's Estate, Re ..... 649, 653
Wenmouth's Estate, Re ..... 623
Wensley, Ex parte ..... 7
West, Ex parte ..... 691
———, Re ..... 367
——— *v.* Lawday ..... 528
——— London Ry. Co *v.* Bernard 28
——— Middlesex Waterworks Co. *v.* Suwercrop ..... 44
——— *v.* Primate of Ireland ..... 629
——— *v.* Steward ..... 26
West's Case ..... 305
Weston, Re ..... 384
Wetherell *v.* Langston ..... 97
——— *v.* Wetherell ..... 592
——— *v.* Wilson ..... 514
Wharton *v.* Walton ..... 28, 29, 32
Whateley *v.* Spooner ... 538, 820 (n.)
Wheeler *v.* Smith ..... 515
Wheldale *v.* Partridge ..... 483
Wheldon *v.* Matthews ..... 8, 38, 41
Whicker *v.* Hume ..... 324
Whitaker's Trusts, Re ..... 995 (n.)
Whitbread *v.* Lord St. John 621, 625
Whitcomb *v.* Whitcomb ..... 322
White, Ex parte ..... 23
———, Re ..... 369, 373, 374
——— *v.* Briggs ..... 673
——— *v.* Carter ..... 642
——— *v.* Collins ..... 638
——— *v.* Heddon ..... 626
——— *v.* Hight ..... 628
——— *v.* Hill ..... 628
——— *v.* North ..... 58
——— *v.* Repton ..... 364
——— *v.* Rose ..... 177, 185
——— *v.* Springett ..... 660, 662
——— *v.* White ..... 665
——— *v.* Wilson ..... 4, 330, 331
White and Hindle's Contract, Re, 641, 643
White's Trusts, Re ..... 682
Whiteacre, Ex parte ..... 558
Whitfield *v.* Langdale ..... 535
Whithorne *v.* Harris ..... 664
Whiting to Loomes ..... 22
Whitmore *v.* Trelawny ..... 680
——— *v.* Wild ..... 328
Whittaker *v.* Whittaker ..... 352, 353
Whittel *v.* Dudin ..... 600
Whitter *v.* Brembridge ..... 576, 592
Whitworth *v.* Crockett ..... 43
Whopham *v.* Wingfield ..... 209 (n.)
Whorwood, Re, Ogle *v.* Lord Shelborne ..... 466
Wick *v.* Hodgson ..... 45

PAGE
Wickens *v.* Evans ..... 99
Wicker *v.* Mitford ..... 677
Widmore *v.* Woodroffe ..... 665
Wigan *v.* Rowland ..... 343
Wigg *v.* Wigg ..... 467
Wightwick *v.* Lord ..... 486
Wilbraham *v.* Scansbrick ..... 629
Wilcox *v.* Smith ..... 275, 287
Wilday *v.* Barnett ..... 567
——— *v.* Sandys ..... 492
Wildbore *v.* Gregory ..... 564, 568
Wilde *v.* Holtzmeyer ..... 472
Wildes *v.* Davies ..... 453, 456
Wild's Case ..... 732 *et seq.*
Wiles *v.* Gresham ..... 493
Wilkes *v.* Atkinson ..... 44
——— *v.* Williams ..... 555
Wilkins *v.* Hogg ..... 974 (n.)
——— *v.* Whiting ..... 638
Wilkinson, Re ..... 567
——————— *v.* Adams 344, 647, 647 (n.), 648, 648 (n.) 649, 652
——————— *v.* Barber ..... 246, 821 (n.)
——————— *v.* Duncan ..... 432, 486, 493
——————— *v.* Schneider ..... 570
——————— *v.* Spearman ..... 683
——————— *v.* Wilkinson ..... 646
Willatts *v.* Willatts ..... 686
Willes *v.* Douglas ..... 614
Willesford, Re ..... 540
Willet *v.* Sandford ..... 408
Willey *v.* Parratt ..... 37
Williams, Re ..... 369, 453
——————— *v.* Arkle ..... 474, 671
——————— *v.* Ashton ..... 660
——————— *v.* Contest ..... 523
——————— *v.* Dormer ..... 322
——————— *v.* Evans ..... 407
——————— *v.* Goodtitle ..... 413, 414, 417, 475, 476, 500
——————— *v.* Hughes ..... 245
——————— *v.* Jones ..... 378, 467
——————— *v.* Owen ..... 84, 392
——————— *v.* Rawlinson ..... 62, 89
——————— *v.* Sawyer ..... 97
——————— *v.* Searle ..... 430
——————— *v.* Stoughton ..... 36, 37
——————— *v.* Tyley ..... 384
——————— *v.* Williams ..... 674
Williamson *v.* Adv.-Gen. ..... 226
——————— *v.* Bennett ..... 39, 58
——————— *v.* Moore ..... 607
——————— *v.* Naylor ... 229, 459 (n.), 713
Willis *v.* Curtois ..... 703
——— *v.* Hiscox ..... 638
——— *v.* Lucas ..... 545, 694, 695
Willock *v.* Noble ..... 335, 336
Wills *v.* Bridge ..... 32
——— *v.* Sayers ..... 562 (n.)
Wills *v.* Wills ..... 614
Willoughby Osborne *v.* Holyoake 570
Willows *v.* Lowe ..... 367
——— *v.* Lydcot ..... 476, 561
——— *v.* North ..... 54
PAGE
Wilmot *v.* Wilkinson ..... 69
——— *v.* Wilmot ..... 689
Wilson, Re ..... 374
——————— Parker *v.* Winder ..... 666
——— *v.* Atkinson ..... 660
——— *v.* Bayly ..... 593
——— *v.* Birchall ..... 311
——— *v.* Brownsmith ..... 209 (n.)
——— *v.* Eden ..... 562
——— *v.* Maddison ..... 514
——— *v.* Mayor ..... 428
——— *v.* Pinkington ..... 663, 668
——— *v.* Smith ..... 12, 79
——— *v.* Spencer ..... 581
——— *v.* Squire ..... 527
——— *v.* Vysar ..... 75
——— *v.* Weddell ..... 356
——— *v.* Wilson ..... 449, 553 (n.)
——— *v.* Zulueta ..... 43
Winbled *v.* Malmberg ..... 33
Winchmore *v.* Hobard ..... 509
Wind *v.* Jekyl ..... 357
Windham *v.* Graham ..... 631
Wingfield *v.* Wingfield ..... 673, 675
Wingrave *v.* Palgrave ..... 627
Winkworth *v.* Winkworth ..... 600
Winn, Re ..... 309
Winsor *v.* Pratt ..... 367
Winter *v.* Winter ..... 419, 480
Winterton *v.* Crawfurd ..... 687
Wisden *v.* Wisden ..... 480, 697
Wise *v.* Charlton ..... 55, 87, 91
Withy *v.* Mangles ... 658, 659, 715 (n.), 716, 718
Wollaston *v.* King ..... 441, 442
Wolverton Mortgaged Estates, Re 529
Wood *v.* Cox ..... 521
——— *v.* Penoyre ..... 799, 990 (n.)
——— *v.* Wood ..... 401, 673
Wood's Will, Re ..... 418, 463
Woodcock *v.* Renneck ..... 617
——————— *v.* Worthington ..... 76
Woodgate *v.* Unwin ..... 682
Woodhouse *v.* Balfour ..... *Addenda*
——————— *v.* Herrick ..... 640
——————— *v.* Walker ..... 942 (n.)
Woodhouselee (Lord) *v.* Dalrymple ..... 606, 648, 650
Woodington, Re ..... 369
Woodmeston *v.* Walker ..... 824 (n.), 825 (n.)
Woodroff *v.* Wickworth ..... 718
Woods, Re ..... 369
——— *v.* Woods ..... 515, 673
Woodward, Re ..... 380
——————— *v.* Glasbrook ..... 691
Woolcomb *v.* Woolcomb ..... 512
Woolmore *v.* Burrows ..... 643
Worley *v.* Harrison ..... 54
——— *v.* Worley ..... 405
Worlidge *v.* Churchill ..... 691
Worthington *v.* Warrington ..... 29
Wotton, Re ..... 369
Wrench *v.* Lord ..... 85
——— *v.* Sutting ..... 704
Wrey, Re ..... 585

PAGE

Wright, Re ..... 369
——— *v.* Atkyns ..... 518, 663, 672
——— *v.* Barnewall ... 205 (n.), 238
——— *v.* Commissioners of Inland Revenue ..... 34
——— *v.* Hall ..... 475
——— *v.* Holford ..... 556
——— *v.* Pearson ..... 636
——— *v.* Sanderson ..... 371
——— *v.* Shawcross ..... 94
——— *v.* Sittler ..... 392
——— *v.* Wakeford ..... 365
——— *v.* Wright ..... 461, 483
Wrigley *v.* Smith ..... 42
Wroughton *v.* Turtle ..... 82, 83, 88
Wyatt, Re ..... 508, 525
Wych *v.* Packington ..... 478
Wyndham *v.* Wyndham ..... 619
Wynham's Trusts, Re ..... 667, 670
Wynn *v.* Wynn ..... 459
Wynne *v.* Fletcher ..... 844 (n.)
——— *v.* Hawkins ..... 519
——— *v.* Littleton ..... 508
Wyth *v.* Blackman ..... 609, 610
Wythe *v.* Thurlston ..... 609

PAGE

X.

Ximenes *v.* Jaques ..... 33

Y.

Yalden, Re ..... 507
Yates *v.* Compton ..... 824 (n.)
——— *v.* Nash ..... 54
——— *v.* Yates ..... 493
Yeap Cheah Neo *v.* Ong Cheah Neo ..... 508
Yelverton *v.* Yelverton ..... 323
Yeo *v.* Dawe ..... 41, 57
Young *v.* Davies ... 464 (n.), 609 (n.), 638
——— *v.* Hassard ..... 403
——— *v.* Sheppard ..... 509

Z.

Zetland (Earl of) *v.* Lord Adv. 279, 280

# TABLE OF STATUTES.

NOTE.—*The numerals in* italics *refer to pages where the Section or Statute is set out at length. The Statutes are as in the Revised Statutes.*


PAGE

7 Ed. 1, c. 1 (Wills) ..... 339, n.
13 Ed. 1, c. 32 (Wills) ..... 339, n.
18 Ed. 1, c. 3 (*Quia Emptores*) ..... 339, n.
15 Rich. 2, c. 5 (Wills) ..... 339, n.
23 Hen. 8, c. 10 (Wills) ..... 339, n.
27 Hen. 8, c. 10 (Jointures) ..... 328
32 Hen. 8, c. 1 (Wills) ..... 327, 360, n.
34 & 35 Hen. 8, c. 5 (Wills) ..... *327*, 339
12 Car. 2, c. 24, ss. 8, 9 (Appointment of Guardians) ..... 431, 753, n.
22 & 23 Car. 2, c. 10 (Distribution) ..... 714
29 Car. 2, c. 3, s. 5 (Statute of Frauds as to Wills) ..... *360*
s. 6 (Revocation of Devises) ..... *396*
s. 12 (Estates *pur autre vie*) ..... 357
s. 35 (Distribution) ..... 716
1 Jac. 2, c. 17 (Distribution) ..... 716
5 & 6 Will. 4 c. 21 (Stamp Duties) ..... 2
7 & 8 Will. 3, c. 37 (Licences in Mortmain) ..... 339
9 Geo. 2, c. 36 (Charitable uses) ..... 339
25 Geo. 2, c. 6 (Attesting Witnesses to Wills) ..... 341
20 Geo. 3, c. 28 (Legacy Duty) ..... 202
23 Geo. 3, c. 58 (Legacy Duty, &c.) ..... 18, n.
29 Geo. 3, c. 51 (Legacy Duty) ..... 202
36 Geo. 3, c. 52 (Legacy Duty) ..... *stated fully* 205 *et seq.*
s. 20 (Estates *pur autre vie*) ..... 266
37 Geo. 3, c. 135 (Legacy Duty) ..... 210
39 Geo. 3, c, 73 (Legacies to Corporations) ..... 210
39 & 40 Geo. 3, c. 98 (Accumulation of Income) ..... 220, *448*
c. 116 (Land Tax Redemption) ..... 47, 75, 82, 96
43 Geo. 3, c. 142 (National Debt) ..... 825, n.
44 Geo. 3, c. 98 (Legacy Duty) ..... 202
45 Geo. 3, c. 28 (Legacy Duty) ..... 202, 206, 211, 221 *et seq.*
48 Geo. 3, c. 149 (Legacy Duty) ..... 202, 209, 225
50 Geo. 3, c, 84 (Parochial Stipends, Scotland) ..... 96
54 Geo. 3, c. 92 (Legacy Duty, Ireland) ..... 205, n.
c. 145 (Forfeiture) ..... 337
55 Geo. 3, c. 184 (Stamp Duties) ..... 142 *et seq.*
ss. 37–50 (Probate Duty) ..... 164, 165
Sched. Pt. iii. (Legacy Duty) ..... 202 *et seq.*
c. 192 (Copyholds) ..... 563
3 Geo. 4, c. 72 (Church Building) ..... 46, 65, 74, 96
5 Geo. 4, c. 90 (Church Building, Scotland) ..... 80
9 Geo. 4, c. 14 (Lord Tenterden's Act) ..... 46
c. 16 (Government Annuities) ..... 825, n.
c. 31 (Offences against the Person) ..... 337
10 Geo. 4, c. 24 (Government Annuities) ..... 825, n.
c. 50 (Woods and Forests) ..... 46, 65, 74, 80
c. 56 (Building Societies) ..... 93
11 Geo. 4, and 1 Will. 4, c. 40 (Executors to be Trustees of Residue) ..... *474*
1 & 2 Will. 4, c. 33 (Public Works, Ireland) ..... 96
3 & 4 Will. 4, c. 74 (Fines and Recoveries), ss. 32, 33 ..... 1035, n.

PAGE

3 & 4 Will. 4, c. 104 (Charge of Debts) ..... 757, n.
c. 105 (Dower Act) ..... 979, n.
c. 106, s. 3 (Devise to Heir) ..... 343
4 & 5 Will. 4, c. 76 (Poor Law) ..... 47, 62, 93
5 & 6 Will. 4, c. 76 (Municipal Corporations) ..... 104, n.
6 & 7 Will. 4, c. 32 (Building Societies) ..... 93
c. 71 (Tithe Commutation) ..... 47, 82
1 Vict. c. 26 (Wills Act) ..... *set out at length* 724 *et seq.*
s. 3 (Property disposable by Will) ..... 346, 357
s. 7 (Infants) ..... 329
s. 8 (Married Women) ..... 1046, n.
s. 9 (Execution and Attestation) ..... 312, 363, 369
s. 10 (Execution of Testamentary Appointments) ..... 566
s. 11 (Wills of Soldiers and Sailors) ..... 329, 363
s. 13 (Publication not necessary) ..... 364
s. 15 (Gifts of Attesting Witnesses) ..... *342*, 740
ss. 16, 17 (Creditors and Executors) ..... 342
ss. 18, 19 (Revocation) ..... 376 *et seq.*, 1054, n.
s. 20 (Mode of Revocation) ..... *377*
s. 21 (Alterations in Wills) ..... *378*
s. 22 (Revival of Revoked Wills) ..... *378*
s. 23 (No Revocation by Conveyance, &c.) ..... *393*
s. 24 (Time from which Will speaks) ..... 350
s. 25 (Residuary Devise) ..... 418, *479*
s. 26 (Attestation) ..... 360
s. 27 (Appointments) ..... *567*
s. 28 (Devise without Words of Limitation) ..... 377, 696
s. 29 (Failure of Issue) ..... *551*
ss. 30, 31 (Estates of Trustees) ..... 699
ss. 32, 33 (Lapse)... *479*, *480*, 796, n., 799, n., 807, n., 853, n., 861, n., 864, n.
1 & 2 Vict. c. 35 (Municipal Corporations) ..... 104, n.
c. 53 (County Treasurers, Ireland) ..... 61
c. 56 (Poor Law, Ireland) ..... 47, 93, 96
3 & 4 Vict. c. 96 (Post Office, Money Orders) ..... 62, 65
c. 101 (Ecclesiastical Commissioners, Ireland) ..... 104, n.
c. 110 (Loan Societies) ..... 61, 65, 93, 96
5 & 6 Vict. c. 35 (Income Tax) ..... 96
c. 79, s. 23 (Probate Duty, Deductions) ..... 165, 186
c. 82 (Charitable Bequests, Ireland) ..... 247
6 & 7 Vict. c. 91 (Loan Societies, Ireland) ..... 61, 65, 93, 96
7 & 8 Vict. c. 21 (Stamp Duties) ..... 18, n., 142 *et seq.*
c. 66 (Naturalization) ..... 341
c. 101 (Poor Law) ..... 93
8 & 9 Vict. c. 76, s. 4 (Legacy Duty) ..... 202, 206, *211*, 221 *et seq.*
c. 83 (Poor Law, Scotland) ..... 82
c. 106 (Amendment of Law of Real Property)... 78, 427, 595, 618
c. 118 (Inclosure) ..... 46, 81
9 & 10 Vict. c. 38 (Battersea Park) ..... 80
c. 86 (Public Works, Ireland) ..... 46, 65, 96
c. 101 (Drainage, Ireland) ..... 65
10 & 11 Vict. c. 32 (Public Works, &c., Ireland) ..... 46, 82, 96
11 & 12 Vict. c. 36 (Entail, Scotland) ..... 448
13 & 14 Vict. c. 97 (Stamp Duties) ..... 18, n., 143 *et seq.*
15 & 16 Vict. c. 24, s. 1 (Position of Testator's Signature) ..... *368*
16 & 17 Vict. c. 46 (Savings Banks) ..... 82, 96
c. 51 (Succession Duty) ..... *stated fully* 249 *et seq.*
s. 2 (Successions) ..... 275 *et seq.*, 297
s. 3 (Joint Successions) ..... 285
s. 4 (Powers of Appointment) ..... 280, 286
s. 11 (Legacies to and Successions of Married Persons) ... 205, *250*
s. 12 (Successor being also Predecessor) ..... 281
s. 14 (Transmitted Successions) ..... 287
s. 15 (Transferred Interests) ..... 287
s. 18 (Exemptions from Duty) ..... *299*

PAGE

16 & 17 Vict. c. 51, s. 21 (Assessment of Duty on Realty) ... 289
s. 31 (Annuities) ... 206
s. 32 (Personalty) ... 289
s. 42 (Charge of Duty) ... 293
s. 44 (Accountable Persons) ... 297
Schedule (Tables and Rules) ... *300 et seq.*
c. 87 (Savings Banks) ... 96
c. 131 (Merchant Shipping) ... 65
17 & 18 Vict. c. 83, s. 37 (Stamp Duty) ... 6, n., 143 *et seq.*
c. 104 (Merchant Shipping) ... 47, 65
c. 105 (Militia) ... 75, 80
c. 113 (Locke King's Act) ... 389, n., 759, n., 851, n.
c. 125. s. 3 (Common Law Procedure) ... 21, n., 46
18 & 19 Vict. c. 43 (Infants' Settlements) ... 810, n.
c. 63 (Friendly Societies) ... 93, 194
19 & 20 Vict. c. 79 (Bankruptcy, Scotland) ... 81
c. 102 (Common Law Procedure, Ireland) ... 46
c. 105 (Militia) ... 96
20 & 21 Vict. c. 60 (Bankruptcy, Ireland) ... 81
c. 77 (Probate Court, England) ... 187, 311
c. 79 (Probate Court, Ireland) ... 178
21 & 22 Vict. c. 56 (Confirmation of Executors, &c., Scotland) ... 178, 179
22 & 23 Vict. c. 35 (Lord St. Leonards' Act) ... 758, 942
ss. 14—18 (Charge of Debts) ... 758, n.
s. 31 (Trustees' Indemnity) ... 972, n., 974, n.
c. 36 (Probate Duty) ... 169
23 & 24 Vict. c. 5 (Indian Government Notes) ... 175
c. 83 (Infants' Settlements, Ireland) ... 810, n.
c. 145 (Trustees) ... 913, n.
24 & 25 Vict. c. 92 (Administration of Estates, &c.) ... 189
c. 114 (Domicil, Wills) ... 267, n., 320
c. 121 (Administration, Foreign Domicil) ... 325
25 & 26 Vict. c. 22 (Probate Duty, Bond Debts) ... 175
c. 53 (Land Transfer) ... 87
26 & 27 Vict. c. 57 (Regimental Debts) ... 195, 248
c. 87 (Savings Banks) ... 62, 82, 96, 194
27 & 28 Vict. c. 16 (Naval Agency) ... 61, 96
c. 36 (Prize Money) ... 195, 248
c. 43 (Government Annuities) ... 825, n.
c. 56 (Pobate Duty) ... 175, 194
28 & 29 Vict. c. 96 (Stamp Duties) ... 143 *et seq.*
c. 111 (Administration of Estates, Navy) ... 195, 248
29 & 30 Vict. c. 47 (Indian Prize Money) ... 61
30 & 31 Vict. c. 23, s. 9 (Marine Policies, Stamps) ... 20, n.
c. 101 (Public Health, Scotland) ... 47, 75, 82, 96
c. 133 (Churchyards) ... 46, 74
c. 144 (Policies of Insurance) ... 186
31 & 32 Vict. c. 90 (Administration of Estates) ... 195, 248
c. 124 (Inland Revenue, 1868) ... 186
32 & 33 Vict. c. 46 (Specialty Debts) ... 757, n.
33 & 34 Vict. c. 14 (Naturalization) ... 336, 341
c. 23 (Forfeiture) ... 337
c. 35 (Apportionment) ... 811, n., 826, n.
c. 82 (Glebe Loans, Ireland) ... 46, 65, 93
c. 97 (Stamp Act, 1870) ... pp. 1 *et seq.*
s. 2 (Definitions) ... 12, n., 143
s. 5 (Crown Property) ... 11
s. 7 (Stamping of Instruments) ... *11*, 30
s. 8 (Instruments to be Separately Charged) ... *27*, 90
s. 9 (Appropriated Stamps) ... 14
s. 10 (Statement of Facts affecting Duty) ... *12*, 66
s. 11 (Foreign Currency) ... *12*
s. 12 (Stock and Marketable Securities) ... *12*
s. 13 (Effect of Statement of Value) ... *13*
s. 14 (Denotation of Duty) ... *13*
s. 15 (Stamping after Execution) ... *16*, 17

PAGE

33 & 34 Vict. c. 97, s, 16 (Admission of Unstamped Instruments as Evidence) ... *21*
s. 17 (Unstamped Instruments) ... *2*, *3*, 5
s. 18 (Opinions of Commissioners) ... 13
s. 19 (Appeals) ... 13
s. 20 (Evidence of Value) ... *14*, 66
s. 21 (Inspection of Rolls, &c.) ... 14
s. 23 (Impressed Stamps) ... 14
s. 24 (Cancellation of Adhesive Stamps) ... *15*
s. 25 (Penalties) ... *16*
s. 36 (Agreements) ... 15, n., 36, n.
s. 38 (Appraisements) ... 18, n.
s. 40 (Apprenticeship) ... 48
s. 43 (Articles of Clerkship) ... 18, n.
s. 48 (Bills of Exchange defined) ... *56*
s. 49 (Promissory Notes defined) ... *56*
s. 50 (Bills of Exchange) ... 14, 15, n.
s. 51 (Foreign Bills) ... 14, *59*, *60*
s. 52 (Bills drawn out of United Kingdom) ... *60*, *61*
s. 53 (Bills of Exchange, Stamping after Execution) 18, n., *59*
s. 54 (Bills of Exchange, Penalty) ... 19, n., 61
s. 55 (Stamping one Bill only) ... *59*
s. 56 (Bills of Lading) ... 19, n.
ss. 66, 67, 68 (Charter Parties) ... 15, n., 17, n., 19, n.
s. 69 (Contract Notes) ... 19, n.
s. 70 (Conveyance on Sale defined) ... 65
s. 71 (Conveyances for Stock, &c.) ... 67
s. 72 (Periodical Payments) ... 67
s. 73 (Conveyances subject to Debts, &c.) ... 67
s. 74 (Apportionment of Consideration) ... 73, 74
s. 79 (Copies or Extracts) ... 19, n.
s. 80 (Copies, &c., from Registers) ... 15, n.
ss. 81, 82 (Copyholds) ... 77
ss. 83, 84, 85, 86 (Copyholds) ... 77, 78
s. 89 (Delivery Orders) ... 15, n.
s. 99 (Leases) ... 15, n., 20, n., 78
s. 101 (Letters of Allotment) ... 20, n.
s. 102 (Proxies) ... 15, n., 20, n.
s. 105 (Mortgages Defined) ... 83
s. 107 (Mortgages, Allowance for Expenses, &c.) ... 88
s. 109 (Transfer of Mortgage) ... 91, 93
s. 115 (Foreign Securities) ... *35*
s. 116 (Notarial Acts) ... 15, n.
s. 119 (Policies of Insurance) ... 15, n.
s. 120 (Receipts defined) ... *94*
s. 121, 122 (Receipts) ... 15, n., 20, n.
s. 127 (Share Certificates) ... 21, n.
s. 128 (Cost-book Mines) ... 15, n.
Schedule to Act ... 100, *et seq.*
c. 98 (Stamp Duties Management) ... 65
c. 99 (Inland Rev. Acts Repeal) ... 6, n.

34 & 35 Vict. c. 4, s. 15 (Stamp Duty, Stock Mortgages) ... 131, n.

35 & 36 Vict. c. 24 (Charitable Trustees Incorporation) ... 107, 117
c. 39 (Naturalization) ... 336
c. 62 (Education, Scotland) ... 75
c. 68 (Military Forces Localization) ... 47, 75

36 & 37 Vict. c. 52 (Administration of Estates) ... 197
c. 66 (Judicature Act) ... 750, n.

37 & 38 Vict. c. 19 (Admission of Barristers) ... 102
c. 26 (Stamp Duties, Canadian Stock) ... 118, n.
c. 42 (Building Societies) ... 65, 81, 96
c. 94 (Conveyancing, &c., Scotland) ... 142, n.

38 & 39 Vict. c. 27 (Administration of Estates) ... 197
c. 60 (Friendly Societies) ... 61, 65, 81
c. 82 (National Schools, Ireland) ... 47, 93
c. 87 (Land Transfer) ... 266

PAGE
39 & 40 Vict. c. 6, ss. 1, 2 (Marine Policies) ..... 20, n., 22
40 & 41 Vict. c. 18 (Settled Estates Act, 1877) ..... 296, 297
c. 33 (Contingent Remainders) ..... *428*, 596, 618
c. 59 (Colonial Stock) ..... 118, n.
42 & 43 Vict. c. 25 (Dispensaries, Ireland) ..... 46, 61, 93
43 Vict. c. 14 (Customs and Inland Revenue, 1879).
s. 10 (Probate Duty, Delivery of Accounts) ..... 190
s. 10 (Commutation of Legacy and Succession Duties) *212*
s. 12 (Discharge of Executors) ..... *213*
s. 13 (Personalty under 100*l.*) ..... 247
43 & 44 Vict. c. 19 (Taxes, Management) ..... 65
c. 20 (Inland Revenue, 1880).
ss. 53, 54 (Compositions for Transfer Duty) ... 118 n., 119 n.
s. 56 (Letters of Renunciation) ..... 15 n., 128 n.
44 & 45 Vict. c. 12 (Customs and Inland Revenue, 1881).
s. 6 (Exemption of Official Receipts from Stamp Duty) 96
s. 22 (Payment of Succession Duty on Realty) ..... *291*, *292*
s. 26 (Powers of Commissioners) ..... *171*
s. 27 (Grant of Probate Duties) ..... *172*
s. 28 (Deduction of Debts) ..... *173*, 185, *et seq.*
s. 29 (Form, &c., of Affidavit of Value) ..... *191*
s. 31 (Return of Overpaid Duty) ..... *192*
s. 32 (Payment of further Duty) ..... *193*
ss. 33, 35, 36 (Estates not exceeding 300*l.*) ..... *195*, *196*, *247*
s. 37 (Proofs of Value) ..... 191
s. 38 (Duty on Accounts) ..... *198*, 277
s. 40 (Penalty for Default in taking out Administration) 201
s. 41 (Cesser of Legacy and Succession Duty at 1 per cent.) ..... *248*
s. 42 (Legacy Duty on Amounts under 20*l.*) ..... 204
s. 43 (Composition for Legacy Duty) ..... 212
s. 44 (Unstamped Documents, Arbitration) ..... *22*
c. 20 (Post Office) ..... 47, 96
c. 41 (Conveyancing and Law of Property Act, 1881).
s. 6 (General Words) ..... 842, n.
s. 30 (Trust and Mortgage Estates) ..... 347, 559, 756, n., 773, n.
s. 31 (Appointment of New Trustees) ..... 967, n.
s. 35 (Sales by Trustees) ..... 867, n.
s. 37 (Powers of Executors to Compound, &c.) ..... 781, n., 790, n., 812, n, 1043, n.
s. 42 (Management of Realty, Maintenance, &c.) ... 918, n., 955, n.
s. 43 (Maintenance, &c.) ..... 796, n., 807, n., 893, n., 910, n., 913, n., 945, n.
s. 44 (Rent-charges) ..... 946, n.
45 & 46 Vict. c. 38 (Settled Land Act, 1882) ..... 294, 856, n., 957, nn., 958, nn., 960, n.
c. 39 (Conveyancing Act, 1882) ..... 602, 969, n.
c. 51 (Government Annuities) ..... 825, n.
c. 75 (Married Women's Property) ..... 335
c. 61 (Bills of Exchange).
s. 2 (Bill payable to Bearer) ..... 55
s. 3 (Bills defined) ..... *50*, *51*, *55*
s. 7 (Payee) ..... 54
s. 8 (Custom of Merchants) ..... 56
s. 9 (Payment with Interest, &c.) ..... *54*
s. 10 (Payment on Demand) ..... *53*, 57
s. 11 (Payment at fixed Time) ..... *53*
ss. 27–30 (Consideration) ..... 55
s. 39 (Payment "After Sight") ..... 53
s. 53 (Stamping after Execution) ..... *59*
s. 54 (Penalty) ..... *59*
s. 55 (Stamping on Bill only) ..... *59*
s. 64 (Alterations) ..... 24
s. 83 (Promissory Notes defined, &c.) ..... *20*, 55

PAGE
45 & 46 Vict. c. 72 (Revenue, &c., Act, 1882), s. 13 (Adhesive Stamps) ..... *15*
46 & 47 Vict. c. 30 (Colonial Companies) ..... 176
c. 41 (Merchant Shipping) ..... 47
c. 52 (Bankruptcy) ..... 142
47 & 48 Vict. c. 18 (Settled Land Act, 1884) ..... 294, 857, n.
c. 62 (Stamps) ..... 105, n.
48 & 49 Vict. c. 51 (Customs and Inland Revenue, 1885).
s. 11 (Duty on Corporate Property) ..... 259, n.
s. 21 (Securities to Bearer) ..... 137
49 & 50 Vict. c. 27 (Guardianship of Infants) ..... 751, n., 753, n.
50 & 51 Vict. c. 73, s. 45 (Copyholds, Trust and Mortgage Estates) ..... 347, 559, 756, n.
51 Vict. c. 2 (National Debt Conversion) ..... 771, n.
c. 8 (Customs and Inland Revenue, 1888).
s. 12 (Foreign Share Certificates) ..... 124, 125, n., 138
s. 14 (Agreements, on Deposit of Certificates to Bearer) 106, 114
s. 15 (Agreements for Deposit of Deeds) ..... 85, 105, n.
s. 17 (Contract Note defined) ..... 19, n., 40
s. 18 (Stamping after Execution) ..... 16, 101, n., 113, n.
s. 19 (Consignment of Life Policies) ..... 110, n.
s. 20 (Conditions against Stamping) ..... *22*
s. 21, sub-s. 1 (Additional Succession Duties) ..... 214, *250*
sub-s. 2 (Succession Duty on Legacies charged on Land, &c.) ..... *272*
Schedule to Act ..... 113, 114, 118, 127, 131, 139, 140

# ADDENDA ET CORRIGENDA.

Page 47, line 4. *For* "45 & 46 Vict. c. 72," *substitute* "44 & 45 Vict. c. 49."

,, 58, line 30. *Add:* "See also *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*, 21 Q. B. D. 352."

,, 75, line 10. *For* "10 Geo. IV. c. 50," *substitute* "30 & 31 Vict. c. 101."

,, 192, line 15, and marginal note. *For* "amounts," *substitute* "accounts."

,, 205, line 11. *For* "18 & 19 Vict.," *substitute* "16 & 17 Vict."

,, 324, line 12. *Add:* "See as to British protected subjects, *Ellen Abd-ul-Messih* v. *Chukri Fabra*, 13 Ap. Ca. 431."

,, 375, line 12. *Add:* "See also, *Woodhouse* v. *Balfour*, 13 P. D. 2."

,, 432, line 12. *Re Dawson* is now reported in 39 Ch. D. 155.

,, 437, line 15. *Add: Re Harvey, Peek* v. *Savory*, 39 Ch. D. 289.

,, 473, line 32. *Delete* "*Re, Beirs' Trusts*, L. R. 4 Eq. 200," and *substitute* "*Sykes* v. *Sykes*, L. R. 3 Ch. 301."

,, 490, line 27. *Add:* "*Re Sheldon, Nixon* v. *Sheldon*, 39 Ch. D. 50."

,, 522, line 25. *Add:* "*Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 215."

,, 527, line 17, *Add:* "*Re Bushell*, 13 P. D. 7."

,, 628, line 7. *Add:* "But see *Re Hamlet, Stephen* v. *Cunningham*, 39 Ch. D. 426."

,, 632, line 22. *Add:* "But see *Locke* v. *Dunlop*, 39 Ch. D. 387."

,, 660, line 2 from end. *For* "3 K. & J. 152," *substitute* "L. R. 1 Eq. 675."

,, 684, line 7. *Re Jupp* is now reported in 39 Ch. D. 148.

,, 877.—*Contributory Mortgage by Trustees.*] Trustees are not justified, in the absence of express authority, in lending trust funds on the security of a contributory mortgage, *Webb* v. *Jonas*, 39 Ch. D. 660.

If therefore it is desired to give them such authority, the following form should be added at the end of the investment clause, Form 22 :—

"22*b*. PROVIDED ALWAYS AND I HEREBY DECLARE that it shall be lawful for my trustees or trustee in their or his discretion to invest the moneys arising from such sale and conversion as aforesaid, or any part thereof, at interest upon any security hereby authorised in conjunction with any

moneys to be invested on the same security by any person or persons by way of contributory loan, and to have such security transferred unto or into the name or joint names of one or any two or more of such contributories, or of such person or persons as shall be nominated by all or some or one of such contributories, and to make such other arrangement in relation to such investment or security as my trustees or trustee shall think fit."

# Jarman and Bythewood's

# PRECEDENTS IN CONVEYANCING

## STAMP DUTIES.

### PRELIMINARY DISSERTATION.

### CHAPTER I.

#### DUTIES IMPOSED BY THE STAMP ACT, 1870, AND SUBSEQUENT STATUTES.


PAGE

1. ADMISSIBILITY OF UNSTAMPED INSTRUMENTS.
   *To exclude Parol Evidence* ... 3
   *For Collateral Purpose* ..... 5
2. GENERAL PROVISIONS AS TO STAMPING INSTRUMENTS.
   *How Duties are to be Determined* ..... 11
   *Opinion of Commissioners* ... 13
   *How Duties are to be Denoted* 14
3. STAMPING AFTER EXECUTION.
   *By Commissioners* ..... 16
   *Admission of Unstamped Instruments in Court* ..... 21
4. ALTERATION AND RE-EXECUTION OF INSTRUMENTS ... 23
5. SEVERAL STAMPS ON ONE INSTRUMENT ..... 27
6. INSTRUMENTS EXECUTED OR TO OPERATE ABROAD.
   *Generally* ..... 33
   *Foreign Securities* ..... 34
7. AGREEMENTS.
   *Stamp Duty on Agreements* ... 35
   *Matter not of Value of 5l.* ... 41
   *Agreements for Hire of Labourers, &c.* ..... 43


NOTE.—It has been thought advisable to insert in this place a Dissertation on points likely to arise in practice with regard to the duties payable on the transfer, transmission, and devolution of real and personal property, including the duties imposed by the Stamp Act, 1870 (33 & 34 Vict. c. 97), on instruments of or relating to transfer of property, and also the duties payable in respect of probate, legacies, and successions. Some of the points treated in the following pages have been incidentally considered in the foregoing Dissertations, to which reference will be made as occasion arises.

PAGE
*Agreements for Sale of Goods, &c.* ..... 43
*Special Exemptions* ..... 46
8. Appraisements and Awards 47
9. Apprenticeship..... 48
10. Bills of Exchange and Promissory Notes.
*Bills of Exchange Act*, 1882 50
*Provisions of Stamp Act*, 1870 56
*Foreign Bills and Notes* ..... 59
*Special Exemptions* ..... 61
11. Bonds..... 62
12. Conveyances on Sale.
*Definition of Term* ..... 65
*What Considerations Chargeable*..... 66
*What is "Property"* ..... 67
*Mere Contracts not liable to* Ad Valorem *Duty*..... 69
*Reduction and Apportionment of Consideration* ..... 73
*Exemptions* ..... 74
13. Copies — Secondary Evidence ..... 75
PAGE
14. Copyholds ..... 77
15. Leases.
*Duty, how Chargeable* ..... 78
*Exemptions* ..... 80
16. Letters of Attorney ... 81
17. Mortgages.
*Generally* ..... 82
*Agreement, or Memorandum of Deposit*..... 85
*Security for Account Current* 87
*Distinct Securities in one Deed* 90
*Transfer of Mortgage*..... 90
*Exemptions* ..... 93
18. Receipts.
*Generally* ..... 93
*Exemptions* ..... 96
19. Release or Renunciation 97
20. Schedules ..... 97
21. Settlements ..... 99
22. Rates of Duties.
*Present Duties*..... 100
*Repealed Duties* ..... 142
*Table of Duties on certain Instruments*..... 158

## 1. Admissibility of Unstamped Instruments.

**Stamp Act, 1870, &c.**

1. *Admission of Unstamped Instruments.*

5 & 6 W. & M. c. 21.

The first Stamp Act, 5 & 6 W. & M. c. 21, enacted, that no record, deed, instrument, or writing thereby charged with a stamp duty should be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available in law or equity, unless duly stamped. The provision was adopted or repeated in substance by the subsequent Acts, and is still in force and applicable to all instruments liable to stamp duty; see 33 & 34 Vict. c. 97, s. 17, which is as follows :—

Instrument

"Save and except as aforesaid (*a*), no instrument executed in

Statutory exemptions from stamp duty.

(*a*) That is to say, "except where express provision to the contrary is made by this or any other Act:" see sect. 15 of the Act. Where the benefit of exemption from liability to stamp duty is claimed, it is incumbent on the person claiming such benefit to show that the instrument comes within the terms of the exemption, otherwise it will be presumed that the instrument is liable to duty: see *R.* v. *Inhabitants of Skeffington*, 3 B. & Al. 382.

any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

not duly stamped inadmissible.

General rule.

The cases on the subject are somewhat inconsistent (per Lord *Cottenham,* in *Matheson* v. *Ross*, 13 Jur. 309); but the balance of authority is in favour of this principle—that an instrument cannot be received in evidence for any purpose, in favour of the party producing it, upon the footing of being operative or binding in any part of it which requires a stamp and has not a sufficient stamp capable of being appropriated for the purpose of covering such part. But if, by producing it, any other purpose can be served, it may be produced for that purpose: see *post,* pp. 5, *et seq.*

The effect of the enactment above referred to is that the want of a stamp does not affect the validity of the instrument, but merely renders it incapable of being admitted in evidence or otherwise for the purpose of founding thereon, or supporting thereby, a claim in any Court: *Duck* v. *Braddyll,* 13 Price, 455; *Robinson* v. *Macdonnell,* 5 M. & S. 228; *Browne* v. *Savage,* 4 Drew, 635.

Unstamped written agreement to exclude parol evidence.

An instrument not duly stamped may, however, be relied on *against* the party producing it or proving its existence, for the purpose merely of defeating a claim supported by other evidence which would be excluded by the unstamped instrument, if admissible. Therefore, where the plaintiff either produces, or by his own witness, on cross-examination or otherwise, proves the existence of a written memorandum of the contract on which he sues, or a written agreement varying or annulling the agreement on which he sues, and the writing is inadmissible for want of a stamp, he cannot, in the former case, prove the contract by parol evidence, although the subject-matter does not require a writing, or, in the latter, recover on the original agreement; and the Court

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

may look at the writing to see whether it applies to the cause of action. But if the plaintiff makes out his case without showing the existence of the unstamped writing, the defendant cannot make the objection: *Reed* v. *Deere*, 7 B. & C. 266; *Fielder* v. *Ray*, 6 Bing. 332; *Hughes* v. *Budd*, 4 Jur. 651. The rule for a new trial in *Alves* v. *Hodgson*, 7 T. R. 241, was clearly wrong; see *White* v. *Wilson*, 2 B. & P. 118. *Sutton* v. *Toomer*, 7 B. & C. 418, appears to have been overruled by *Jardine* v. *Payne*, 1 B. & Ad. 663. In *Sweeting* v. *Halse*, 9 B. & C. 365, it was held, that this rule extended only to conclusions of law to be drawn by the judge; but that under no circumstances ought a jury to be allowed to draw a conclusion of fact from an unstamped instrument. It may be doubted, however, whether anything turns on the distinction between the Court and the jury. In most cases, the question is one of construction, and therefore for the Court; but if, under any circumstances, an unstamped instrument can be looked at on the footing of being operative, it seems to be indifferent whether it is submitted to the eyes of the Court or to those of the jury. See, however, the observations of Lord *Campbell*, in *Matheson* v. *Ross*, 13 Jur. 311. And the rule is equally applicable to a contract set up by the defendant on parol evidence, if his witness betrays the existence of an unstamped memorandum. Where, however, the plaintiff's witness proved the existence of an unstamped written agreement, relating generally to the transaction in question, it was held, that the agreement could not be produced, even to show that all or part of the plaintiff's demand was not within the agreement: *Vincent* v. *Cole*, 3 C. & P. 481. That decision was to some extent grounded on the *inconvenience* of requiring the judge to look through a long agreement to see whether it contained provisions applicable in any degree to fifty or sixty items, which a party claimed to recover independently of it. (See another decision on the mere ground of inconvenience, *Wellard* v. *Moss*, 7 Moo. 503.) The contrary had been held in *R.* v. *Pendleton*, 15 East, 451, where, it being shown that a hiring and service had commenced

Parol proof of a fact, whether excluded by unstamped writing.

under an unstamped writing, it was held that the Court might look at the writing to see whether the term of service under it had not expired before the time to which the parol evidence of service applied; to see, in short, whether the alleged written evidence and the proffered parol evidence related to the same thing; and *Bayley*, J., said the Court might look at an unstamped contract for the sale of goods, to see whether it applied to the goods for the price of which the plaintiff was suing on parol evidence. In *Buxton* v. *Cornish*, 12 M. & W. 426, however, *Vincent* v. *Cole* was followed, and said to have overruled the dictum of *Bayley*, J., in *R.* v. *Pendleton*. Of course, the existence of an unstamped written contract of tenancy does not exclude evidence of the mere fact of tenancy, by proof of payment of rent, though it excludes parol evidence of the special terms of contract: *R.* v. *Inhabitants of Holy Trinity, Kingston-upon-Hull*, 7 B. & C. 611; *R.* v. *Rawden*, 8 B. & C. 708; *R.* v. *Merthyr*, 1 B. & Ad. 29; see *Strother* v. *Barr*, 2 Moo. & P. 207. And an unstamped receipt for money does not exclude parol evidence of the fact of payment, and may even be used by a witness to refresh his memory: *Jacob* v. *Lindsay*, 1 East, 460; *Catt* v. *Howard*, 3 Stark. 3.

Admission of unstamped instrument for a collateral purpose.

By sect. 17 of the Stamp Act, 1870, criminal proceedings are expressly excepted from the operation of the enactment that instruments not duly stamped shall not be pleaded or given in evidence or admitted to be good, useful or available. This exception is founded on a rule which had already been repeatedly affirmed by judicial decisions, and which has an application which extends to cases other than criminal proceedings. The rule in question is that an unstamped instrument may be produced for a purpose that does not involve the assumption of its being operative or binding in favour of the party producing it. Thus, on an indictment for forging a bill of exchange, the forged instrument is admissible without a stamp; for it is assumed *not* to be what it purports to be: *R.* v. *Hawkesworth*, 1 T. R. 450; *R.* v. *Reculist*, 2 Leach, 703. On an indictment for stealing a bill or other

Forgery.

Larceny, &c., of a security for money.

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

security for money, which is unstamped, and cannot be stamped after execution, the unstamped document is inadmissible: see *R.* v. *Pooley*, 3 B. & P. 311. But, if the instrument is capable of being stamped at any time, and so made available, it may be the subject of an action of trover: *Scott* v. *Jones*, 4 Taunt. 868; and the giving of it up may be a good consideration for a promise: *Haigh* v. *Brookes*, 10 A. & E. 309. On the other hand, the rule that an instrument not duly stamped was not admissible in evidence formerly applied even to criminal proceedings, where the validity of an instrument is relied on to support the indictment. Thus it was held that an unstamped policy of insurance was inadmissible on an indictment for fraudulent arson: *R.* v. *Gillson*, 1 Taunt. 95; and on an indictment for embezzling money, an unstamped receipt for the money could not be read: *R.* v. *Hall*, 3 Stark. 67 (*b*).

Distinction where the instrument may be stamped after execution.

To prove fraud or illegality.

An instrument which is part of a fraudulent or illegal transaction, may be read without a stamp, to prove the fraud or illegality (as bribery, &c.); for it is then used to show the intentions of the parties, and is not assumed in favour of the party producing it, to be valid or operative: *R.* v. *Fowle*, 4 C. & P. 592; *Holland* v. *Duffin*, Peake, 58; *Nash* v. *Duncombe*, 1 M. & Rob. 104; *Coppock* v. *Bower*, 4 M. & W. 361; *Keable* v. *Payne*, 8 A. & E. 559; *R.* v. *Gompertz*, 9 Q. B. 824; *Holmes* v. *Sexsmith*, 7 Exch. 302. So, the handwriting of an unstamped note may be looked at for proof that the maker was drunk during the transaction in question: *Gregory* v. *Fraser*, 3 Camp. 454. (See 7 Sc. N. R. 789, n.) And an assignment of the whole of a debtor's property for the benefit of his creditors may be given in evidence as an act of bankruptcy, though unstamped: *Ex parte Wensley*, 1 De G., J. & S. 273;

(*b*) By the stat. 17 & 18 Vict. c. 83, sect. 37, it was enacted that "every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or annexed thereto." This is repealed by the stat. 33 & 34 Vict. c. 99; but the Stamp Act, 1870, does not expressly re-enact it, but excepts criminal proceedings from the disabling operation of sect. 17.

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

*Ponsford* v. *Walton*, L. R. 3 C. P. 167; *Ex parte Squire, Re Gouldwell*, L. R. 4 Ch. 47. Evidence of payment by a bill of exchange may be rebutted by producing the instrument without a stamp, and so showing that it was unavailable: *Smart* v. *Nokes*, 7 Sc., N. R. 786. On the trial of an issue as to the validity of an assignment of goods alleged to be fraudulent, a former unstamped and cancelled assignment of the same goods to the same person was rejected: *Williams* v. *Gerry*, 10 M. & W. 296. The case was barely within the rule. It seems to have been assumed that the instrument was offered to prove that a valid assignment had been in existence. Proof of the *intention* to assign could not, in such case, be separated from the proof of the fact of assignment. But it was conceded that, on an indictment for larceny of the goods, if they had been taken under the assignment, the instrument might have been read to prove an innocent intention. So, an unstamped promissory note cannot be read as an acknowledgment of a debt under Lord Tenterden's Act: *Jones* v. *Ryder*, 4 M. & W. 32.

Evidence for a stranger.

An unstamped instrument may be evidence for a stranger, if his object is not to prove that that was done which the instrument purports to do: it may be evidence for a party who wholly denies its validity (for the words of the statute are then not infringed): it cannot be evidence for a party to it who produces it and treats it as valid. The policy of the stamp laws must always be borne in mind, which is to induce all persons interested in the validity of an instrument to see that it is properly stamped.

Verbal contract by reference to an existing unstamped instrument.

Where A. and B. verbally agreed for a tenancy on the same terms as were contained in a certain written agreement between A. and C., it was held that that writing, which bore an agreement stamp, but required a lease stamp, was inadmissible to prove the terms of B.'s tenancy: *Turner* v. *Power*, 7 B. & C. 625. But if, as appears to have been the case, the verbal agreement identified the writing, this decision was erroneous, for the writing was not referred to as containing a valid contract, but the words written down in it were incorporated by

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

reference in the parol agreement, and that did not render it liable to a stamp. For the purpose of the reference it was immaterial whether that agreement had been executed or not; *Drant* v. *Brown*, 3 B. & C. 665. See *Duck* v. *Braddyll*, 13 Price, 455. In *Wallis* v. *Broadbent*, 4 A. & E. 877, where it was attempted to make out an *implied* contract of tenancy upon the term of an expired lease, it was held, that the lease, not being properly stamped, was inadmissible, for it was required to prove, not merely the terms of the new parol contract, but the fact of the former existence of the old contract. But *Coleridge*, J., said: "I do not wish to be bound to an assertion, that if there had been an *express* promise to hold upon the terms contained in the original instrument, the mere production of the instrument, without proof of the execution or stamp, might not be sufficient;" and *Patteson*, J., expressed himself to the same effect.

Unstamped instrument part of *res gesta*.

An unstamped instrument may be produced as part of a chain of evidence to establish a fact; as, a cheque drawn beyond the legal limit to prove the receipt of money by means of it, though not to discharge the banker, the drawing and presentment of the cheque being part of the *res gesta*: *Blair* v. *Bromley*, 11 Jur. 617.

Where instrument may operate in two ways, one of which requires no stamp.

An instrument which is capable of two distinct operations, or which may be used for two distinct purposes, one of which does and the other does not require a stamp, may be read for the latter purpose alone, without a stamp. Thus, an unstamped agreement for a dissolution of partnership may be read as an admission of the existence of the partnership: *Wheldon* v. *Matthews*, 2 Chitt. 399. So, an admission of the possession of goods, in an unstamped agreement for making other goods, may be read: *Forsyth* v. *Jervis*, 1 Stark. 437. (See *Keane* v. *Janes*, 2 C. & K. 725, *contra*.) So, a receipt indorsed on a mortgage deed, and containing matter of agreement, may

Admission in an unstamped agreement or receipt (*c*).

(*c*) A receipt which cannot be read for want of a stamp may be referred to by a witness to refresh his memory: *Maugham* v. *Hubbard*, 8 B. & C. 14; *Jacob* v. *Lindsay*, 1 East, 459.

be read, as to the receipt, without a stamp: *Odye* v. *Cookney*, 1 Moo. & R. 517. See *Grey* v. *Smith*, 1 Camp. 387. So, a bill of parcels having an unstamped receipt subscribed: *Millen* v. *Dent*, 10 Q. B. 846. In *Hawkins* v. *Warre*, 3 B. & C. 690, it was held, that an unstamped receipt for rent could not be admitted to prove the terms of the tenancy. But that was an action of replevin, and the defendant tendered the receipt, which was only signed by himself. Taking away the fact of payment, it was merely evidence of a demand (*d*). It came, however, from the custody of the plaintiff, and had been relied on by him in a suit for specific performance. However that might be, the principle of the decision is not inconsistent with that of the House of Lords in *Matheson* v. *Ross*, 13 Jur. 307; 2 H. L. C. 286, which establishes the proposition, that a purpose requiring a stamp does not render an unstamped instrument inadmissible for another purpose which does not require a stamp. In that case, an unstamped acknowledgment of the receipt of a sum of money, "being balance amount of pay bills paid from 7th August to 11th December," was admitted to prove the amount of the balance. Lord *Cottenham* said, "That, because a paper purporting to be a receipt cannot be used for the purpose of proving that receipt without a stamp, it should not be used for another purpose, equally apparent upon the face of the paper which does not require a stamp, is a proposition which, it seems to me, is extremely difficult to support by any argument,—certainly not by any language to be found in the Stamp Acts, or, I believe, by any authority, though there are some which it might be difficult to deal with." It follows, that an instrument having two distinct operations, and bearing a stamp which would be sufficient in respect of one standing alone, but would not be sufficient with respect to the other standing alone, may

*Matheson* v. *Ross.*

Instrument having two operations, and sufficiently stamped as to one only.

(*d*) See *Doe* v. *Frankis*, 11 A. & E. 792, where an unstamped attornment by the defendant, containing matter of contract and produced from the plaintiff's custody, was not allowed to be read as evidence for the defendant.

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

be read for the purpose in respect of which the stamp is sufficient (*e*). See *Fancourt* v. *Thorne*, 9 Q. B. 312; *Rutty* v. *Benthall*, L. R. 2 C. P. 488. But if the stamp would be sufficient for either purpose, standing alone, and each requires a separate stamp (*infra*, p. 26), the instrument cannot be read for either, as there is no means of appropriating the stamp to either. See *Lovelock* v. *Franklyn*, 8 Q. B. 371.

Admission of instrument after material alteration.

It is on the same principle that an instrument, originally valid and duly stamped, but afterwards rendered either void or inadmissible, as a continuing obligation, by alterations with or without consent or re-execution, and unstamped in respect of the alterations (see *post*, pp. 23, *et seq.*), may be read in evidence for any purpose consistent with the conclusion that it is no longer binding by way of covenant or obligation; for the purpose, for instance, of shewing that an estate passed by it: *Doe* v. *Hirst*, 3 Stark. 60, (sed qu. as to things lying in grant: Rolle, 188); or to prove any collateral circumstance: *Sutton* v. *Toomer*, 7 B. & C. 416; *Hutchins* v. *Scott*, 2 M. & W. 809.

Unstamped counterpart as secondary evidence.

Where several parts of an instrument are executed, each part is not only an original operative instrument, but also a copy of the other; and on the principle of *Matheson* v. *Ross*, an unstamped counterpart may be read, like any other copy, as secondary evidence, the proper foundation for admitting secondary evidence having been laid; as, by the holder of the stamped part refusing, after notice, to produce it; or by proof that the stamped part has been lost: *Garnons* v. *Swift*, 1 Taunt. 507; *Mann* v. *Godbold*, 11 Moo. 49; see also *Braythwaite* v. *Hitchcock*, 10 M. & W. 491.

Original instrument unstamped, and annexed as a schedule to another.

So, an original instrument, not duly stamped as such, may be read as a schedule to another instrument to which it is annexed, and which refers to it, and bears a stamp sufficient to cover its contents: *Duck*

(*e*) *Corder* v. *Drakeford*, 3 Taunt. 382, where an agreement for a demise and for the sale of fixtures was held to amount to a lease, and rejected as bearing an agreement stamp only, in an action for the price of the fixtures, may seem, at first sight, opposed to this conclusion; but the ground of the decision was the mutual dependence of the two parts.

Stamp Act, 1870, &c.

1. *Admission of Unstamped Instruments.*

v. *Braddyll*, 13 Pri. 455. See *Pearce* v. *Cheslyn*, 5 N. & M. 653; *infra*, p. 98.

In order to render an instrument admissible it must be "duly stamped in accordance with the law in force at the time when it was first executed": see sect. 17 of the Stamp Act, 1870. Where a deed tendered in evidence bore a date subsequent to the commencement of the Act, but was proved to have been executed some time previously, it was held to be inadmissible, as not being stamped according to the law in force at the time of its execution: *Clarke* v. *Roche*, 3 Q. B. D. 170.

Stamp to be in accordance with law at time of first execution.

As to the presumption that a missing deed was properly stamped, see *post*, p. 76.

Presuming stamps.

## 2. General Provisions as to Stamping Instruments.

Grant of duties.

The present Stamp Act (33 & 34 Vict. c. 97) which came into operation on the 1st January, 1871, charges upon the instruments mentioned in the schedule thereto, the duties specified in the schedule and no other duties: sect. 3. Progressive duty is thus abolished, and by sect. 4 it is provided, that instruments formerly charged under various statutes not relating to stamp duties with the duty of 35*s.*, should thenceforth be chargeable with a duty of 10*s.* By sect. 5 instruments relating to property of the Crown are chargeable with duty, except so far as specially exempted by statute.

By sect. 7 of the Act it is enacted as follows:—

How instruments are to be written and stamped.

"(1.) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

"(2.) If more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable."

Where the same instrument contains or relates to several matters, or is made for several considerations,

Stamp Act, 1870, &c.

2. *General Provisions.*

it is to be chargeable with duty as if it were a separate instrument in respect of each of such matters or considerations: sect. 8, *post*, p. 27.

Stamp generally regulated solely by contents of instruments.

In general, the liability of the instrument to duty must be ascertained solely from its own contents.

Conveyance.

And the *ad valorem* duty on conveyances is expressly regulated by the consideration stated in the conveyance. But the stamp on a lease at such rent as was paid by the late tenant, must be determined by extrinsic evidence: *Parry* v. *Deere*, 5 A. & E. 551.

Lease.

Where, in a lease, the premiums of insurance were to be added to the rent, it was held that the party objecting to the stamp must shew that the premiums would increase the rent beyond the limit covered by the stamp: *Wilson* v. *Smith*, 12 M. & W. 401. See *Pooley* v. *Goodwin*, 4 A. & E. 94, where the Court appears to have confounded a mortgage with a sale.

With regard to the determination of the amount of *ad valorem* duty chargeable on instruments, by the Stamp Act, 1870, it is enacted as follows:—

Facts and circumstances affecting duty to be set forth in instruments.

Sect. 10. "All the facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument; and every person who, with intent to defraud her Majesty, or her heirs or successors,

"(1.) Executes any instrument in which all the said facts and circumstances are not fully and truly set forth;

"(2.) Being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances;

Penalty; 10*l.*

shall forfeit the sum of ten pounds.

Money in foreign or colonial currency to be valued.

Sect. 11. "Where an instrument is chargeable with *ad valorem* duty in respect of any money in any foreign or colonial currency, such duty shall be calculated on the value of such money in British currency according to the current rate of exchange on the day of the date of the instrument.

Stock and marketable securities to be valued.

Sect. 12. "Where an instrument is chargeable with *ad valorem* duty in respect of any stock (*f*) or security, such duty shall be

(*f*) By sect. 2 (g) of the Act the term "Stock" is thus defined: "'Stock' means and includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital

calculated on the value of such stock or security according to the average price thereof on the day of the date of the instrument.

Effect of statement or value.

Sect. 13. "Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with such statement, it is, so far as regards the subject-matter of such statement, to be deemed duly stamped, unless or until it is shown that such statement is untrue, and that the instrument is in fact insufficiently stamped.

Sect. 14. "Where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of such last-mentioned duty shall, if application be made to the Commissioners for that purpose, and on production of both the instruments, be denoted in such manner as the Commissioners think fit upon such first-mentioned instrument."

Commissioners may be required to express opinion as to duty.

By sect. 18 of the Stamp Act, 1870, the Commissioners may be required by any person to express their opinion as to whether any executed instrument is chargeable with any duty; and, if so, with what amount of duty it is chargeable. They must then impress the instrument with a particular stamp denoting either that no duty is chargeable, or that the instrument is duly stamped; and in either case an instrument bearing a denoting stamp is admissible in evidence and available for all purposes, notwithstanding any objection relating to duty. The opinion of the Commissioners must, however, in order to render it thus conclusive, have been pronounced before objection has been taken to the admissibility of the document on the ground of insufficiency or absence of the stamp: see *Prudential Mutual Assurance Association* v. *Curzon*, 8 Exch. 97.

Persons dissatisfied may appeal.

By sect. 19 of the Act a right of appeal to the Court of Exchequer (now the Queen's Bench Division) is given to any person dissatisfied with the assessment to be brought within twenty-one days after the date thereof, and the Commissioners may be required to state a case setting forth the question on which their opinion was required, and the assess-

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stock or funded debt of any company, corporation, or society in the United Kingdom, or of any foreign or colonial company, corporation, or society."

Stamp Act, 1870, &c.

2. *General Provisions.*

ment made by them. And by sect. 20 it is enacted that—

The Commissioners may call for and refuse to proceed without evidence.

"In any case of application to the Commissioners with reference to any instrument, the Commissioners may require to be furnished with an abstract of the instrument and also with such evidence as they may deem necessary in order to show to their satisfaction whether all the facts and circumstances affecting the liability of the instrument to duty, or the amount of the duty chargeable thereon, are fully and truly set forth therein and may refuse to proceed upon any such application until such abstract and evidence have been furnished accordingly."

Rolls, &c., to be open to inspection.

And by sect. 21 all public officers having in their custody any rolls, books, &c., the inspection whereof may tend to secure any duty or to the proof or discovery of any fraud or omission in relation to duty are, under penalties, to permit the Commissioners to inspect the same.

How duties are to be denoted.

The stamps by which duties are denoted are of two kinds, impressed and adhesive. "Except where express provision is made to the contrary, all duties are to be denoted by impressed stamps only": sect. 23. Formerly different kinds of stamps were appropriated to particular kinds of instruments; and by sect. 9 appropriated stamps are not available for other kinds of instruments. But now the only kinds of instruments to which stamps are appropriated in respect of duties payable under the Stamp Act, 1870, are bills of exchange and promissory notes, which accordingly must bear the proper impressed stamps appropriated thereto, and will not be deemed to be duly stamped if they have adhesive stamps, except in the case of bills payable on demand (sect. 50), and bills and notes drawn or made out of the United Kingdom (sect. 51); in the latter case the use of adhesive stamps is compulsory. Appropriated stamps are also required by the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8) sect. 12, sub-sect. (3), in the cases of foreign and colonial share certificates and bonds, &c., transferable by delivery, and by sect. 16 of the same Act, in the case of contract notes.

By sect. 13 of the stat. 45 & 46 Vict. c. 72, it is enacted that:—

"On and after the 1st January, 1883, any stamp duties of an amount not exceeding 2*s.* 6*d.*, which may legally be denoted by adhesive stamps not appropriated by any word or words on the face of them, to any particular description of instrument, and any postage duties to the like amount may be denoted by the same adhesive stamps."

Stamp Act, 1870, &c.

2. *General Provisions.*

Assimilation of certain adhesive stamps for stamp duties and postage duties.

The Stamp Act, 1870, contains the following provisions with regard to adhesive stamps :—

Sect. 24.—"(1.) An instrument, the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp (*g*), is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

General direction as to the cancellation of adhesive stamps.

"(2.) Every person who, being required by law to cancel an adhesive stamp, wilfully neglects or refuses duly and effectually

Penalty for neglect or refusal, 10*l.*

(*g*) The use of adhesive stamps is compulsory only in the case of bills and notes drawn or made abroad (*supra*, p. 14); in the case of notices of shipments under the stat. 39 & 40 Vict. c. 36, sect. 104; and in the case of foreign share certificates and bonds, &c., transferable by delivery and contract notes under the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), sects. 12, 16.

The use of adhesive stamps is permitted in the case of the following kinds of instruments :—

Agreements liable to a duty of 6*d.*: 33 & 34 Vict. c. 97, sect. 36.
Bills of exchange payable on demand liable to fixed duty of 1*d.*: sect. 50.
Charterparties: sect. 66.
Copies and extracts (certified) from Registers of Births, &c.: 33 & 34 Vict. c. 97, sect. 80.
Delivery orders and warrants for goods: sect. 89.
Leases or Tacks for any definite term less than a year, of (1) whole or part of a dwelling-house or tenement at a rent not exceeding the rate of 10*l.* per annum, and (2) any furnished dwelling-house or apartments: sect. 99.
Letters of Renunciation: stat. 43 & 44 Vict. c. 20, sect. 56.
Notarial Acts, and protests of bills of exchange and promissory notes: 33 & 34 Vict. c. 97, sect. 116.
Policies of Insurance (other than Life Policies and Sea Policies): sect. 119.
Proxies and Voting Papers: sect. 102.
Receipts: sect. 121.
Transfers of shares in Cost-book Mines: sect. 128.

Stamp Act, 1870, &c.

2. *General Provisions.*

to do so in manner aforesaid, shall forfeit the sum of ten pounds (*h*).

Sect. 25. "Any person who—

Penalty for frauds in relation to adhesive stamps,

"(1.) Fraudulently removes or causes to be removed from any instrument any adhesive stamp, or affixes any adhesive stamp which has been so removed to any other instrument with intent that such stamp may be used again;

"(2.) Sells or offers for sale, or utters, any adhesive stamp which has been so removed, or utters any instrument having thereon any adhesive stamp which has to his knowledge been so removed as aforesaid;

or to any duty, 50*l.*

Recovery of penalties.

"(3.) Practises or is concerned in any fraudulent act, contrivance, or device not specially provided for, with intent to defraud her Majesty, her heirs or successors, of any duty,

shall forfeit, over and above any other penalty to which he may be liable, the sum of fifty pounds."

## 3. Stamping after Execution.

By sect. 15 of the Stamp Act, 1870, as amended by the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), sect. 18, sub-sect. (2), it is enacted that:—

Terms on which instruments may be stamped after execution.

"(1.) Except where express provision to the contrary is made by this or any other Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds of interest on such duty, at the rate of five pounds per cent. per annum, from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty.

"And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp.

Proviso: as to instruments executed abroad.

"(2.) Provided as follows:

"(*a.*) Any unstamped or insufficiently stamped instrument, which has been first executed at any place out of the United Kingdom, may be stamped at any time within

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(*h*) Where two or more adhesive stamps are used each stamp must be cancelled as above directed; otherwise the instruments will be invalidated and the penalty imposed by sect. 24 will be incurred: see stat. 45 & 46 Vict. c. 72, sect. 14.

*thirty days* [formerly "two months"] after it has been received in the United Kingdom, on payment of the unpaid duty; (*i*)

"(*b.*) The Commissioners may, if they think fit, at any time within *three* [formerly "twelve"] months after the first execution of any instrument, remit the penalty or penalties, or any part thereof."

**Stamp Act, 1870, &c.**

3. *Stamping after Execution.*

As to remission of penalties.

By sect. 18 of the Act of 1888 additional penalties are imposed in case of default in stamping certain instruments as therein provided: see *post*, p. 101.

Instrument not invalidated by want of a stamp, except in certain cases.

The effect of omitting to stamp an instrument before execution, or in due time where a time is allowed after execution, is to make it not void, but merely inadmissible in evidence; though, in cases where the stamping after execution, or after the expiration of a certain time from the execution, is prohibited, the effect is much the same as if the instrument were declared void. And in such cases the Court will take notice of the time when the stamp was affixed: *Roderick* v. *Hovil*, 3 Camp. 103; *Green* v. *Davies*, 4 B. & C. 235. But, in other cases, it is sufficient if the instrument is duly stamped when it is produced: *Clarke* v. *Jones*, 3 D. P. C. 277; *Preston* v. *Eastwood*, 7 T. R. 95. Where an instrument is stamped after execution, it is thus rendered operative as from the time of execution, and not merely from the time when the stamp is affixed: *Taylor* v. *Lake*, 8 Mod. 226; *R.* v. *Bishop of Chester*, 8 Mod. 364; *Brown* v. *Savage*, 7 W. R. 571.

Practice of Commissioners as to remission of penalties.

The 15th section of the Stamp Act, 1870, authorised the Commissioners to remit the penalty at their discretion, within twelve months after the execution of the instrument. This period is now limited to three months. It has been the practice of the Commissioners not to remit the penalty except on special grounds, to be stated in a memorial, unless the instrument was brought to be stamped within two calendar months after its first execution, in which case the penalty was remitted as a matter of course. It is probable that this period of grace

(*i*) A charterparty executed entirely abroad and stamped within two months after it has been received in this country is admissible in evidence as being within this section; sects. 67 and 68 of the Act do not apply to such a case: *The Belfort*, 9 P. D. 215.

Stamp Act, 1870, &c.

3. *Stamping after Execution.*

will be reduced to thirty days so as to correspond with the period allowed in the case of instruments executed abroad. The date of the instrument, if legible and without erasure, is accepted by the Commissioners as *primâ facie* evidence of the time of first execution; but if there is an alteration or erasure or doubt as to the date, then unless the matter is sufficiently explained by the attestation clause of the instrument, a statutory declaration as to the date of first execution will be required.

Exceptions.

There are, however, certain exceptions to the general rule of the Commissioners, whereby this period of grace is allowed after execution for the stamping of instruments. A list of these exceptions is given in the note (*k*); some of them, as there

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(*k*) AGREEMENTS were by the stat. 23 Geo. 3, c. 58, allowed to be stamped within twenty-one days after execution; and this liberty was by subsequent Acts (7 & 8 Vict. c. 21; 13 & 14 Vict. c. 97) limited to fourteen days. The Act of 1870 has reduced the stamp duty on agreements not under seal to 6*d.*; and the Commissioners do not, except on special grounds, stamp such instruments after the expiration of fourteen days from the date of execution, except on payment of the full penalty of 10*l.*

APPRAISEMENTS must be written out within fourteen days after the making thereof upon duly stamped material: see sect. 38 of the Stamp Act, 1870. The Commissioners do not, as a general rule, stamp appraisements after the expiration of fourteen days, except on payment of the penalty.

ARTICLES OF CLERKSHIP "are not to be stamped at any time after the expiration of six months from the date thereof, except upon payment of penalties as follows:—(1.) If brought to be stamped within one year after date, ten pounds: (2.) If brought after one year, and within five years after date, for every complete year, and also for every additional part of a year elapsed since the date, ten pounds: (3.) In every other case, fifty pounds:" sect. 43 of the Stamp Act, 1870. The effect of this enactment was to limit the period during which the Commissioners had a discretionary power to remit the penalty to six months instead of a year. It has been, however, the practice to exact the penalty on stamping articles of clerkship at any time after execution. Ordinary articles of apprenticeship, as also assignments of articles of clerkship or apprenticeship, are subject to the same rules as deeds in general.

BILLS OF EXCHANGE and promissory notes (other than foreign bills, as to which see in the text, *supra*, p. 16) may be stamped after execution only on the terms specified in sect. 53 of the Stamp Act, 1870, which is as follows:—

"(1.) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient

appears, are created by the regulations or practice of the Commissioners, and may be waived on special

Stamp Act, 1870, &c.

3. *Stamping after Execution.*

amount but improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, and of ten pounds if not so payable.

"(2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof."

The Act also imposes certain personal penalties for issuing unstamped bills or notes: see sect. 54.

Bills of Lading are not to be stamped after the execution thereof; and every person who makes or executes any bill of lading not duly stamped shall forfeit the sum of fifty pounds: see sect. 56 of the Stamp Act, 1870.

Charter-parties.—"An executed instrument chargeable with duty as a charter-party, and not being duly stamped, may be stamped with an impressed stamp upon the following terms, that is to say:—(1.) Within seven days after the first execution thereof, on payment of the duty, and a penalty of four shillings and sixpence; (2.) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of ten pounds; and shall not in any other case be stamped with an impressed stamp:" sect. 68 of the Stamp Act, 1870.

Contract Notes.—The duty on these instruments may be denoted by an adhesive stamp; and the penalty for making an unstamped note is 20*l.*: sect. 69 of the Stamp Act, 1870. A contract note may, however, be stamped after execution on payment of the penalty under sect. 15, and it is the practice of the Commissioners strictly to exact the latter penalty. By the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), sect. 17, a "contract note" is defined for the purposes of the Stamp Act, 1870, as a "note sent by a broker or agent to his principal (except where such principal is acting as broker or agent for a principal) advising him of the sale or purchase of any stock or marketable security."

Copies or Extracts may be stamped at any time within fourteen days after the date of the attestation or authentication on payment of the duty, only without any penalty: sect. 79 of the Stamp Act, 1870. After the expiration of that period the penalty under sect. 15 will, as a general rule, be inflicted.

Delivery Orders.—The duty may be denoted by an adhesive stamp: the penalty for making use of an order not duly stamped is 20*l.*; but an order may be stamped after execution on payment of the penalty under sect. 15, which will, as a rule, be strictly exacted.

Leases.—The duty on leases or agreements for leases for any definite term less than a year of (a.) any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum; or (b.) of any furnished dwelling-house or apartments; or (c.) any duplicate or counterpart thereof, may be denoted by an adhesive stamp; but, in all

Stamp Act, 1870, &c.

3. *Stamping after Execution.*

grounds; others, however, are expressly enacted by statute.

Where it appears that the instrument was stamped after execution, the Court will not generally inquire whether the penalty has been paid: *R.* v. *Preston,* 5 B. & Ad. 1034; unless indeed a

Proof of payment of penalty.

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these cases, the stamp must be impressed or affixed at or before execution of the instrument under a penalty of 5*l.*, except in the case of letters or correspondence constituting an agreement for a lease: see sects. 99, 100 of the Stamp Act, 1870. If a lease or agreement for a lease is brought to be stamped at any time after execution, the penalty under sect. 15 will be strictly enforced.

Letters of Allotment or Renunciation.—The duty is regulated by similar statutory provisions as in the case of "contract notes:" sect. 101 of the Stamp Act, 1870; and the practice of the Commissioners is the same.

Policies of Assurance (Marine) are not allowed to be stamped at any time after they are signed or underwritten on any pretence whatever except in the following cases:—

"(1.) A policy of mutual insurance already stamped may be stamped with an additional stamp or stamps, provided that at the time the additional stamp or stamps are required, it is not signed or underwritten to a greater amount than the stamp or stamps already impressed will warrant:" stat. 30 & 31 Vict. c. 23, sect. 9.

"(2.) A policy executed abroad may be stamped at any time within fourteen days after it is first received in the United Kingdom on payment of the duty only:" sect. 117 of the Stamp Act, 1870.

"(3.) A policy by which distinct interests of two or more persons are insured, duly stamped in respect of the aggregate interests but not in respect of each of them, may be stamped with an additional stamp or stamps at any time within one month after the last risk has been declared:" 39 & 40 Vict. c. 6, sect. 1.

"(4.) A policy not duly stamped may be stamped after execution under the Stamp Act, 1870, except that the penalty for so stamping the same is to be 100*l.*:" 39 & 40 Vict. c. 6, sect. 2.

Policies of Assurance (other than Marine) will not, as a general rule, be stamped at any time after execution except upon payment of the penalty under sect. 15 of the Stamp Act, 1870. The duty may be denoted by adhesive stamp, and a personal penalty of 20*l.* is imposed on making a policy not duly stamped: sect. 118 of the Stamp Act, 1870.

Proxies and voting papers cannot be stamped at all after execution: sect. 102 of the Stamp Act, 1870.

Receipts may be stamped within fourteen days on payment of duty, and of a penalty of 5*l.*; or after fourteen days but within a month on payment of the duty and of a penalty of 10*l.*; afterwards not at all: sect. 122 of the Stamp Act, 1870. In this case a personal penalty of 10*l.* is also imposed on giving a receipt liable to duty not duly stamped.

Stamp Act, 1870, &c.

3. *Stamping after Execution.*

period of more than twelve (now three) months has elapsed since the execution, in which case the instrument, if executed after the 14th August, 1850, will be inadmissible without a stamp denoting the payment of the penalty.

Sect. 16 of the Stamp Act, 1870, enacts as follows:—

Terms upon which unstamped or insufficiently stamped instruments may be received in evidence in court.

"(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon (*l*), and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty, and the penalty payable by law on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

The officer of the court to account for duties and penalties.

"(2.) The officer receiving the said duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the cause or proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to the Receiver-General of Inland Revenue, or to such other person as the Commissioners may appoint, the money received by him for the said duty and penalty.

"(3.) Upon production to the Commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly."

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Scrip Certificates.
Share Warrants.
Warrants for Goods.

The duty on these several classes of instruments may be denoted by adhesive stamps; and personal penalties are in every case imposed for executing such instruments not duly stamped: see the Stamp Act, 1870, sects. 101, 127, and 92. And it is the general practice of the Commissioners also to enforce the penalty under sect. 15 of the Act, when any such instruments are brought to them to be stamped at any time after execution.

(*l*) The ruling of the Judge respecting the sufficiency of the stamp on a document admitted by him at the trial is final: see sect. 31 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

Stamp Act, 1870, &c.

3. *Stamping after Execution.*

By the stat. 44 & 45 Vict. c. 12, s. 44, it is enacted that :—

Production of insufficiently stamped instrument before an arbitrator.

"Section 16 of the Stamp Act, 1870, in relation to the production of instruments in evidence, shall apply to such production in all proceedings before an arbitrator or referee, and for the purposes of such application, the arbitrator or referee shall be the 'officer' as well as the 'judge' in the said section mentioned."

And as regards policies of marine insurance it is enacted by the stat. 39 & 40 Vict. c. 6, s. 2, that :—

"Section 16 of the Stamp Act, 1870, shall apply to a policy of sea insurance. Such policy shall, for the purposes of the said section, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same as aforesaid shall be the sum of 100*l.*"

Agreement in evasion of the stamp laws.

An agreement that a document shall for the present remain unstamped, but that, if it should become necessary to stamp it, one of the parties will cause the stamp to be impressed and pay the penalty, was held to be void : *Abbott* v. *Streeten*, 3 J. & L. 616 ; see *Nixon* v. *Albion Marine Insurance Co.*, L. R. 2 Ex. 338. And now by the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), sect. 20, it is enacted that :—

Conditions and agreements as to stamp duty void.

"Every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the passing of this Act, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void."

Right of purchaser of mortgaged property.

A purchaser of property which is subject to a mortgage is entitled on a contract for sale with the mortgagor, to require the mortgage-deed to be stamped before completion with the proper *ad valorem* stamp at the vendor's expense, notwithstanding that the mortgagee agrees to join in the conveyance to the purchaser : *Whiting* to *Loomes*, 17 Ch. D. 10. See, however, *Re Birkbeck Freehold Land Society*, 24 Ch. D. 119, where it was held that on a compulsory purchase of lands from the society, the purchasers were not entitled to require certain reconveyances to be stamped, which had been

executed merely to vest the legal estate in the society for the purposes of the purchase.



4. Alteration and Re-execution of Instruments.



A deed which has once performed its office cannot be used in a second transaction to which its terms may apply, without re-execution and a new stamp: *Hammond* v. *Foster*, 5 T. R. 635; *Chitty* v. *Bishop*, 4 Moo. 413; see *ante*, Vol. I. p. 393. Thus, a note made and deposited merely as a security for a debt, and delivered up on payment of the debt, cannot be again used as a security for a new debt: *Bartrum* v. *Caddy*, 9 A. & E. 275. But, of course, a bill is negotiable until it is paid by the acceptor; so that the drawer taking it up may negotiate it again upon his own indorsement: *Callow* v. *Lawrence*, 3 M. & S. 97.

Deed cannot be used twice with one stamp.

Bill taken up by drawer.

A material addition to or alteration of an instrument after execution requires, of course, re-execution, and also a fresh stamp, if the instrument was previously stamped: *Hill* v. *Patten*, 8 East, 373; see *French* v. *Patten*, 9 East, 350. And in this respect it makes no difference whether the alteration was made with or without the consent of the parties: *Bowman* v. *Nichol*, 5 T. R. 537. If the instrument was not stamped, it is presumed that the re-execution will make no difference in the terms on which the stamp will be affixed. An indorsement varying the terms of an agreement requires a new stamp: *Bacon* v. *Simpson*, 3 M. & W. 78; see *Stephens* v. *Lowe*, 2 M. & Sc. 44. So, no material alteration can be made in a bill of exchange after it has been completed: *Knill* v. *Williams*, 10 East, 431; *Downe* v. *Richardson*, 5 B. & Al. 674. But it is otherwise while the bill or note is *in fieri*; so that a note, commencing as a single note, "I promise to pay, &c.," signed by two persons, has been held a joint and several note, there being no reason to suppose that the second signature was an afterthought: *Clerk* v. *Blackstock*, Holt, 474; see *Ex parte White*, 2 D. & Ch. 234. Of course, a material alteration in a bill or note makes it void, as the old stamp is spent, and it cannot be stamped after execution: *Knill* v. *Williams*, 10 East, 431; *Master* v. *Miller*,

Material alterations after execution.

Alteration of unstamped instrument.

Alteration of bill while *in fieri*.

Stamp Act, 1870, &c.

4. *Alteration, &c.*

45 & 46 Vict. c. 61, s. 64.

5 T. R. 367; *Outhwaite* v. *Luntley*, 4 Camp. 179. See *Leykariff* v. *Ashford*, 12 Moo. 281.

With regard to alterations of bills of exchange it is enacted by sect. 64 of Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), as follows:—

"(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsees.

"Provided that—

"Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its general tenor.

"(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

What is a material alteration.

The following are some of the leading decisions on the question as to what alterations are material, so as to render a document void unless re-executed and stamped afresh (*m*). Bills of exchange and promissory notes have been held to be vitiated by the addition of a clause providing for payment of interest at a specified rate: *Warrington* v. *Early*, 2 T. R. 763; by the addition of another maker's name after issue: *Gardner* v. *Walsh*, 5 E. & B. 83. Alterations as to date, amount, or time, or place of payment: *Walton* v. *Hastings*, 4 Camp. 223; *Cardwell* v. *Martin*, 9 East, 180; *Master* v. *Miller*, 4 T. R. 320; *Bowman* v. *Nichol*, 5 T. R. 537; *Alderson* v. *Langdale*, 3 B. & Ad. 660; *R.* v. *Treble*, 2 Taunt. 329. The insertion of a place for payment, where the acceptance is general: *Cowie* v. *Halsall*, 4 B. & Ad. 197; *Taylor* v. *Moseley*, 6 C. & P. 278; *Crotty* v. *Hodges*, 4 M. & Gr. 561; and see stat. 45 & 46 Vict. c. 61, s. 64, *supra*. The removal of the

(*m*) Most of these cases were decided on the ground that material alterations were made after execution without the consent of all the parties; but such alterations, even if made with such consent, would constitute a new contract and so require a fresh stamp.

name of one of the makers, where the obligation is joint and several: *Mason* v. *Bradley,* 11 M. & W. 590. So also, where an addition was made as to the rate of exchange at which a bill drawn on Paris was to be paid: *Hirschfeld* v. *Smith,* L. R. 1 C. P. 340. Where a memorandum was indorsed on a contract altering the time for its completion it was held that there was a new contract necessitating a fresh stamp: *Bacon* v. *Simpson,* 3 M. & W. 78. In *Powell* v. *Divett,* 15 East, 29, it was held that a broker's sale-note was annulled by the addition of a memorandum providing for allowance to be made in case of damage of the goods. So also where an attempt was made to convert an agreement not under seal into a deed, by affixing seals to the signatures of the parties: *Davidson* v. *Cooper,* 11 M. & W. 784; *S. C.* in Ex. Ch., 13 M. & W. 353. As to what alterations in the terms of a tenancy will amount to a new demise, see *Crowley* v. *Vittey,* 7 Exch. 319; *Watson* v. *Wand,* 8 Exch. 335. The result of the cases seems to be that an alteration will be regarded as material, if it causes the instrument to have a legal effect different from its original legal effect. See *Hill* v. *Patten,* 8 East, 373; *French* v. *Patten,* 9 East, 351; *Reede* v. *Deere,* 7 B. & C. 261; see also Taylor on Evidence, 1550; 1 Sm. L. C. 831 *et seq.*

Alteration to correct mistake.

A mistake may be corrected by alteration and re-execution, without rendering a fresh stamp necessary; even in the case of a bill of exchange: *Kershaw* v. *Cox,* 10 East, 435; *Jacobs* v. *Hart,* 2 Stark. 45; *Cardwell* v. *Martin,* 9 East, 190; *Byrom* v. *Thompson,* 11 A. & E. 31. See *Knight* v. *Clements,* 8 A. & E. 215; *Cole* v. *Parkin,* 12 East, 471; *Sawtell* v. *Loudon,* 5 Taunt. 359; *Robinson* v. *Touray,* 1 M. & S. 217; *Sanderson* v. *Symonds,* 4 Moo. 42; *Hall* v. *Chandless,* 12 Moo. 316. But see *Shaw* v. *Jakeman,* 4 East, 201. An alteration, whether material or not, of an instrument made by a party taking any benefit under it by way of contract or obligation, without the consent of the party bound destroys its obligatory form, though it does not revest any estate or property passed by it: *Doe* v. *Hirst,* 3 Stark. 60; *Mollett* v. *Wackerbath,* 5 C. B. 181. An immaterial alteration, made by consent, does not avoid the

Stamp Act, 1870, &c.

4. *Alteration, &c.*

instrument or render a fresh stamp necessary: *Doe* v. *Houghton*, 1 M. & R. 208; *Hartley* v. *Warren*, 4 Sc. N. R. 728.

Alterations while the instrument is *in fieri*.

Alterations while the instrument is *in fieri*, or executed by some of the parties only, intended to bind the parties subsequently executing, and assented to by the parties who have executed, do not render a fresh stamp necessary: *Matson* v. *Booth*, 5 M. & S. 223; *Ex parte Sawyer*, 17 Ves. 244; *Hall* v. *Chandless*, 12 Moo. 316; *Downes* v. *Richardson*, 5 B. & Al. 674; *Knight* v. *Crockford*, 1 Esp. 189; *Alten* v. *Farren*, 5 C. & P. 513; *Jones* v. *Jones*, 1 Cr. & M. 721; *Spicer* v. *Burgess*, 1 C. M. & R. 129. See *London and Brighton Rail. Co.* v. *Fairclough*, 3 Sc. N. R. 68. In *Leyburn* v. *Warrington*, 1 Stark. 162, a deed containing a covenant to pay an annuity quarterly was signed, and after signature, but before the deed was sealed and delivered, a memorandum was indorsed thereon and executed providing that the payments should be made half-yearly; it was held that the deed and indorsement were one transaction, and that a fresh stamp was not required.

Additions contemplated by instrument.

Additions which are contemplated and provided for by the frame of the instrument itself, may be made without avoiding it or rendering any further stamp necessary. Thus, a schedule of creditors, and of their debts, may be added to a composition deed after the execution of it by the debtor, if that is consistent with the apparent intention: *West* v. *Steward*, 14 M. & W. 47. See *Hudson* v. *Revett*, 2 Moo. & P. 633; *Weeks* v. *Maillardet*, 14 East, 568. So where an agreement was executed providing for a boundary line to be determined by an indifferent surveyor; it was held that a memorandum agreeing to appoint a particular surveyor did not require a fresh stamp: *Taylor* v. *Parry*, 1 M. & Gr. 604.

Presumption as to time of making alterations.

Alterations and interlineations in deeds and ordinary instruments are presumed to have been made before execution, until the contrary is shown: 12 Vin. Ab. 58. But, in the case of a bill or note, the onus of showing when the alteration was made is generally on the plaintiff: *Knight* v. *Clements*, 8 A. & E. 215. See *Sibley* v. *Fisher*, 7 A. & E. 444.

Stamp Act, 1870, &c.

5. *Several Stamps.*

## 5. Several Stamps on One Instrument.

By sect. 8 of the Stamp Act, 1870, it is enacted that :—

Instruments to be separately charged in certain cases.

"Except where express provision to the contrary is made by this or any other Act,

"(1.) An instrument containing or relating to several distinct matters is to be separately and distinctly charged as if it were a separate instrument in respect of each of such matters.

"(2.) An instrument made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be charged with duty in respect of such last-mentioned consideration or considerations as if it were a separate instrument made for such consideration or considerations only."

Appointment of new trustees.

Thus an instrument appointing a new trustee and conveying to or vesting in him the trust property will require a stamp of 10*s.* in respect of the appointment and a further stamp in respect of the conveyance or vesting declaration : see *Hadgett* v. *Commissioners of Inland Revenue*, 3 Ex. D. 46.

What are "distinct matters."

The question has frequently arisen as to what are "distinct matters" so as to require an instrument to bear more than one stamp. The distinction on this subject is thus stated in a passage which is often cited : "If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the interest affects the separate interests of several, and there is a community of the same subject-matter as to all the parties, then a single stamp will be sufficient ; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party." Phillips on Evidence, vol. i. p. 490.

Community of subject-matter.

Partition and settlement of allotments.

Release by next of kin, &c.

What is a sufficient community of subject-matter cannot be stated in general terms. The partition of an estate held in common or coparcenary, and the limitation of the several allotments to distinct uses by way of settlement, may, no doubt, be effected by one deed and under one stamp. So, several next of kin of an intestate may release the administrator under one stamp : *Thomas* v. *Bird*, 9 M. & W. 68.

Cases in which a single

A single stamp has been held sufficient in the

Stamp Act, 1870, &c.

5. *Several Stamps.*

stamp has been held sufficient.

following cases:—A warrant of attorney with a defeasance and release of errors: *Barrow* v. *Mashiter*, 4 East, 431; *Cawthorne* v. *Holben*, 1 B. & P. N. R. 279. An exemplification of letters of administration *de bonis non*, and also of the original grant: *Doe* v. *Gunning*, 7 A. & E. 240. A guarantee by several persons, each to a distinct amount, for the payment of a single debt: *Ramsbottom* v. *Davis*, 4 M. & W. 584. An agreement by several persons to advance specified distinct sums for a dock: *Davis* v. *Williams*, 13 East, 232; but see *Briggs* v. *Peel*, 11 Jur. 611. A bond by which each of the members of a musical society bound himself separately to attend the meetings: *Bowen* v. *Ashley*, 1 N. R. 274. A bond for payment of money, and also for the observance of the rules of a society: *Dearden* v. *Binns*, 1 M. & R. 130. The several signatures of the parliamentary contract by the subscribers to a railway company: *W. London Rail. Co.* v. *Bernard*, 3 Rail. Ca. 649. Several powers of attorney in one deed by the members of a mutual marine insurance club, authorising certain persons to execute the policies: *Allen* v. *Morrison*, 8 B. & C. 565; see *Linley* v. *Clarkson*, 1 Cr. & M. 436. A bond by principal and surety, containing an indemnity to the surety: *Annandale* v. *Pattison*, 9 B. & C. 919. A covenant by a surety for payment of rent in a lease: *Price* v. *Thomas*, 2 B. & Ad. 218; see *Wharton* v. *Walton*, 7 Q. B. 474, *infra*. An agreement by several underwriters to refer the claim of the insured to arbitration: *Goodson* v. *Forbes*, 6 Taunt. 171. An indenture of apprenticeship to A. for four years, and to B. in a different trade for the three following years: *R.* v. *Inhabitants of Louth*, 8 B. & C. 247. (The common purpose here was an apprenticeship for seven years.) See *Morris* v. *Cox*, 3 Sc. N. R. 116. An agreement by one person in respect of the freight of goods belonging to himself solely, and of other goods belonging to himself and partners: *Shipton* v. *Thornton*, 9 A. & E. 314. A release by several commoners of their separate rights of common: *Carpenter* v. *Buller*, 2 M. & Rob. 298. Two demises of separate properties for different terms, at distinct rents, and with special stipulations

Stamp Act, 1870, &c.

5. *Several Stamps.*

Lease, with other matter.

as to each, by one deed, bearing an *ad valorem* stamp on the aggregate amount of the rents : *Blount* v. *Pearman*, 1 Sc. 55 ; *Boase* v. *Jackson*, 3 Br. & B. 185. An agreement for a lease, with an option to purchase the fee : *Worthington* v. *Warrington*, 5 C. B. 635 ; but not if the option extends to other property not to be demised : *Lovelock* v. *Franklyn*, 8 Q. B. 371. A lease with an agreement for the sale of *fixtures* (semble) : see *Corder* v. *Drakeford*, 3 Taunt. 382. The fixtures were accessory to the house. But it has been said, that an agreement for the sale of *goods* (*e.g.* stock in trade) in a lease, requires a further stamp, as the goods are not accessory to the lease : *Clayton* v. *Burtenshaw*, 5 A. & E. 41. The distinction is fine. A surrender of a lease for a money consideration, with an agreement for a new lease requires no stamp in addition to the *ad valorem* stamp ; the agreement is part of the consideration, and therefore part of the transaction : *Doe* v. *Phillipps*, 11 A. & E. 796. In *Wharton* v. *Walton*, 7 Q. B. 474, a brewer's lease contained a covenant by the lessee to take beer of the lessor, and a guarantee by a surety for the price to a certain amount. The guarantee was held to require a separate stamp. But it is clear that the whole arrangement was accessory to the lease ; as well might a covenant in a lease to leave the straw, &c., for the next incoming tenant at a certain price, be charged as distinct from the lease. In *Coster* v. *Cowling*, 7 Bing. 456, a lease of a house at a certain rent, and of fixtures and furniture at a further rent, and stamped sufficiently to cover the house rent only, was rejected. The Court said, either the rents were to be taken together, or the lease of the fixtures and furniture required a separate stamp, as a lease not otherwise charged. The peculiarity of the cases on leases is, that leases are specifically charged, and any extraneous matter, not incident to the lease, cannot be covered by the lease stamp. Had the instruments been mere agreements, or had leases not been charged except under the general denomination of deeds, a single stamp would have been sufficient. Thus a deed containing covenants for the title to copyholds by a vendor with the purchaser, a declara-

Stamp Act, 1870, &c.

5. *Several Stamps.*

tion of trust by the vendor, and the usual mortgage covenants by the purchaser with a mortgagee, with a power of sale and other mortgage clauses, requires but one stamp: *Rushbrook* v. *Hood*, 5 C. B. 131. In *Walker* v. *Giles*, 6 C. B. 662, it was said, per *Maule*, J., that a proviso in a mortgage deed that the mortgagor should be tenant at will of the mortgagee at a certain rent with a power of re-entry by the mortgagee, would not render the instrument liable to duty as a lease. As to mortgages expressed to be for an aggregate amount which is in fact contributed by several persons, see *Reed* v. *Wilmot*, 7 Bing. 577; *Doe* v. *Govier*, 5 L. T. 37.

Distinct transactions between the same parties not being specially charged.

An instrument comprising distinct transactions, not incidental to any common purpose, but all taking place between the same parties, was formerly not considered liable to several duties, unless the several subject-matters, or some of them, were specially charged by some particular description. "If a party puts several indentures on the same sheet, he is liable to pay distinct stamps [see now sect. 7 (2) of the Stamp Act, 1870]. But there is nothing to prevent a person making one indenture do the work of several deeds:" per *Maule*, J., in *Rushbrook* v. *Hood*, 11 Jur. 932. But this rule is now abrogated by the express terms of sect. 8 of the Act, whereby all distinct matters are separately and distinctly chargeable with duty.

Several documents relating to one transaction.

If a number of separate instruments, whether written on the same material or detached, constitute one contract relating to the same subject-matter only one stamp will be required.

Where a memorandum assenting to the terms contained in a letter, and subsequently a guarantee for payments to be made by one of the parties, were written on the back of the letter, it was held that the whole required but one stamp, as being one transaction: *Stead* v. *Liddiard*, 8 Moo. 2.

Correspondence, &c.

Where an agreement consists of a series of letters only one stamp will be required, which should be affixed to the letter which finally and unconditionally accepts the terms proposed or discussed in the previous letters, and should be cancelled by the writer of such letter at the time of signature.

Detached papers, not in the form of letters, but constituting together a record of an agreement, and made during and as part of the treaty, have been held to be admissible with a single stamp on one of them: *Peate* v. *Dicken*, 1 C. M. & R. 422. So, in the case of *Re Albert Average Association* (*Blyth's Case*), L. R. 13 Eq. 529. B. & Co. wrote to the managers of the Association to insure a ship, and undertook to abide by the rules and regulations of the Association; a duly stamped policy was accordingly issued which did not refer to the rules: it was held that the letter and policy formed one agreement, and consequently that the letter was admissible unstamped.

Where two persons exchanged similar undertakings in writing relating to the same subject-matter, and each expressed to be given in consideration of the other, it was held that the two undertakings constituted one agreement, and that inasmuch as one of them had been properly stamped the other was admissible without a stamp: *Peate* v. *Dicken*, 1 C. M. & R. 422.

Cases in which several stamps have been held necessary.

Purchase of several lots.

The following are the principal cases (except those on mortgages, stated *infra*), in which several stamps have been held necessary. One memorandum of agreement by one purchaser with one vendor, for the purchase of several lots at an auction: *Watling* v. *Horwood*, 12 Jur. 48. It was said, that there were distinct contracts for each lot; the decision has been criticised on the ground that it was not necessarily so, and, if it were so, could not affect the question as to the stamp; inasmuch as an agreement containing several stipulations, with a provision that the performance of one part should not be dependent on that of another, would not require several stamps. (See *Balday* v. *Parker*, 2 B. & C. 37.) But the principle of the decision has been adopted in several subsequent cases, and does not seem now to be open to question. In *Powell* v. *Edmunds*, 12 East, 6, there were two memoranda of agreement with respect to different lots but signed by the same purchaser, with a stamp on the first memorandum only; it was held that two stamps were necessary, but the stamp was appropriated to

Stamp Act, 1870, &c.

5. *Several Stamps.*

the first memorandum. In *Roots* v. *Lord Dormer*, 4 B. & Ad. 77, all the purchasers at an auction had joined in one memorandum, which was held to contain a distinct contract in respect of each lot, even of several lots purchased by one person. So, where an auctioneer (as agent for the purchasers) set down the name of each purchaser against the lot as it was knocked down to him: *James* v. *Shore*, 1 Stark. 426; *Emmerson* v. *Heelis*, 2 Taunt. 38. Where property is purchased from several persons having separate interests therein (as tenants in common, or a tenant for life and remainderman) it would seem that the question as to whether one or several stamps will be necessary will depend on the terms of the agreement itself, that is to say, on whether it is so worded as to be a contract for the purchase of the whole estate at an entire price, or so as to give the purchaser a right to enforce performance against each vendor and *vice versâ*, in respect of the separate interests: see Dart, V. & P. 795 (6th ed.); Sugd. V. & P. 567; and see *Wills* v. *Bridge*, 4 Exch. 193; *Doe* v. *Tidbury*, 14 C. B. 304. Where several tenants in common contracted to sell copyholds, it was held that only one stamp was necessary in respect of the surrender, but that the purchaser must be separately admitted in respect of each tenant's interest, and that a separate stamp was necessary in respect of each admittance: *R.* v. *Eton College*, 8 Q. B. 526.

Builder's contract for distinct works with different persons.

Contracts by a builder, by the same general clause, with several artificers, for different works, to be performed on the same building, according to distinct annexed specifications: *Briggs* v. *Peel*, 11 Jur. 611.

Lease, with other matter.

A lease, with an agreement to sell the demised property, and also other property: *Lovelock* v. *Franklyn*, 8 Q. B. 371. A lease of a shop, with an agreement for the sale of the stock in trade: *Clayton* v. *Burtenshaw*, 5 A. & E. 41 (decided on another ground). A guarantee on a brewer's lease, for the price of beer, which the lessee is bound to take of the lessor: *Wharton* v. *Walton*, 7 Q. B. 474. (See p. 29.)

Several instruments on one sheet.

Distinct admissions of several persons to a corporation on one sheet, with one stamp, not appropriated to any one: *R.* v. *Reeks*, Str. 716. So of distinct affidavits, 2

Stamp Act, 1870, &c.

5. *Several Stamps.*

Chitty, 14. But, if the stamp can be appropriated to one of the instruments, to the exclusion of the others, this may be done, and the instrument to which the stamp is appropriated, will be admissible accordingly: *Powell* v. *Edmunds*, 12 East, 6; *Robson* v. *Hall*, Peake, 128; *Evans* v. *Pratt*, 4 Sc. N. R. 378; *Millen* v. *Dent*, 10 Q. B. 846. See *Doe* v. *Day*, 13 East, 241.

### 6. Instruments Executed or to Operate Abroad, &c.

Local operation of the stamp laws.

The stamp duties are, of course, only payable in Great Britain and Ireland; and in the absence of express provisions to the contrary, the British Colonies and dominions abroad must be regarded as foreign countries, for the purposes of the stamp laws. Every part of the British dominions within which a particular law has no force is, with respect to that law, a foreign country. This was formerly the case between England and Ireland, with respect to the then stamp laws of those countries respectively: *Snaith* v. *Mingay*, 1 Mau. & S. 87 (*n*).

Agreement made at sea.

An agreement executed at sea does not require a stamp: *Ximenes* v. *Jaques*, 1 Esp. 311. See *Winbled* v. *Malmberg*, 1 Esp. 454.

Instrument executed abroad affecting personalty here.

An instrument executed abroad by a person domiciled abroad, and relating to his personal property, other than chattels real, in Great Britain,

(*n*) Stat. 1 & 2 Geo. 4, c. 55, was passed "to remove doubts as to the amount of stamp duties to be paid on deeds and other instruments, under the several Acts in force in Great Britain and Ireland respectively." The enactments in that statute are expressed in general terms, which would charge all instruments, wherever executed and whatever the residence of the parties, or the subject-matter of the instrument. As it would be absurd to take this literally, the Act must be treated as operating only to the extent expressed by its preamble and title, viz., to make Great Britain and Ireland not foreign countries to each other for the purposes of the stamp laws. And the same limitation must be regarded as affecting the enactments of the Stamp Act, 1870, which is intituled "An Act for granting certain Stamp Duties in lieu of Duties of the same kind now payable under various Acts, and consolidating and amending provisions relating thereto."

1 & 2 Geo. 4, c. 55.

Stamp Act, 1870, &c.

6. *Execution, &c., Abroad.*

is clearly not liable to stamp duty; for the locality of movable property is deemed to follow the owner's domicil. The cases on legacy duty are conclusive on this point. And there is nothing in the Stamp Acts to charge an instrument executed abroad, and relating to property abroad, merely because the owner has a British domicil; but an instrument executed abroad and relating to real property situate in England cannot be recognised here unless properly stamped: see sect. 17 of the Act, *ante*, p. 2.

Real property.

Instrument executed here to operate abroad.

An instrument is liable to duty if it is executed here, though it relates to property abroad or acts to be done abroad: *Stonelake* v. *Babb*, 5 Burr. 2675; *Wright* v. *Commissioners of Inland Revenue*, 11 Exch. 458. Special provisions are made in the Stamp Act with respect to foreign bills of exchange (*o*).

Foreign revenue laws not enforced here.

If an instrument made abroad, and subject to the law of the country (*i.e.*, not made wholly between persons having a British domicil, and not relating to real property in the United Kingdom), would, by the foreign law, be absolutely void without a stamp, it must, as a general rule (*o*), if unstamped, be held void here; but, in other cases, the revenue laws of a foreign country will not be regarded in our Courts: *Holman* v. *Johnson*, Cowp. 340; *James* v. *Catherwood*, 3 D. & R. 198; *Planché* v. *Fletcher*, Doug. 251. See as to the stamp laws of a British colony, *Alves* v. *Hodgson*, 7 T. R. 241; *Clegg* v. *Levy*, 3 Camp. 166; *Crutchley* v. *Mann*, 5 Taunt. 529; *Snaith* v. *Mingay*, 1 M. & S. 87; and as to the Isle of Man, see *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753.

Colonial stamp laws enforced here.

Foreign currency.

As to stamp duty in respect of money in any foreign or colonial currency, see *ante*, p. 12.

*Foreign Securities.*]—With regard to foreign securities, the stat. 34 & 35 Vict. c. 4, enacts as follows (*p*):—

nterpretation of the

Sect. 2. "The term 'foreign security' means and includes every

(*o*) See as to bills of exchange issued abroad, *post*, p. 59.

(*p*) These enactments are substituted for those contained in sects. 113 and 114 of the Stamp Act, 1870.

security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation or company, bearing date or signed after the third day of June, 1862 (except an instrument chargeable with duty as a bill of exchange or promissory note),

"(1.) Which is made or issued in the United Kingdom; or

"(2.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom.

term "foreign security."

Sect. 3. "Every person who in the United Kingdom makes, issues, assigns, transfers, or negotiates any foreign security, not being duly stamped, shall forfeit the sum of twenty pounds."

Penalty on issuing, &c., any foreign security not duly stamped.

In the case of *Grenfell* v. *Commissioners of Inland Revenue*, 1 Ex. D. 242, it was held that bonds issued in New York but offered for sale and delivered in this country, were not liable to duty within the above enactment. But now, by the stat. 48 & 49 Vict. c. 51, sect. 21, it is enacted that,—

Securities issued abroad, but sold here.

"The term 'foreign security' shall not include a security by or on behalf of any Colonial Government, but shall otherwise have the necessary assignment to it by the Act 34 & 35 Vict. c. 34 [*supra*], and shall also include a security which though originally issued to the holder out of the United Kingdom, is offered by him for subscription, and given or delivered to the subscriber in the United Kingdom."

By sect. 115 of the Stamp Act, 1870,—

"The Commissioners may at any time, without reference to the date thereof, allow any foreign security to be stamped without the payment of any penalty, upon being satisfied, in any manner that they may think proper, that it was not made or issued, and has not been transferred, assigned, or negotiated within the United Kingdom, and that no interest has been paid thereon within the United Kingdom."

Foreign securities may be stamped without penalty.

For the rates of duties payable in respect of foreign securities, see the Table of Duties, *post.*

## 7. Agreements.

What agreements are charged.

The agreement duty of 6*d.* is charged on a contract under hand only, whether obligatory on the parties from being a written instrument (*i.e.* the subject-matter being such as to render a writing

Stamp Act, 1870, &c.

7. *Agreements.*

necessary to the validity of the contract), or merely evidence of a contract which might be made by parol: see *Vaughton* v. *Brine*, 1 Sc. 263 (*q*). A writing which is evidence of an agreement is liable, though it be not signed: *Chadwicke* v. *Clarke*, 1 C. B. 700 (*r*). Agreements by deed are chargeable as deeds with a stamp of 10*s*.

What is an agreement for purposes of duty.

The writing must have been made with the intention of containing in itself the terms of an agreement between the parties: *Beeching* v. *Westbrook*, 8 M. & W. 411; *Knight* v. *Barber*, 16 M. & W. 70; and it must, at the time it is made, be evidence of a contract then binding either on both or on one of the parties. Thus, a proposal in writing is binding on the party making it, if the other party assents, though but verbally or by conduct, before it is retracted; and such a proposal must be stamped: *Bowen* v. *Fox*, 2 M. & R. 167. So where a document stating terms was sent by one party unsigned to the other party who signed it, it was held that the document was an agreement liable to duty: *Hegarty* v. *Milne*, 18 Jur. 496. See also *Hughes* v. *Budd*, 4 Jur. 654. But a proposal which is not, by an unconditional acceptance, made binding on the party making it, is not evidence of an agreement within the Stamp Act, though the parties subsequently contract with reference to it: see *Doe* v. *Cartwright*, 3 B. & Al. 326. Thus, if parties verbally agree to be bound by the terms of a general prospectus issued by one of them, the prospectus does not require a stamp: *Edgar* v. *Blick*, 1 Stark. 464. And a written proposal which was not accepted when it was made, though the parties afterwards verbally agreed to the terms contained in it, was admitted without a stamp: *Drant* v. *Brown*, 3 B. & C. 665. In *Williams* v. *Stoughton*, 2 Stark. 292, where a schoolmaster, on being applied to for his terms, in reply sent

Proposal accepted.

Proposal followed by verbal agreement.

(*q*) So in *Nicholson* v. *Smith*, 3 Stark. 128, a bill of exchange, though duly stamped as such, was held not to be admissible as evidence of a contract, as not bearing an agreement stamp.

(*r*) "The duty of 6*d*. may be noted by an adhesive stamp to be cancelled by the person by whom the agreement is first executed:" sect. 36 of the Stamp Act, 1870.

a copy of his prospectus, it was held that the copy was a proposal in writing, and that the proposal having been accepted, the production of it duly stamped was essential; but this case may be regarded as virtually overruled by the decision in *Clay* v. *Crofts*, 20 L. J. Ex. (N. S.) 361, where, under similar circumstances, a schoolmaster's prospectus was admitted unstamped. Again, an estimate for work, intended as a proposal, but not acceded to, may be read without a stamp, in reduction of the plaintiff's demand: *Penniford* v. *Hamilton*, 3 Stark. 475. So, a letter of application for shares in a company, answered by a letter of allotment containing terms varying from those proposed, does not form with the letter a written agreement: *Vollans* v. *Fletcher*, 1 Exch. 20; *Willey* v. *Parratt*, 3 Exch. 211. In *Duke* v. *Andrews*, 2 Exch. 290, the defendant never assented to the terms in the letter of allotment, and it was held that he was not bound. And where the defendants, having the letter of application, did not produce it after notice, it was presumed that it differed from the letter of allotment: *Moore* v. *Garwood*, 19 L. J. Ex. 15. See *Doe* v. *Cartwright*, 3 B. & Al. 326, where a written proposal of terms of a lease was followed by performance with a variation, but no further writing, was held not liable to duty. In *Hawkins* v. *Warre*, 3 B. & C. 690, a proposal for a tenancy not accepted was read without a stamp, to rebut evidence of a prior concluded agreement.

Proposal followed by variation of terms.

In *Vollans* v. *Fletcher*, and *Willey* v. *Parratt* (cited above), it was further held, that the letters of allotment, which had been accepted and acted on by the allottees, did not require stamps, because they were mere proposals, and did not contain complete agreements. And similar decisions were given in *Moore* v. *Garwood*, 19 L. J. Ex. 15, and *Hudspeth* v. *Yarnold*, 14 Jur. 578. These decisions seem quite irreconcileable with the authorities already cited. See, too, *Chadwicke* v. *Clarke*, 1 C. B. 710, where *Maule*, J., said, with reference to the stamp duty, "Where the terms of an agreement are reduced into writing, in the shape of a proposal on one side, assented to on the other, that is a binding contract." It is obvious,

Proposal in writing accepted, held not to require a stamp.

Stamp Act, 1870, &c.

7. *Agreements.*

that if an agreement signed by one party only does not require a stamp, the duty may be evaded in the majority of cases: see *Chanter* v. *Dickinson*, 6 Sc. N. R. 182.

Writing not intended to be evidence.

A writing containing the terms of a contract, but not intended to be in itself either binding as a contract or proposal, or evidence of the contract (*e.g.* a draft of an intended agreement), requires no stamp:

Draft.

*Doe* v. *Pedgriph*, 4 C. & P. 312. There the words, "We approve of this draft," signed by the parties, were held not to import an actual agreement. But in *Chadwicke* v. *Clarke*, 1 C. B. 700, a draft, settled by the solicitors of both parties, though not signed by the parties themselves, was held to require a stamp. Yet it is obvious that after such draft has been settled neither party is bound by it, either as a concluded agreement, or as a proposal waiting the acceptance of the other party.

Writing containing some of the terms only.

A written proposal with reference to one of the terms of an arrangement, the principal part of which was settled verbally, has been received without a stamp: *Bethel* v. *Blencowe*, 3 Sc. N. R. 568.

Resolution of committee.

A resolution signed by a provisional committee, respecting the terms on which they were to engage a secretary, was held not to be an agreement, as it did not appear that the secretary was present or consulted about it: *Vaughton* v. *Brine*, 1 Sc. N. R. 258.

Minute of proceedings.

In *Lucas* v. *Beach*, 1 Sc. N. R. 350, a minute of the proceedings of a committee, in the course of which a verbal contract had been made, was admitted without a stamp; but a minute at a subsequent meeting, of an agreement for a deviation, which was read to the contractor, and to which he assented, was held to require a stamp.

Acknowledgment of subsisting contract.

A mere acknowledgment in writing of a subsisting contract as a past transaction, though it is evidence of the contract, does not require a stamp, if no evasion was intended: *Beeching* v. *Westbrook*, 8 M. & W. 411; *Knight* v. *Barber*, 16 M. & W. 70; *Jenkins* v. *Blizard*, 1 Stark. 418; *Wheeldon* v. *Matthews*, 2 Chitt. 399; *Marshall* v. *Powell*, 11 Jur. 61. See *Pyle* v. *Partridge*, 15 M. & W. 20; *May* v. *Smith*, 1 Esp.

283 ; *Frazer* v. *Bunn,* 8 C. & P. 704 : *Horsfall* v. *Hay,* 2 Exch. 778 ; *Hyne* v. *Dewdney,* 21 L. J. Q. B. (N. S.) 278. But where parties discuss a question in the morning, and in the afternoon put down the result in writing, the inference is, that they mean to abide by what they have written, and the writing will control the parol evidence. In such cases it must be stamped : *Knight* v. *Barber,* 16 M. & W. 69.

Memorandum of facts expressing also the contract implied from them.

In some cases, even where the written acknowledgment was contemporary with the verbal agreement, it was admitted without a stamp. As, a memorandum that " I have in my hand three bills, amounting to 120*l.* 10*s.* 6*d.*, which I have to get discounted or return on demand : " *Mullett* v. *Huchison,* 7 B. & C. 639 (doubted in 11 A. & E. 795) ; *Langden* v. *Wilson,* 7 B. & C. 640. So also, a memorandum that " I A. have this day borrowed of B. 300*l.* at 4*l.* per cent. payable yearly :" *Cory* v. *Davis,* 14 C. B. (N. S.) 370 ; but see *Williamson* v. *Bennett,* 2 Camp. 417, where a memorandum that A. had borrowed of B. a sum of money, and thereby promised to pay interest thereon at a specified rate, was held liable to stamp duty as an agreement. So, an acknowledgment by A., that he has deposited title deeds as a security for 500*l.* and interest, contained in the same writing with a promise to pay the amount to the mortgagee, or order : *Fancourt* v. *Thorn,* 9 Q. B. 312, 10 Jur. 639 ; see *Bowen* v. *Fox,* 2 M. & R. 169 ; *Robertson* v. *Showler,* 13 M. & W. 609. But a note for a specified sum given by a principal and sureties to a bank, and endorsed with a memorandum that it was given to secure a floating balance, was held liable to duty as an agreement : *Cholmeley* v. *Darley,* 14 M. & W. 344 ; see *Leeds* v. *Lancashire,* 2 Camp. 205. In *Barry* v. *Goodman,* 2 M. & W. 768, the following memorandum was read without a stamp :—" I hereby certify, that I remain in the house belonging to Mr. G. upon sufferance only, and agree to give immediate possession to Mr. G. at any time he may require." So, a receipt for rent with a proviso that it should not operate as a waiver of a notice to quit, was held not to be liable to stamp duty as an agreement : *Doe* v. *Fuller,* Tyr. & G. 17. In *Notley* v. *Webb,* 5 C. B. 834, the following memo-

Stamp Act, 1870, &c.

7. *Agreements.*

randum was received without a stamp :—"I acknowledge that you have for my accommodation accepted a bill of even date, for, &c., and I agree to provide for the same when due." In all these cases the writing expressed no other contract than that which was implied from the *facts* of which it was intended to be a memorandum and explanation: see also *Blackwell* v. *M'Naughtan*, 1 Q. B. 127; *Bray* v. *Manson*, 8 M. & W. 668; *Hill* v. *Ramm*, 6 Sc. N. R. 571; *Marshall* v. *Powell*, 9 Q. B. 779; *Pyle* v. *Partridge*, 15 M. & W. 20.

Broker's note. A broker's note to his principal was held not to be an agreement: *Tomkins* v. *Savory*, 9 B. & C. 704; *Josephs* v. *Pebrer*, 1 C. & P. 341. But see now 51 Vict. c. 8, sects. 16, 17, *ante*, p. 19,

Auctioneer's note. note. But an auctioneer's note, if signed by him, is an agreement, as he is agent for both parties: *Ramsbottom* v. *Mortley*, 2 M. & S. 445; see also *Emmerson* v. *Healis*, 2 Taunt. 38; *Champion* v. *Plummer*, 5 Esp. 240; but if not signed the note will not be liable to duty: *Ramsbottom* v. *Tunbridge*, 2 M. & S. 434.

Cognovit. A cognovit, like any other mere acknowledgment, is not liable to an agreement stamp unless it contains special stipulations, as for payment by instalments, &c.: *Ames* v. *Hill*, 2 B. & P. 150; *Bray* v. *Manson*,

Attornment. 8 M. & W. 668; *Morley* v. *Hall*, 2 D. P. C. 494. A mere attornment requires no stamp: *Doe* v. *Edwards*, 5 A. & E. 95; *Doe* v. *Smith*, 8 A. & E. 255; unless it states the terms of the tenancy: *Doe* v. *Frankis*, 11 A. & E. 792: see *Cornish* v. *Searell*, 8 B. & C.

I. O. U. 471. Nor an I. O. U., unless it contains terms, as the time of payment, &c.: *Israel* v. *Israel*, 1 Camp. 499; *Gould* v. *Coombs*, 1 C. B. 543; *Brooks* v. *Elkins*, 2 M. & W. 74: see *Melanotte* v. *Teesdale*, 13 M. & W. 216. As to other acknowledgments, see *Forsyth* v. *Jervis*, 1 Stark. 437; *Blackwell* v. *M'Naughtan*, 1 Q. B. 127.

Consent. A consent to a judge's order does not require a stamp: *Bray* v. *Manson*, 8 M. & W. 668.

Authority. An authority to pay money does not require a stamp: *Parker* v. *Dubois*, 1 M. & W. 30.

Licence. In *Hill* v. *Ramm*, 6 Sc. N. R. 571, the following unstamped writing was held to be a mere licence;—

"In consideration of you withdrawing, at my request, the distress on the premises I hold of you, I authorise you to re-enter and distrain for the rent, 38*l.* 10*s.*, or any less sum due." It was rather an acknowledgment that the distress had not been satisfied. So, also, where a tenant gave to his landlord, who had distrained, a request in writing not to sell the goods; and undertaking that they should remain on the premises; and that he would not replevy; and that the distress should remain in force; and for payment of costs: *Fishwick* v. *Milnes*, 4 Exch. 824.

Notice of dissolution of partnership.

A notice of an agreement to dissolve a partnership is not admissible unless stamped: *May* v. *Smith*, 1 Esp. 283; but where a partnership has been actually dissolved, a notice or advertisement of the fact will not require a stamp: *Jenkins* v. *Blizard*, 1 Stark. 418; see *Wheldon* v. *Matthews*, 2 Chitt. 399.

Promise to pay.

A written promise to pay a sum of money upon a contingency is an agreement and not a promissory note for the purposes of stamp duty, and must be stamped accordingly: *Yeo* v. *Dawe*, 53 L. T. 125; 33 W. R. 739; see also *Barlow* v. *Broadhurst*, 4 Moo. 471. And see further as to promises to pay, *post*, p. 57.

Value of 5*l.*

*Exemption—Agreement or Memorandum the Matter whereof is not of the value of* £5.]—If the subject-matter of an agreement not under seal cannot be shown to have been, at the time of making the agreement, of the pecuniary value of 5*l.* or upwards it may be read without a stamp. A contract of marriage, therefore, without reference to money or property of that value, is exempt: *Orford* v. *Cole*, 2 Stark. 351. See *Browne* v. *Dawson*, 12 A. & E. 624. The value contemplated by the Stamp Act is the direct value of the thing to be done under the agreement, not the value of anything about which it is to be done. Therefore, in an agreement with a carrier or wharfinger, the value of the services, and not that of the goods, is to be considered, though there is a stipulation limiting the carrier's liability as insurer: *Latham* v. *Rutley*, 2 B. & C. 20;

Promise of marriage.

Direct value of thing to be done.

Bailment of goods.

Stamp Act, 1870, &c.
7. *Agreements.*

*Chadwick* v. *Sills*, Id. 15. But perhaps a stipulation *extending* the ordinary liability would require a stamp. And the rule is the same if the bailment is gratuitous: *Baldwin* v. *Alsager*, 13 M. & W. 365.

Tenancy.

So, notwithstanding the express exemption of agreements for leases under the yearly rent of 5*l.*, an agreement for a tenancy requires no stamp if the rent during the whole time for which the tenant is bound to hold may not amount to 5*l.*: *Doe* v. *Amos*, 2 M. & Ry. 180; *Burton* v. *Reevell*, 16 M. & W. 307; *Mayfield* v. *Robinson*, 7 Q. B. 486. So, an agreement to pay interest on a debt exceeding 5*l.* is exempt, if the interest may not amount to 5*l.*: *Melanotte* v. *Teasdale*, 11 M. & W. 216. So, an agreement to give a judgment for 30*l.* to secure 5*l.* and costs. *Ames* v. *Hill*, 2 B. & P. 150. See also *Remon* v. *Hayward*, 2 A. & E. 666; *Stephens* v. *Lowe*, 2 M. & Sc. 44; *Bacon* v. *Simpson*, 3 M. & W. 78.

The value of the tenancy or other subject-matter is the rent or price agreed to be paid for it, if any is expressed: *Doe* v. *Wiggins*, 4 Q. B. 367; *R.* v. *Enderby*, 2 B. & Ad. 205. But it is sufficient if the value appear by necessary implication or extrinsic evidence: *Wrigley* v. *Smith*, 5 B. & Ad. 1117; *Shepherd* v. *Wheble*, 8 Car. & P. 534. See *Feltham* v. *Cartwright*, 7 Sc. 695. If the value at the date of the agreement does not certainly appear to amount to 5*l.* the agreement is exempt: *Cox* v. *Bailey*, 6 Sc. N. R. 798; *Hill* v. *Ramm*, *Id.* 571. It would be different if the contract had been to do work which it was clear at the time of the contract would cost more than 5*l.*: *Liddiard* v. *Gale*, 19 L. J., Ex. 160. See *Lloyd* v. *Mansel*, 19 L. J., Q. B. 192, where an agreement for a reference was held not to require a stamp.

The value is that which may be ascertained at the date of the agreement, excluding any contingent increase, as on a guarantee for possible costs: *Anon.*, Chitty on Stamps, 173; see *Wrigley* v. *Smith*, 5 B. & Ad. 1117; *Pemberton* v. *Vaughan*, 10 Q. B. 87.

Purchase of several lots at auction.

Where several lots are sold at an auction to one purchaser, a separate contract is deemed to have been entered into in respect of each lot (see *ante*,

p. 31), and accordingly, if the price of each lot is under 5*l.*, no stamp will be necessary, although the aggregate amount of the purchase-money may exceed 5*l.*: see *Roots* v. *Dormer*, 4 B. & Ad. 77.

Hire of labourer, &c.

*Exemption—Agreement for the Hire of any Labourer, Manufacturer, or Menial Servant.*]—The exemption of such agreements from all stamp duties does not extend to assignments of apprentices: *R.* v. *St. Paul's*, 6 T. R. 452. Nor to agreements for piecework: *Hughes* v. *Budd*, 4 Jur. 654; *Fielder* v. *Ray*, 4 Car. & P. 63; *Sharman* v. *Sanders*, 13 C. B. 166. It includes firemen and stokers on board of foreign steamers: *Wilson* v. *Zulueta*, 14 Jur. 366. The exemption applies where the agreed remuneration includes a participation in profits: *R.* v. *Wortley*, 15 Jur. 1137. As to the exemption of agreements with mariners, &c., see the schedule, the Merchant Seamen's Act, 17 & 18 Vict. c. 104, ss. 9 and 149; and with respect to the Sea Fishing Service, 46 & 47 Vict. c. 41, s. 11.

Sale of goods.

*Exemption—Agreement for or relating to the Sale of Goods, Wares, or Merchandise.*]—Exempted if not under seal: *Clayton* v. *Burtonshaw*, 5 B. & C. 41. Agreements have been held to *relate* to the sale of goods, within the meaning of this exemption, in the following cases:—Agreement (for a commission) by a broker, to indemnify his principal against loss on the resale of goods purchased for the principal: *Curry* v. *Edensor*, 3 T. R. 524. Guarantee for the price of goods sold at the time or to be supplied from time to time: *Warrington* v. *Furbor*, 8 East, 242; *Watkins* v. *Vince*, 2 Stark. 368; *Sadler* v. *Johnson*, 16 M. & W. 776. Guarantee of title to goods sold: *Heron* v. *Granger*, 5 Esp. 269. Warranty of soundness: *Skrine* v. *Elmore*, 2 Camp. 407. Agreement to sell a ship, to secure part of the price on mortgage of the ship and earnings, and to procure her to be chartered: *Meering* v. *Duke*, 2 M. & Ry. 121. Agreement for an advance by an auctioneer on goods sent to him to be sold: *Southgate* v. *Bohn*, 16 M. & W. 34. Agreement to substitute a new agreement for a former one relating to the sale of goods: *Whit-*

Cases within the exemption.

Stamp Act, 1870, &c.
7. *Agreements.*

*worth* v. *Crockett*, 2 Stark. 431. Agreement to take a share in an adventure of goods already purchased by one of the parties: *Venning* v. *Leckie*, 13 East, 7 (this was on the ground that a share was sold,—not that the agreement was for the future selling of the goods: see the next case). Agreement to purchase a share in a horse to be entered for races: *Marson* v. *Short*, 2 Sc. 243; but not an agreement to take a share in a ship for a single adventure: *Leigh* v. *Banner*, 1 Esp. 403. Agreement for the sale of goods to be manufactured or procured hereafter, or not yet in existence,—*e.g.* for supplying water or gas, for making and setting up a machine, &c.: *W. Middlesex Waterworks Co.* v. *Suwercrop*, 4 C. & P. 87; *Wilks* v. *Atkinson*, 6 Taunt. 11; *Hughes* v. *Breeds*, 2 Car. & P. 159; *Pinner* v. *Arnold*, 2 C. M. & R. 613 (overruling *Buxton* v. *Bedall*, 3 East, 303, and the dictum in *Boydell* v. *Drummond*, 11 East, 150); *Garbutt* v. *Watson*, 5 B. & Ald. 653. Agreement for making a printing press: *Pinner* v. *Arnold*, 2 C. M. & R. 613; to sell oil not yet pressed; *Wilks* v. *Atkinson*, 6 Taunt. 11. As to fixtures, and "goods sold and delivered," see *Clark* v. *Bulmer*, 11 M. & W. 248; *Defries* v. *Littlewood*, 9 Jur. 988; *Chatfield* v. *Cox*, 16 Jur. 594. Agreements for the sale of growing crops to be harvested, or taken up by the purchaser: *Jones* v. *Flint*, 2 P. & D. 594; *Parker* v. *Stanyland*, 11 East, 362; *Warwick* v. *Bruce*, 2 Mau. & S. 205; *Evans* v. *Roberts*, 5 B. & Cr. 829; *Sainsbury* v. *Matthews*, 4 M. & W. 347; *Rodwell* v. *Phillips*, 9 M. & W. 503; see *ante*, Vol. I., p. 286 *et seq.* (where the cases on the Statute of Frauds are collected). However, in *Rodwell* v. *Phillips* it was held, that an agreement for the sale of growing fruit required a stamp, on the ground that it was not an emblement, but would pass to the heir, and could not be taken in execution. See also *Scorell* v. *Boxall*, 1 Y. & J. 396, where an agreement for the sale of underwood to be cut by the purchaser was held to confer an interest in the land, and so not to be within the exemption. In *Smith* v. *Surman*, 9 B. & C. 561, where an agreement to sell growing timber at so much per foot was held to be a contract for the sale of goods within the 17th section of the Statute of Frauds.

Goods not in existence.

Sale of growing produce which is not an emblement.

Timber.

The following cases have been held not to be within the exemption:—Agreement for printing calico: *Fielder* v. *Ray*, 4 Car. & P. 63. Agreement to quarry stone belonging to the employer, for a wall, at per rod, being neither for the sale of goods nor for the *hire* of an artificer: *Hughes* v. *Budd*, 4 Jur. 654, 8 D. P. C. 478. Agreement for an advance secured by a pledge of goods, with a provision for a sale, the loan being the primary object: *Smith* v. *Cator*, 2 B. & Al. 778; see *Southgate* v. *Bohn*, 16 M. & W. 34. Agreement to take a share in a ship for a single adventure: *Leigh* v. *Banner*, 1 Esp. 403. Agreement for the sale of fixtures not to be delivered apart from the land: *Wick* v. *Hodgson*, 12 Moo. 213; 2 Sc. 249; see *Horsfall* v. *Key*, 2 Exch. 772, *post*, p. 71. (But it would probably be otherwise if the agreement were for the sale of fixtures to be severed by the vendor and delivered: see *Pitt* v. *Shew*, 4 B. & Al. 206; *Hallen* v. *Runder*, 1 C. M. & R. 266; *Dalton* v. *Whittem*, 3 Q. B. 961.) Agreement for a licence to use a patent furnace, to be fixed by patentee, at a certain price for patent right, ironwork, bricks, and labour, except furnace builder's time, which was to be 6*s.* a day. The labour and the patent right were considered to be as principal objects as the goods: *Chanter* v. *Dickinson*, 6 Sc. N. R. 182. *Sed qu.*, for the patent right was merely a right to sell and use certain goods; the labour of fixing was clearly accessory. Agreement for the sale of "two flies," at 60*l.*, harness and *good-will* included: *South* v. *Finch*, 4 Sc. 293. But the good-will was unquestionably an incident to the flies. *Tindal*, C. J., suggested the case of a sale of the plant and good-will of a brewery, which is widely different. The plant of a brewery is not known to the customers—the good-will is incident either to the place or to the person, and does not in either case follow the plant as such. Agreement to purchase the produce of twenty-three acres of hops at 10*l.* per cwt., to be delivered at Whitstable, in pockets: *Waddington* v. *Bristow*, 2 B. & P. 452. The reason given by Lord *Alvanley*, C. J., and *Heath* and *Rooke*, JJ., was, that the goods did not exist at the time. (See now 9 Geo. 4, c. 14, s. 7.) *Chambre*, J.,

Cases not exempted.

Fixtures.

Good-will.

Growing crops, &c.

Stamp Act, 1870, &c.
7. *Agreements.*

allowed that that alone was not sufficient, and said, that the buyer took an interest in the land. But hops are *fructus industriales.* See also *Crosby* v. *Wadsworth*, 6 East, 602, where the exemption was not allowed in the case of an agreement for the sale of growing grass. These cases are clearly not law.

Scrip, shares, and foreign bonds.

Scrip or railway shares are not goods, wares, or merchandises: *Knight* v. *Barber*, 16 M. & W. 66; *Humble* v. *Mitchell*, 11 A. & E. 205; *Bowlby* v. *Bell*, 3 C. B. 284. Nor are foreign bonds which pass by delivery: *Heseltine* v. *Siggers*, 1 Exch. 857.

*Special Exemptions.*]—Various Acts of Parliament not otherwise relating to stamp duties contain enactments specially exempting certain kinds of agreements from liability to stamp duties.

Thus acknowledgments or promises for the purpose of barring the Statute of Limitations, under Lord Tenterden's Act (9 Geo. 4, c. 14), are exempt from duty: see sect. 8 of that Act (*s*). So also agreements and other documents under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 30), and see as to Ireland, stat. 19 & 20 Vict. c. 102, s. 36; agreements under Church Building Acts: see 3 Geo. 4, c. 72, s. 28; by or with Commissioners of Public Works in Ireland under Landed Property (Ireland) Act, 1846 (9 & 10 Vict. c. 86, s. 8), and 1847 (10 & 11 Vict. c. 32, s. 59); by or with the Commissioners of Woods and Forests: 10 Geo. 4, c. 50, s. 77; agreements under the Consecration of Churchyards Acts, 1867 (30 & 31 Vict. c. 133, s. 6); under the Dispensary Houses (Ireland) Act, 1879 (42 & 43 Vict. c. 25, s. 14); under the Glebe Loan (Ireland) Act, 1870 (33 & 34 Vict. c. 112, s. 8); under the Inclosure Act, 1845 (8 & 9 Vict. c. 118,

(*s*) This exemption applies only to the acknowledgment establishing or reviving the original contract, which must be proved by other means; and if such contract was in writing, it will not be admissible unless duly stamped: *Morris* v. *Dixon*, 4 A. & E. 845; *Taylor* v. *Steele*, 16 M. & W. 665; see *Jones* v. *Ryder*, 4 M. & W. 32.

An unstamped promissory note given by a debtor is not admissible as an acknowledgment under this Act, for its operation as a note is essential to the inference of the acknowledgment: *Jones* v. *Ryder*, 4 M. & W. 32.

s. 173); under the Land Tax Redemption Acts (42 Geo. 3, c. 116, s. 173); between landlord and tenant, under the Land Law (Ireland) Act, 1881, s. 8 (6) and s. 20 (2) (45 & 46 Vict. c. 72); between masters of ships and seamen under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, ss. 9 & 149) and the Merchant Shipping (Fishing Boats) Act, 1883 (46 & 47 Vict. c. 41, s. 11); under the Military Forces Localization Act, 1872 (35 & 36 Vict. c. 68, s. 12); under the Militia Law Amendment Act, 1854 (17 & 18 Vict. c. 105, s. 20); under the National School Teachers' Residence (Ireland) Act, 1875 (38 & 39 Vict. c. 82, s. 6); under the Poor Law Board Act (England), 1834 (4 & 5 Will. 4, c. 76, s. 86) and (Ireland) 1838 (1 & 2 Vict. c. 56, s. 96) (*t*); under the Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20, s. 5); under the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 101, s. 120); and under the Tithes Commutation Act, 1836 (6 & 7 Will. 4, c. 71, s. 9).

See further as to stamps on agreements, *ante*, Vol. I., pp. 381 *et seq.*, sub tit. AGREEMENTS.

### 8. APPRAISEMENTS AND AWARDS.

Definition of appraisement.

Appraisements for the purposes of stamp duty are valuations made by a person who values or appraises any estate or property, real or personal, or any interest, whether in possession or not, in any estate or property, or any goods, merchandise, or effects, for or in expectation of any hire, gain, fee or reward, or valuable consideration: see stat. 46 Geo. 3, c. 43, s. 4.

Appraisement not between parties.

An appraisement for the mere information of the employer, and not as part of a binding contract, is not chargeable: *Atkinson* v. *Fell*, 5 Mau. & S. 240. And an appraisement made to enable two partners to wind up their affairs was held to be exempt, though it formed the foundation of a subsequent contract: *Jackson* v. *Stopherd*, 2 Cr. & M. 361.

Appraisement of value not an award.

A mere appraisement of value, though binding by

(*t*) See as to contracts for sale of land, *Banbury Union* v. *Robinson*, 4 A. & E. (N. S.) 919.

Stamp Act, 1870, &c.
8. *Appraisements and Awards.*

force of a prior agreement, is not an award: *Leeds* v. *Burrows*, 12 East, 1. See *Jebb* v. *M'Kurnan*, M. & Mal. 320; *Perkins* v. *Potts*, 2 Chit. 399.

Opinion of counsel.

"The award stamp is only to be imposed on those instruments which on their face purport to be awards, which this (a verdict of a miners' jury) does not. If two persons agree to refer a case to counsel, and to be bound by his opinion, if the opinion does not contain the evidence of the agreement, it is not liable to an award stamp:" per *Parke*, B., in *Sybray* v. *White*, 1 M. & W. 441; see *Boyd* v. *Emmerson*, 2 A. & E. 184.

Accountant's report.

A balance of accounts between partners, drawn out by an accountant, and by which the partners are guided in their settlements, is not an award if it is not binding on them: *Goodyear* v. *Simpson*, 15 M. & W. 16. It is an award if it is binding: *Jebb* v. *M'Kurnan*, M. & Mal. 320. So also an engineer's certificate of the amount to be paid as a penalty for non-performance of a contract is not liable to duty as an award: *Northampton Gas Light Co.* v. *Purnell*, 15 C. B. 630.

Parol testimony by appraiser.

The existence of a written valuation does not exclude the parol testimony of the valuer: *Stafford* v. *Clarke*, 1 C. & P. 24.

### 9. Apprenticeship.

Amount paid to be stated.

The Stamp Act, 1870, s. 40, requires the full sum and the value of anything, not being money, paid, given, or secured to or for the benefit of the master (*u*), with or in respect of any apprentice, to be fully and truly set forth in an instrument of apprenticeship, under a penalty of 20*l.*, and makes the indenture void if the amount is not truly stated. See the section set out, *ante*, Vol. II., p. 75.

Essentials to contract.

A contract of apprenticeship is a contract for *teaching* and service. If the master do not agree to

(*u*) Money paid to a third person in relation to an apprenticeship is not liable to duty: *R.* v. *St. Petrox*, 4 T. R. 196; *R.* v. *Portsea*, Burr. S. C. 834. In the absence of stipulation to the contrary, the duty is payable by the master: *Keene* v. *Parsons*, 2 Stark. 506.

teach, it is a mere hiring: *R.* v. *Shinfield*, 14 East, 540; *R.* v. *Burbach*, 1 M. & S. 370. If the master agree to teach, and the pupil to serve, it is immaterial by what expressions they manifest their intent: *R.* v. *Nether Knutsford*, 1 B. & Ad. 726. But see *Reg.* v. *North Owram*, 10 Jur. 1003.

Value.

In estimating the value of the equivalent given to the master, necessaries furnished to the apprentice in exoneration of the master's liability to maintain him are not to be considered: *R.* v. *Aylesbury*, 3 B. & Ad. 569; *R.* v. *Walton*, 3 T. R. 515; *R.* v. *Leighton*, 4 T. R. 732; *R.* v. *Wantage*, 1 East, 601. Nor are the earnings of the apprentice to be reckoned: *R.* v. *Bradford*, 1 M. & S. 150; *R.* v. *Wantage*, 1 East, 601.

Instrument void if consideration not truly stated.

If the consideration is not truly stated, the indenture is void: *R.* v. *Amersham*, 4 A. & E. 508. But the consideration to be stated means the sum actually paid, and accordingly the sum originally agreed upon may be reduced for the purpose of reducing the stamp: *Shepherd* v. *Hall*, 3 Camp. 180. The present scale of duties (see *post*, p. 109) renders any material reduction now generally impossible. The premium or consideration for the apprenticeship itself may, however, be separated from the amount agreed to be paid to the master for the apprentice's board, and no *ad valorem* duty will be payable in respect of the latter amount: *Hawkins* v. *Clutterbuck*, 2 C. & K. 810.

Consecutive apprenticeship.

An indenture binding an apprentice to several masters consecutively requires only one stamp: *R.* v. *Louth*, 8 B. & C. 247.

Assignments.

Assignments of apprentices stand on the same footing as other ordinary instruments: *R.* v. *Ide*, 2 B. & Ad. 867; and an extension of the term in an assignment does not render a new stamp necessary: *Morris* v. *Cox*, 3 Sc. N. R. 568.

Exemption of cases of charity.

In cases of charity within the exemption (see the schedule, *post*, p. 109) the recital of the facts in the articles will not be sufficient, but there must be distinct evidence of the grounds of exemption: *R.* v. *Skeffington*, 3 B. & Ad. 382; *R.* v. *Llangunnor*, 2 B. & Ad. 616. A temporary charitable donation is

Stamp Act, 1870, &c.

9. *Apprenticeship.*

within the exemption: *R.* v. *St. Matthew*, Burr. S. C. 574; *R.* v. *Clifton*, Id. 697. See *R.* v. *Fakenham*, 2 A. & E. 528, where an instrument of apprenticeship was held not to be within the exception, though the premium was paid out of a charitable fund, the trustees of the charity not being parties. Where an instrument is within the exemption, the consideration need not be set out: *R.* v. *Quainton*, 2 M. & S. 338; see *R.* v. *Ide*, 2 B. & Ad. 866.

## 10. Bills of Exchange and Promissory Notes.

The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), contains the following definitions of the terms "bill of exchange" and "promissory note" respectively:—

Bill of exchange defined.

Sect. 3. "(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money, to or to the order of a specified person or to bearer.

"(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange."

Promissory note defined.

Sect. 83. "(1.) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to bearer.

"(2.) An instrument in the form of a note, payable to maker's order, is not a note within the meaning of this section, unless and until it is indorsed by the maker."

Condition.

Before this Act it had been repeatedly held that an instrument wherein the payment of money pursuant to an order or promise was made to depend on a condition or contingency was not a bill of exchange or a promissory note, as the case might be; as where the payment of money was made conditional on the abandonment of legal proceedings: *Shenton* v. *James*, 5 Q. B. 199; *Drury* v. *Macaulay*, 16 M. & W. 146; or contingent on the person liable to pay having sufficient funds for the purpose: *Roberts*

v. *Peake*, 1 Burr. 323; see *Ex parte Tootell*, 4 Ves. 372; or where the money was made payable on the sale or purchase, when sold, of certain property: *Hill* v. *Halford*, 2 B. & P. 413. A promise to pay a certain sum for goods *ordered* is conditional on the supply, and therefore not a note; otherwise, if it be to pay a certain sum for goods supplied: *Jarvis* v. *Wilkins*, 7 M. & W. 410. An agreement for a set-off is a condition which cannot form part of a note: *Davies* v. *Wilkinson*, 10 A. & E. 98. See also *Palmer* v. *Pratt*, 9 Moo. 358; *Lovell* v. *Hill*, 6 C. & P. 238; *Richardson* v. *Martyr*, 25 L. T. 64; and see Story on Bills, s. 46.

By sect. 3 it is further enacted as follows:—

"(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill, is unconditional."

As to orders for payment out of a particular fund, see *Stevens* v. *Hill*, 5 Esp. 247; *Banbury* v. *Lissett*, 2 Str. 1211; *Hill* v. *Halford*, 2 B. & P. 413. For an instance of an unqualified order to pay, with an indication of a particular fund out of which the money is to be taken, see *Haussoullier* v. *Hartsinck*, 7 T. R. 733, where the order was to pay 50*l.*, "being a portion of value as under deposited in security for the payment thereof." In *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753, a document worded as follows: "Isle of Man, July 15, 1865. On the first of August next, please to pay to Messrs. G. or order 600*l.*, on account of moneys advanced by me to the S. & F. Company, Limited. To Mr. A., the official liquidator of the said company"—was held to be a good foreign bill of exchange for stamp purposes. See also as to particular accounts to be debited: *Bolton* v. *Dugdale*, 4 B. & Ad. 619; *Banner* v. *Johnston*, L. R. 5 H. L. 157.

As an example of a bill payable out of a fund which may not be available, see *Early* v. *Collins*, 6 M. & S. 144, where the order was upon an auctioneer for payment of 200*l.* and interest, out of the proceeds

Stamp Act, 1870, &c.

10. *Bills and Notes.*

of furniture to be sold by him. See *Butts* v. *Swann*, 2 Br. & B. 78; *Parsons* v. *Middleton*, 6 Hare, 261.

Order or promise.

No particular form of words is necessary for the order or promise to pay: *Morris* v. *Lee*, 2 Ld. Raym. 1397; see *Brown* v. *De Winton*, 6 C. B. at p. 376. A request not amounting to an order, binding in terms as between the parties, is not a bill: *Norris* v. *Solomon*, 2 M. & Rob. 266; see *Little* v. *Slackford*, M. & Mal. 171; *Ruff* v. *Webb*, 1 Esp. 29; *Hamilton* v. *Spottiswoode*, 4 Exch. 200. A mere acknowledgment of a debt without a promise to pay, as an I. O. U., is not a promissory note: see *Curtis* v. *Rickards*, 1 Sc. N. R. 155; *Brooks* v. *Elkins*, 2 M. & W. 74; *Horne* v. *Redfearne*, 6 Sc. 260 (which was an extreme case); *Ellis* v. *Mason*, 7 D. P. C. 598; *Shrivel* v. *Payne*, 8 D. P. C. 441. An agreement to return a specific sum deposited (not as a debt) is not a note: *Sibree* v. *Tripp*, 15 M. & W. 23.

Address of bill.

Where an instrument was drawn, payable to the drawer or his order at a particular place, without being addressed to any person by name, and was afterwards accepted by the person residing at the place where it was made payable, it was held that the acceptor was liable on the instrument as a bill of exchange: *Gray* v. *Milner*, 8 Taunt. 739; see *Peto* v. *Reynolds*, 9 Exch. at p. 416; *Reynolds* v. *Peto*, 11 Exch. 418. Now, however, as regards inland bills, a bill must be expressed to be addressed to some person as "drawee" who must be named, or otherwise indicated in the bill with reasonable certainty: sect. 6 (1); but, as regards foreign bills, their validity "as regards requisites of form is determined by the law of the place of issue:" sect. 72; and accordingly it is conceived that if it should be shown that according to the law of the place where a bill is issued the address is not an essential part of the bill, the acceptor would be liable in this country on an unaddressed bill, if properly stamped.

Signature.

The signature of the drawer or promisor is essential to constitute a bill or note; the signature of the acceptor is not sufficient: *Stoessiger* v. *South-Eastern Rail. Co.*, 3 E. & B. 557; *McCall* v. *Taylor*, 19 C. B. (N. S.) 301; see *Ex parte Hayward*, L. R. 6 Ch. 546. The signature may be in pencil: *Geary*

v. *Physic*, 5 B. & C. 234; or by mark: *George* v. *Surrey*, 1 M. & Mal. 516.

By sect. 10 of the Bills of Exchange Act, 1882—

Payment on demand.

"(1.) A bill is payable on demand,

"(*a.*) Which is expressed to be payable on demand, or at sight, or on presentation,

"(*b.*) In which no time for payment is expressed.

"(2.) Where a bill is accepted or indorsed when it is over due, it shall as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand."

A note is payable on demand, if expressed so to be, notwithstanding that interest is thereby made payable: *Norton* v. *Ellam*, 2 M. & W. 461.

By sect. 11 of the Act—

Payment at a fixed or determinable time.

"A bill is payable at a determinable future time within the meaning of this Act, which is expressed to be payable,

"(1.) At a fixed period after date or sight,

"(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

"An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect."

By "after sight" is meant after acceptance: sect. 39 (1); and see *Campbell* v. *French*, 6 T. R. 212. Though the time of payment may be indefinite, it must be certain to arrive, as six weeks after the death of A.: *Cook* v. *Colehan*, Str. 1217; *Roffey* v. *Greenwall*, 10 A. & E. 222. See also *Alexander* v. *Thomas*, 16 Q. B. 333. A draft payable 30 days after the arrival of a ship was held not to be a valid bill of exchange: *Palmer* v. *Pratt*, 2 Bing. 185. See *Evans* v. *Underwood*, 1 Wils. 262, where an undertaking to pay a sum of money within two months after a king's ship should be paid off was held to be a good promissory note. A promise to pay within a specified period after the promisor's marriage is not a note: *Pearson* v. *Garrett*, 4 Mod. 242; see *Beardsley* v. *Baldwin*, 2 Str. 1151. In *Richards* v. *Richards*, 2 B. & Ad. 447, it was held that the contingency must appear on the face of the instrument. A promise to pay at a fixed date, and after that date

Stamp Act, 1870, &c.

10. *Bills and Notes.*

on demand, is a good promissory note: *Haussoullier* v. *Hartsinck*, 7 T. R. 733.

Sum certain in money.

The sum to be paid must be definite, *e.g.*, not "the proceeds of a shipment of goods, value about 2,000*l.*, consigned to you:" *Jones* v. *Simpson*, 2 B. & C. 318. A promise to pay a certain sum, and also an uncertain balance, is not a note: *Smith* v. *Nightingale*, 2 Stark. 375; *Aysey* v. *Fearnsides*, 4 M. & W. 168; *Bolton* v. *Dugdale*, 4 B. & Ad. 619. But a bill or note may be made payable with interest or by instalments. By sect. 9 of the Bills of Exchange Act, 1882, it is enacted:—

Payment with interest, by instalments, &c.

"(1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid,

"(*a.*) With interest,

"(*b.*) By stated instalments,

"(*c.*) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

"(*d.*) According to an indicated rate of exchange to be ascertained as directed by the bill.

"(2.) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable."

It has been decided in a Scotch case that the interest must be expressed to be at a fixed rate: *Tennant* v. *Crawford*, 5 Ct. Sess. Ca. (4th Series) 433; see also as to bills payable with interest, *Warrington* v. *Early*, 2 E. & B. 763 (*v*). And as to bills and notes payable by instalments, see *Worley* v. *Harrison*, 3 A. & E. 669; *Cridge* v. *Sherborne*, 11 M. & W. 374; *Carlon* v. *Kennedy*, 12 M. & W. 139; *Cooke* v. *Horne*, 29 L. T. (N. S.) 369.

Specified person.

The payee need not be specified by name, provided he is sufficiently indicated to be ascertainable when the bill is drawn: see sect. 7. As to what is or is not a sufficient designation, see *Gray* v. *Milner*, 8 Taunt. 739; *Cowie* v. *Stirling*, 6 E. & B. 333; *Reynolds* v. *Peto*, 11 Exch. 418; *Yates* v. *Nash*, 36 L. T. 430. Where a note was made pay-

(*v*) Interest secured by a bill or note is not chargeable with duty: *Israel* v. *Benjamin*, 3 Camp. 40; *Preussing* v. *Ing.*, 4 B. & Al. 204; *Wills* v. *Nooth*, 4 Tyr. 726.

able to "trustees" without naming them, it was held that the designation was sufficient: *Holmes* v. *Jaques*, L. R. 1 Q. B. 376. As to extrinsic evidence to identify a payee, see *Soares* v. *Glyn*, 8 Q. B. 24.

Bearer.

"'Bearer' means the person in possession of a bill or note which is payable to bearer:" sect. 2.

By sect. 3, sub-sect. (4) of the Bills of Exchange Act, 1882, it is enacted that—

> "A bill is not invalid by reason:—
> "(*a.*) That it is not dated;
> "(*b.*) That it does not specify the value given, or that any value has been given;
> "(*c.*) That it does not specify the place where it is drawn, or the place where it is payable."

Presumption as to consideration.

The consideration for a bill of exchange or promissory note is presumed unless disproved: see sects. 27 to 30 of the Act. A pledge of a collateral security with authority to sell the same does not invalidate a promissory note: sect. 83 (3); and see *Wise* v. *Charlton*, 4 A. & E. 786; *Fancourt* v. *Thorne*, 9 Q. B. 312.

The case of *Russell* v. *Powell*, 14 M. & W. 418, well illustrates the difficulty of discriminating between negotiable and non-negotiable orders for payment of money. The question arose on the following order, made respecting a fund which, by order of the Court of Chancery, was payable to the joint order of J. M. and G. P.:—"To the executors of the late T. H.—*Powell* v. *Norwood*.—We hereby authorise and require you to pay to Mr. G. P., or his order, the sum of 250*l.*, being the amount directed by the order of the 29th of July last to be paid to our order." G. P., being the payee, did not sign this order; and on this ground the Court held that the instrument, at least until indorsed by G. P., was incomplete, and not a bill of exchange. *Rolfe*, B., thought that it was complete on the face of it.

Notes payable to maker's order.

As to notes payable to the maker's own order, see *Brown* v. *De Winton*, 6 C. B. 336; *Hooper* v. *Williams*, 2 Exch. 13; *Wood* v. *Mytton*, 10 Q. B. 805. Such notes are within the statute, when indorsed, even in blank: see *Absolon* v. *Marks*, 11 Q. B. 19;

Stamp Act, 1870, &c.

10. *Bills and Notes.*

*Minet* v. *Gibson*, 3 T. R. 481; *Phillips* v. *Im Thurn*, L. R. 1 C. P. 463.

Many instruments which are not bills or notes are charged as such.

The foregoing observations apply to bills which are negotiable by the custom of merchants, and to notes made negotiable by the Bills of Exchange Act, 1882: see sect. 8. They do not alone furnish the means of determining the liability of instruments to the duties charged on bills and notes; which duties are imposed on many instruments that are neither bills nor notes within the meaning of that Act. By the Stamp Act, 1870, the terms bill of exchange and promissory note are thus defined for the purposes of stamp duty:—

Interpretation of term "bill of exchange."

Sect. 48. "(1.) The term 'bill of exchange' for the purposes of this Act includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned.

"(2.) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a bill of exchange for the payment of money on demand.

"(3.) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also any order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf, is to be deemed for the purposes of this Act a bill of exchange for the payment of money on demand."

Interpretation of term "promissory note."

Sect. 49. "(1.) The term 'promissory note' means and includes any document or writing (except a bank note) containing a promise to pay any sum of money.

"(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a promissory note for the said sum of money."

Post-dated cheque.

A post-dated cheque, whether payable to order or to bearer, bearing a penny stamp, is admissible in evidence after the date it bears, though the holder took it with knowledge of the post-dating: *Bull* v. *O'Sullivan*, L. R. 6 Q. B. 209; *Gatty* v. *Fry*, 2 Ex. D. 265.

Bill of exchange, or assignment of debt.

Where a person being indebted to the defendants wrote a letter addressed to T. in these terms,—"Dear Sir, I hereby assign to Messrs. R. and Son the sum of 40*l.* or any other sum now due, or that may hereafter become due in respect of the steam launch which I am building for you,"—it was held that this was not an order for payment of money within sect. 48, but an assignment of a debt, and might be given in evidence on payment of the duty and of the penalty under sect. 7 of the Act (*ante*, p. 11): *Buck* v. *Robson*, 3 Q. B. D. 686. See also *Diplock* v. *Hammond*, 5 De G. M. & G. 320; *McGowan* v. *Smith*, 4 W. R. 690; *Brice* v. *Bannister*, 3 Q. B. D. 569; *Fisher* v. *Calvert*, 27 W. R. 301 (*w*).

An instrument in these words,—"I, D., promise to pay Y., on his signing a lease of the Castle Hotel, 150*l.*,"—was held to be a promissory note within sect. 49, and therefore incapable of being stamped after execution, either as a note (see sect. 52, *infra*), or as an agreement: *Yeo* v. *Dawe*, 32 W. R. 203.

Orders sent to the drawee himself are not chargeable: *Hutchinson* v. *Heyworth*, 9 A. & E. 375; *Humphreys* v. *Briant*, 4 C. & P. 157.

An I. O. U. expressed to be for value received, is not chargeable as a note: *Gould* v. *Coombs*, 1 C. B. 543.

Notes payable on demand, &c.

A distinction is taken in the Stamp Act between bills payable on demand and other bills: see the schedule to the Act, *post*, p. 111. As to what is a bill payable on demand, see *Misa* v. *Currie*, L. R. 1 H. L. 554; see also sect. 10 (2) of the Bills of Exchange Act, 1882, *ante*, p. 53. The fixed duty of 1*d.* imposed on bills payable on demand does not apply to promissory notes payable in like manner, but all promissory notes are liable to *ad valorem* duty.

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(*w*) The decision of *Bacon*, C.J., in *Ex parte Shellard*, L. R. 17 Eq. 109, may be regarded as overruled.

Stamp Act, 1870, &c.

10. *Bills and Notes.*

Special agreements.

Instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, and not by the Act expressly directed to be deemed promissory notes, are not to be charged as notes. In *Ellis* v. *Ellis*, a writing, by which A. agreed to give to B. 5*l.* for a cart for the use of C., and promised to pay in three weeks, was held not to be a note, but an agreement. If it were, every memorandum for the purchase of goods on credit would be a note: *Ellis* v. *Ellis*, Gow, 216. So notes given for definite sums with endorsements that they are given to secure floating balances are chargeable as agreements: *Leeds* v. *Lancashire*, 2 Camp. 205; *Cholmely* v. *Darley*, 14 M. & W. 344, *ante*, p. 39.

In *Horne* v. *Redfearn*, 6 Sc. 260, the following instrument was held to be not a note, but a special agreement:—"Sir,—I have received the sum of 20*l.*, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest." He might be accountable by set-off: see *Davis* v. *Wilkinson*, 3 Jur. 405, *ante*, p. 51. But where the maker promised to be accountable to A. *or order*, set-off was out of the question, and it was held to be a note: *Morris* v. *Lee*, Str. 629. "Borrowed of J. W. the sum of 200*l.*, to account for, on behalf of the Alliance Club, at —— months' notice, if required," was held a special agreement, and not a note: *White* v. *North*, 3 Exch. 689. See *Williamson* v. *Bennett*, 2 Camp. 417; and see *ante*, pp. 39 *et seq.*

In *Hamilton* v. *Spottiswoode*, 4 Exch. 200, A. authorised B. to pay 6000*l.* by instalments to C., out of moneys which should become due from B. to A. for goods to be supplied; and B. wrote under that authority a memorandum, addressed to C.:—"Sir, having received the above authority, I undertake to make you the payments, as above stated." This was held not to require a stamp as a bill or note, and for obvious reasons. The request was not an order, but merely gave an option, and was therefore not a bill. The undertaking, though binding, was contingent on there being a balance in A.'s favour, and the amount was not under 20*l.*

The Act contains the following further provisions

with respect to the stamping of bills of exchange and promissory notes :—

Sect. 53. "(1.) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenour, and of ten pounds if the same be so payable.

Terms upon which bills and notes may be stamped after execution.

"(2.) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after execution thereof."

Sect. 54. "(1.) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped, shall forfeit the sum of ten pounds, and the person who takes or receives from any other person any such bill or note not being duly stamped, either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

Penalty for issuing, &c., any unstamped bill or note, 10*l.*; and the bill or note to be unavailable.

"(2.) Provided that if any bill of exchange for the payment of money on demand, liable only to the duty of one penny, is presented for payment unstamped, the person to whom it is so presented may affix thereto a proper adhesive stamp, and cancel the same, as if he had been the drawer of the bill, and may upon so doing, pay the sum in the said bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct such duty from the said sum, and such bill is, so far as respects the duty, to be deemed good and valid.

Proviso as to fixed duty,

"(3.) But the foregoing proviso is not to relieve any person from any penalty he may have incurred in relation to such bill."

not to relieve from penalty.

Sect. 55. "When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from such duly stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from such lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of such lost or destroyed bill."

One bill only out of a set need be stamped.

As to foreign bills and notes the Stamp Act, 1870, enacts as follows :—

Foreign bills and notes.

Sect. 51. "(1.) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

*Ad valorem* duties to be denoted in

Stamp Act, 1870, &c.

10. *Bills and Notes.*

certain cases by adhesive stamps.

"(2.) Every person into whose hands any such bill or note comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays such bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

"(3.) Provided as follows:

Provisoes for the protection of bonâ fide holders.

"(*a.*) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder thereof there is affixed thereto an adhesive stamp effectually obliterated, and purporting and appearing to be duly cancelled, such stamp shall, so far as relates to such holder, be deemed to be duly cancelled, although it may not appear to have been so affixed or cancelled by the proper person.

"(*b.*) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder thereof there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for such holder to cancel such stamp as if he were the person by whom it was affixed, and upon his so doing such bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been duly cancelled by the person by whom it was affixed.

Not to relieve any other person.

"(4.) But neither of the foregoing provisoes is to relieve any person from any penalty incurred by him for not cancelling any adhesive stamp."

What bills, &c., are foreign.

The place where the bill is signed by the drawer, and not the place where it is accepted or made payable, determines whether a bill is British or foreign: *Amner* v. *Clark*, 2 C. M. & R. 468. Therefore, bills drawn abroad, with blanks for the sums and names of drawers, "to be filled up in this country," are foreign bills: *Snaith* v. *Mingay*, 1 M. & S. 87; and so are bills written and accepted here, and subsequently signed by the drawer abroad: *Boehm* v. *Campbell*, Gow, 55.

An unstamped bill, purporting to have been drawn abroad, but proved to have been drawn here, must formerly have been rejected, though in the hands of an indorsee for value without notice: *Steadman* v. *Duhamel*, 1 C. B. 188.

But by sect. 52 of the Stamp Act, 1870, it is enacted that,—

"A bill of exchange or promissory note purporting to be drawn

or made out of the United Kingdom is, for the purposes of this Act, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."

Formerly a foreign bill or note, not bearing the stamp of the country in which it was issued, was held to be void, and incapable of being enforced in this country; but now the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), sect. 72, provides that—

"Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue."

Cancellation of stamps on foreign bills.

In the case of a foreign bill, the penalty imposed by sect. 54 of the Stamp Act, 1870, is not incurred, if it bears the proper stamp, by reason of such stamp not being cancelled as required by sect. 24, *ante*, p. 15: *Marc* v. *Rouy*, 31 L. T. (N. S.) 372. But if the stamp on a foreign bill has not been cancelled, the purchaser cannot recover from the seller the price paid for the bills, even though both parties may have been unaware of the omission: *Pooley* v. *Brown*, 11 C. B. (N. S.) 566.

*Exemptions.*]—In addition to the exemptions from duty given by the Stamp Act, 1870, it is provided by the Revenue Act, 1882 (45 & 46 Vict. c. 72), sect. 6, that no stamp duty shall be chargeable upon any draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

Bills, notes, and orders made or issued under the following Acts are also exempt from stamp duty:—

County Treasurers Act (Ireland): 1 & 2 Vict. c. 53.

Dispensaries (Ireland) Act, 1879: 42 & 43 Vict. c. 25.

Friendly Societies Act: 38 & 39 Vict. c. 60.

Indian Prize Money Act: 29 & 30 Vict. c. 47 (*x*).

Loan Societies Act (England): 3 & 4 Vict. c. 110.

Loan Societies Act (Ireland): 6 & 7 Vict. c. 91.

Naval Agency, &c., Act: 27 & 28 Vict. c. 16.

Stamp Act, 1870, &c.

10. *Bills and Notes.*

Poor Law Act: 4 & 5 Will. 4, c. 76.
Post Office (Money Orders) Act: 3 & 4 Vict. c. 96.
Savings Bank Act: 26 & 27 Vict. c. 87.

## 11. Bonds.

What is a bond.

Any acknowledgment of a debt by writing under seal, however informal, is a bond: Bac. Ab. *Oblig.* A., 11 Mod. 218; see *ante*, Vol. II., p. 268; *Courtney* v. *Taylor*, 7 Sc. N. R. 749. It was generally supposed, however, that covenants to pay money were not liable to the duties on bonds: *Walmsley* v. *Brierley*, 1 M. & Rob. 529; but see *Smeeton* v. *Collier*, 1 Exch. 462. Covenants for payment of money are now expressly charged with *ad valorem* duty: see *post*, p. 113.

Covenants.

Bonds for unlimited sums.

Bonds for securing future advances without limit will be admissible in evidence with any stamp, but will not be available as securities for a greater sum than the stamp they bear will cover. But if the amount is expressly limited, the bond will, it seems, be inadmissible, unless the stamp is sufficient to cover the full limit: see sect. 107 of the Stamp Act, 1870.

Bond for floating balance is a continuing security.

A bond to secure to bankers all moneys which, during ten years, they should pay or be liable to pay on discounts and other engagements for the obligor, not exceeding the sum of 5000*l.* on the whole, was held to be a continuing security, and not satisfied by the payment of the first 5000*l.* advanced on behalf of the obligor, and to require a stamp on the 5000*l.* only: *Williams* v. *Rawlinson*, 10 Moo. 362; *Lloyd* v. *Heathcote*, 1 C. & M. 336.

What sums to be covered by the stamp.

The duty in respect of future advances is imposed on bonds for the *repayment* of moneys to be thereafter lent, advanced, or paid, which may become due upon an account current, together with any sum already advanced or due, or without. This does not include interest, or the incidental expenses of enforcing the security, which need not be covered by the stamp, though they be expressly mentioned in the condi-

Not interest, though accrued prior to the bond.

(*x*) The exemption under this Act applies only to orders, &c., for payment of prize-money not amounting to 40*s.*

tion: *Israel* v. *Benjamin*, 3 Camp. 40; *Dearden* v. *Binns*, 1 M. & R. 130; *Foreman* v. *Jeyes*, 5 Car. & P. 419; *Dixon* v. *Robinson*, Id. 96, 1 M. & Rob. 115. See *Preussing* v. *Ing*, 4 B. & A. 204; *Prudential Life Assurance Co.* v. *Curzon*, 8 Exch. 97; and the cases cited *infra*, tit. MORTGAGE. Nor is interest from a day prior to the date of the bond chargeable: *Barker* v. *Smark*, 7 M. & W. 59; see *Pierpont* v. *Gower*, 5 Sc. N. R. 605; *Daines* v. *Heath*, 3 C. B. 938. Nor such charges as a banker's commission, and customary and incidental charges: *Frith* v. *Rotherham*, 15 M. & W. 39, overruling *Dickson* v. *Cass*, 1 B. & Ad. 343.

Nor banker's commission, &c.

The following are instances of bonds which have been held not to be "specifically charged with any duty," and which would now apparently be liable, where the amount recoverable exceeds 300*l.*, to a fixed duty of 10*s.* only.

Bonds not specifically charged.

A bond to secure a composition to creditors, not stating the amount, was held not to be liable to *ad valorem* duty: *Annandale* v. *Pattison*, 9 B. & C. 919.

Composition.

A bond given on a new trial being granted, after a verdict for 37,000*l.*, to secure the amount to be recovered and costs, was held not to require an *ad valorem* stamp, as either for a sum certain or for money to be thereafter lent: *Lopez* v. *De Tastet*, 8 Taunt. 712, 2 Moo. 236. See *Hughes* v. *King*, 1 Stark. 119.

Uncertain sum not in the nature of future advances.

So, bonds of indemnity against expenses which the obligor is primarily liable to pay (*e.g.* bastardy bonds), were held not to be chargeable with *ad valorem* duty or as securities for unlimited advances: *Bownes* v. *Marsh*, 10 Q. B. 787.

Indemnity.

In the clause charging bonds to secure annuities for terms certain, so that the total amount may be previously ascertained, bonds for securing interest or rent on a lease are excepted. Such bonds require to be stamped only as bonds not otherwise charged: *Corn Exchange, Winchester*, v. *Gillingham*, 4 Q. B. 475.

Bond to secure rent.

A bond to secure an annuity on the original creation and sale thereof, being the only or principal instrument, is charged as a conveyance with an *ad valorem* duty on the price, or, being a collateral security, with the *ad valorem* duty at the rate of 6*d.*

Annuity bond on sale of annuity;

Stamp Act, 1870, &c.

11. *Bonds.*

not on a sale.

for every 100*l.* or part of 100*l.* of the amount secured. A bond to secure an annuity on any other occasion than the original creation and sale thereof for a term certain, is charged *ad valorem* on the total amount; if for life or other uncertain term, it is charged with an *ad valorem* duty according to a special scale. In *Mestayer* v. *Biggs*, 1 C. M. & R. 111, it was held that a bond to secure a life annuity granted in consideration of the conveyance of an estate, was not liable to *ad valorem* duty as an annuity bond. But that was a mistake. By the sale of an annuity is clearly meant a sale for a pecuniary consideration, chargeable with the *ad valorem* duty on conveyances.

Annuity bond in consideration of a conveyance.

Bond to secure a salary.

A yearly salary to a clerk is not an annuity, and a bond to secure such a salary does not require an *ad valorem* stamp: *Mounsey* v. *Stephenson*, 7 B. & C. 403.

Bond accompanying equitable mortgage.

The stat. 48 Geo. 3, c. 149, charged agreements and bonds, accompanied with a deposit of title-deeds, for making a mortgage, with the *ad valorem* mortgage duty, which was under that Act higher than the duty on bonds. It was held that a bond for securing money or stock, duly stamped as a bond, not referring to a contemporary deposit of title-deeds with a separate agreement which was not duly stamped, was admissible without a mortgage stamp: *Blair* v. *Ormond*, 14 Jur. 191 (*y*).

Bond with other matter.

A money or annuity bond, with other matter specifically charged with duty (except a declaration of trust of the money, &c., secured), must bear a stamp on the extraneous matter. But this does not extend to matter incident to the principal object, as, a counter security to a surety for the obligor: *Annandale* v. *Pattison*, 9 B. & C. 919.

*Exemptions.*]—In addition to the exemptions contained under the heading of "Bonds" in the Schedule to the Stamp Act, 1870 (see *post*, p. 112), exemptions from duty are also given by the following statutes not otherwise relating to stamp duty:—

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(*y*) The duty on the bond would now be higher than that on the agreement relating to the deposit: see 51 Vict. c. 8, sect. 15.

Building Societies Act: 37 & 38 Vict. c. 4, s. 41.
Church Building Acts: 3 Geo. 4, c. 72, s. 28.
Commissioners of Woods and Forests, 10 Geo. 4, c. 50, s. 77.
Drainage Act (Ireland): 9 & 10 Vict. c. 101, s. 47.
Friendly Societies Act: 38 & 39 Vict. c. 60, s. 15.
Glebe Loan (Ireland) Act: 33 & 34 Vict. c. 112, s. 8.
Loan Societies (England) Act: 3 & 4 Vict. c. 110, s. 9.
Loan Societies (Ireland) Act: 6 & 7 Vict. c. 91, s. 26.
Merchant Shipping Acts: 16 & 17 Vict. c. 131, s. 51; and 17 & 18 Vict. c. 104, s. 495.
Public Works (Ireland): 9 & 10 Vict. c. 86, s. 8.
Regulation of the Duties of Postage: 3 & 4 Vict. c. 96, s. 25.
Stamp Duties Management Act: 33 & 34 Vict. c. 98, s. 5.
Taxes Management Act: 43 & 44 Vict. c. 19, s. 78.

## 12. Conveyance on Sale.

Definition of term "conveyance on sale."

For the purposes of stamp duty "the term 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or any other person on his behalf, or by his direction:" sect. 70 of the Stamp Act, 1870. *Comm'rs of I.R. v. Angus & Co.*

The *ad valorem* duties imposed on conveyances on sale by the schedule to the Act are set out, *post*, p. 115; and the sections of the Act relating to such conveyances will be found set out fully in Vol. V., pp. 369 *et seq.*, sub tit. Purchase Deeds.

Duty determined by consideration.

The duty charged on conveyances on sale is determined solely by the consideration indicated. All facts and circumstances affecting the liability to *ad valorem* duty must be truly set forth for the purpose

Stamp Act, 1870, &c.

12. *Conveyance on Sale.*

of determining the amount of duty payable (*x*), and the omission to do so, though it will not invalidate the deed (see *Doe* v. *Lewis*, 10 B. & C. 673; *Att.-Gen.* v. *Brown*, 3 Exch. 662), will subject the parties to heavy penalties, even though a sufficient stamp be impressed on the deed; see sect. 10 of the Stamp Act, 1870, *ante*, p. 12, and sect. 18 of the Customs and Inland Revenue Act, 1888, *post*, p. 101. Moreover, such omission will render the vendor liable to an action by the purchaser for a return of the consideration not set forth in the deed: see *Gingell* v. *Perkins*, 4 Exch. 720.

Power of Commissioners to require evidence.

The commissioners may require to be furnished with an abstract of the instrument and such evidence as they may deem necessary to satisfy them that the facts and circumstances are truly set forth: see sect. 20 of the Stamp Act, 1870, *ante*, p. 14.

What considerations are chargeable.

Under the stat. 55 Geo. 3, c. 184, pecuniary considerations alone were chargeable; namely, money actually paid or agreed to be paid, money charged on the property sold and due and owing to the purchaser, and money not owing to the purchaser but to be paid by him either to the vendor or to another. The release of a debt owing to the purchaser, whether secured by a bond or mortgage or not, if not secured or charged on the purchased property, was not chargeable under that Act; nor did the duty attach, on the sale of an equity of redemption, in respect of the mortgage debt, unless there was an express provision in the conveyance that the purchaser should pay off the debt: see *Marquis of Chandos* v. *Commissioners of Inland Revenue*, I. R. 6 Exch. 464; *Carr* v. *Roberts*, 5 B. & Ad. 78. But by the stat. 16 & 17 Vict. c. 59, sect. 10, it was enacted that the *ad valorem* duty should be payable upon the amount of any mortgage, bond, or other debt or any

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Consideration, how to be stated.

(*x*) The stat. 48 Geo. 3, c. 149, s. 22, required the consideration-money to be truly set forth in words at length on the principal or only instrument of conveyance, or in case of the sale of an annuity, on the grant, bond, or covenant for securing it. This seems to be no longer necessary, but it is still usual to state the consideration in words instead of figures.

gross or entire sum of money, subject to which the property might be sold or conveyed, whether or not the purchaser was liable to pay the same or to indemnify the vendor or any other person in respect thereof.

By sect. 71 of the Stamp Act, 1870, conveyances in consideration of stock or securities are chargeable with duty; and by sect. 73 of the same Act, where property is conveyed in consideration, wholly or in part, of a debt due to the purchaser, or subject to the payment or transfer of any money or stock, whether charged on the property or not, such debt, money or stock is to be deemed the whole or part of the consideration as the case may be, and to be chargeable with duty accordingly.

Consideration consisting of periodical payments.

Formerly, if the amount of the consideration was not ascertainable, as in the case of a purchase in consideration of a life annuity, no *ad valorem* duty was payable: *Blandy* v. *Herbert*, 9 B. & C. 396. But by the stats. 16 & 17 Vict. c. 63, and 17 & 18 Vict. c. 83, conveyances in consideration of annual sums payable in perpetuity, or for any indefinite period, were rendered chargeable with *ad valorem* duties; but releases on the repurchase of annuities in exercise of a power in the annuity deed, whether optional or not, were to be charged with duty on the amount of the redemption money or stock. And now by sect. 72 of the Stamp Act, 1870, where the consideration, or any part thereof, consists of money payable periodically, either for a definite period, so that the total amount can be previously ascertained, or of money payable in perpetuity or for an indefinite period not terminable with life, or payable during any life or lives, *ad valorem* duty will be payable on such consideration, to be ascertained in manner provided by the Act with regard to each case: see, *ante*, Vol. V., p. 370.

What is property within the Stamp Act.

Goodwill.

Where timber, fixtures, or other parts of the inheritance are separately valued, the amount so ascertained must be included in the consideration on which the duty is payable. Goodwill of a business was formerly, on the authority of a dictum of Lord *Ellenborough*, considered not to be chargeable with duty: *Lyburn* v. *Warrington*, 1 Stark. 162.

Stamp Act, 1870, &c.

12. *Conveyance on Sale.*

But it has since been expressly decided that goodwill is property within the meaning of the Stamp Act, and that its assignment is liable to *ad valorem* duty: *Potter* v. *Commissioners of Inland Revenue*, 10 Exch. 147, in which case *Pollock*, C. B., defined property as "that which belongs to a person exclusive of others, and which can be the subject of bargain and sale to another." And, accordingly, it has been held that the grant of a non-exclusive licence to carry on a business by means of a particular product to be supplied by the grantor is not a conveyance of property, and is accordingly chargeable with a deed stamp of 10*s.*: *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue*, L. R. 7 Ex. 211.

Judgment debt.

In *Warren* v. *Howe*, 2 B. & C. 281, it was held that a judgment debt was not properly within the meaning of the Stamp Acts; but this decision cannot be relied on. In *Caldwell* v. *Dawson*, 14 Jur. 316, it was decided that a policy of life assurance is property for the purposes of stamp duty; and *Rolfe*, B., expressed his opinion that an assignment of a judgment debt would be liable to *ad valorem* duty.

Life policy.

Share in partnership.

Where a retiring partner transfers to other members of the firm his share in the partnership property in consideration of a definite sum of money, or of an indemnity against ascertained liabilities of the partnership, the transaction is a conveyance on sale liable to *ad valorem* duty: *Christie* v. *Commissioners of Inland Revenue*, L. R. 2 Ex. 46; *Phillips* v. *Commissioners of Inland Revenue*, L. R., 2 Ex. 399. If, however, on a dissolution, the assets of the partnership are divided in specie, the transaction will apparently be of the nature of a partition, and any instrument necessary for effecting it will accordingly not be chargeable with *ad valorem* duty, except in respect of any money paid for equality of division: see *Macleod* v. *Commissioners of Inland Revenue*, 22 Sc. L. R. 674; see also *Scott* v. *Parker*, 1 Q. B. 199.

Compensation on compulsory purchase.

Compensation paid by a railway company for injury to the business of a vendor of land taken by them for the purposes of the undertaking is part of the consideration for the land taken, and liable to

duty accordingly: *Inland Revenue Commissioners* v. *Glasgow & S. W. Rail. Co.*, W. N., 1887, p. 106.

Family arrangements.

Family arrangements, as, where a father purchases from one child a provision for another, or a relation purchases a provision for the objects of a marriage settlement, have been held not to be chargeable as sales: *Denn* v. *Diamond*, 4 B. & C. 243; *Massey* v. *Nanney*, 4 Sc. 258; see also *Marquis of Chandos* v. *Commissioners of Inland Revenue*, 6 Exch. 464.

Creditors' deeds.

An assignment by a debtor of his property to trustees for sale, for the benefit of his creditors, is not chargeable with *ad valorem* duty as a conveyance on sale: *Coates* v. *Perry*, 6 Moo. 188; *S. C.*, 3 Br. & B. 48 (see, *ante*, Vol. V., p. 373); see *Hudson* v. *Revett*, 2 Moo. & P. 663.

Mere contracts not charged with *ad valorem* duty.

The duty is not charged on the sale, but on the instrument of conveyance in performance of the bargain. A contract to convey is not charged; and if the purchaser can obtain the property, or a title to it, without a written assurance, or relies on his equitable title under the contract, he escapes the charge. This is plain where the contract relates to property which may be assigned at law; as in *Phillips* v. *Morrison*, 12 M. & W. 740, where an agreement for the sale of the whole of two veins of coal lying under certain lands, with stipulations as to the manner of working, and no provision for a formal conveyance, was held not to *vest the thing sold in the purchaser*, within the Act;—*à fortiori*, where the agreement was to deliver an abstract of title to and to execute a grant of a next presentation, and was not under seal: *Wilmot* v. *Wilkinson*, 6 B. & C. 506, where *Bayley*, J., said, "The *ad valorem* duty is imposed upon the conveyance of an interest, not upon the right to call for such conveyance." And in *R.* v. *Ridgwell*, 6 B. & C. 665, a writing under hand only, in the form of a release of an estate in land, was admitted with an agreement stamp.

Contract by purchase of a merely equitable interest.

That which is agreed to be done for a valuable consideration, is in equity considered as done. Consequently, a contract for the purchase of a merely equitable interest passes it as effectually as the most formal conveyance: see *Newborough* v. *Shröder*, 13

Stamp Act, 1870, &c.

12. *Conveyance on Sale.*

Sale of goods.

Jur. 611, 7 C. B. 342; and, if the purchaser has already the legal estate (as where a mortgagee purchases the equity of redemption), the contract gives a complete title. Again, at law, a contract for the immediate sale of specific goods, leaving nothing to be done by the vendor as between him and the purchaser (see *Hinde* v. *Whitehouse*, 7 East, at p. 570; *Heseltine* v. *Seggers*, 1 Exch. 857), vests the property immediately in the latter, though the payment of the price is deferred, or even contingent on the arrival of the goods (the purchaser having assented to a particular mode of carriage): *Tarling* v. *Baxter*, 6 B. & C. 364; *Dixon* v. *Yates*, 5 B. & Ad. 340; *Alexander* v. *Gardner*, 1 Sc. 630; and the rule extends to fixtures which a tenant may remove: *Thomson* v. *Pettit*, 10 Q. B. 101. In these cases of the sale of goods, the parties may effect the sale and transfer the property without writing; but, if they choose to have a written assignment, it requires an *ad valorem* stamp. See, however, the dictum of *Parke*, B., cited *infra*, p. 71. And, as the stamp on an instrument is in general determined by its legal effect, and not by its form (6 B. & C. 669), a written contract for the sale of goods, if sufficient to pass the property, ought to be stamped as a conveyance. The cases of agreements for leases operating as leases (*infra*, p. 78) are familiar instances of the application of this principle. There is, however, this distinction between a sale of goods and a lease or sale of an estate in land. The legal title to the goods may, and generally does, pass by delivery without writing; so that a stamped assignment is not the usual consequence of a contract to sell goods, and the admission of ordinary written contracts, which pass the property, without the conveyance stamp, leads to no evasion of the law. But a lease not within the exception in the Statute of Frauds cannot be effected without a writing, and the stamp laws would be evaded if an agreement having the force of a lease were admitted without a lease stamp. Assignments of the kind commonly called bills of sale of goods must be excepted from the above remarks, the intention of such assurances

Bill of sale.

being to pass the property without passing the possession. The sound rule, and that which seems to be sanctioned by the case of *Matheson* v. *Ross*, *ante*, p. 9, would perhaps be to distinguish between the operation of the instrument as a contract and its operation as an assurance, and to receive it as evidence of a mere agreement, but to reject it if insufficiently stamped as evidence of title to the property. This, however, would, no doubt, be inconsistent with many cases in which agreements for leases operating as leases but stamped as agreements only, were rejected, though offered only to prove the contract.

Whether instrument operating as a transfer may be read as a contract.

In *Horsfall* v. *Hey*, 2 Exch. 778, the following instrument, signed by the parties, was held to require a conveyance stamp:—"Memorandum, that Mr. T. H. has sold to G. H. all the goods, stock in trade, and *fixtures* in the shop of W. H., at, &c., for 90*l*." It was offered in evidence in an action of trover for the goods. *Parke*, B., said that the instrument was meant to be a record of a transfer: the words being in the past tense made no difference (see *Toll* v. *Lee*, *infra*, p. 72; Shep. Touch. 232); and added, "It has been ingeniously argued that, if we adopt that construction and hold this instrument to operate as an immediate conveyance of the property, no agreement for the sale of goods, wares, and merchandise would be within the exemption in the Stamp Act. That made me pause; because, if it were so, all bought and sold notes would require to be stamped, and that would create great confusion in the mercantile world. The result, however, would not be as contended. Under the head 'Agreement,' there is an exemption, not merely from the preceding stamp duty, but from all other stamp duty, of any 'memorandum, letter, or agreement, for or relating to the sale of goods, wares, and merchandise.' Then this instrument, being a conveyance relating to the sale of goods, would have been within the exemption and required no stamp, *if it did not also embrace the transfer of fixtures.*" The argument from the exemption of agreements for the sale of goods seems, however, to be ill founded; that exemption was an

Memorandum of past sale of *fixtures*.

Memorandum of sale of goods.

Stamp Act, 1870, &c.

12. *Conveyance on Sale.*

exemption of agreements which, if not exempted would have been chargeable with the duty on *agreements,* from that and also from any duty to which they might be liable as instruments not otherwise charged. Therefore, the exemption does not extend to agreements *under seal* for the sale of goods: *Clayton* v. *Burtenshaw,* 5 B. & C. 47. There may be an agreement for or relating to the sale of goods not operative as an assignment. If agreements for leases had been exempted from the duty on agreements, and from all other stamp duties, it is clear that agreements operating as leases would not have come within the exemption.

Contract for sale of an equity.

It was suggested in a former Edition of this Work (9 Byth. & Jarm. Conv. 3rd Ed. 219), that a similar distinction would be taken in the case of contracts for the sale of an equitable interest, which might be admitted under an agreement stamp in a suit against the vendor himself, but might be rejected without the *ad valorem* stamp in a suit against the trustee or mortgagee. The uniform practice, however, is not to impress the *ad valorem* stamp on instruments in the form of contracts for the purchase of equitable interests, and which contemplate the future execution of formal assurances.

Acknowledgment of assignment of even date.

In *Toll* v. *Lee,* 4 Exch. 230, a shareholder in a Cornish mining adventure addressed to the purser of the mine a certificate to the following effect:—"I., E. L., for the considerations expressed in a deed of transfer, bearing date, &c. [the date of the certificate], do hereby certify that I have assigned, sold, and transferred to Mr. J. D. L. three 256th shares of or in the mine or adventure called Wheal Mary, situate, &c., with the like share of and in all engines, &c., and all future dividends, and all my estate, &c., to hold unto the said J. D. L., his executors, administrators, and assigns, subject to the same rules, &c., as I held the same immediately before the execution thereof." Under this was written an agreement by the purchaser to accept the shares, subject to the rules, &c. This writing was held not to be chargeable with the duty imposed on a transfer of shares in a company. It was merely an admission (as in

*Beeching* v. *Westbrook, &c., ante*, p. 38), that a transfer had been made, open to any observation which might be addressed to the jury on the non-production of the deed referred to. But see *Horsfall* v. *Hey, ante*, p. 71.

Inclosure award.

In *Doe* v. *Preston*, 7 B. & C. 392, an Inclosure Act authorised the commissioners by their award to effect exchanges of lands within the district, and also, in case any allotment should have been sold before the execution of the award, to make the allotment directly to the purchaser. It was held, that the commissioners had power to award an exchange, subject to the payment of 2000*l.* by one of the parties for equality of exchange, and that the award required no *ad valorem* stamp. The award being a special instrument of a public nature, and affecting a variety of distinct interests, it would have been difficult to come to any other conclusion.

Confirmation of void conveyance.

A deed of confirmation of a prior deed which was intended to be a conveyance and had been duly stamped as such, but had proved to be inoperative, was held not to require an *ad valorem* stamp : *Doe* v. *Weston*, 2 Q. B. 249.

Reducing and apportioning consideration.

The consideration may of course be reduced, or, in cases admitting of apportionment, be apportioned in any manner for the purpose of reducing the duty : see *Shepherd* v. *Hall*, 3 Camp. 180 ; *Hawkins* v. *Clutterbuck*, 2 C. & K. 810. But, where goods and land are purchased at a gross price, and the goods pass by delivery without any written assignment, it is conceived that if the parties unfairly apportion an obviously inadequate sum as the consideration for the land, they will be liable to penalties for misstating the consideration. Where property sold for an entire consideration is conveyed to the purchaser in separate parts or parcels, the consideration may be apportioned as the parties think fit, but a distinct consideration for each separate part is to be set forth in the conveyance relating thereto, and such conveyance is to be chargeable accordingly : sect. 74 (1) of the Stamp Act, 1870. This provision allows the apportionment of the consideration in the case of the purchase of properties of different tenures or

Stamp Act, 1870, &c.

12. *Conveyance on Sale.*

held under different titles; and formerly by a judicious apportionment a considerable saving of duty was frequently effected; but under the present scale of duties such expedients are of little advantage. In the case of a joint purchase for an entire consideration where the property is conveyed by separate instruments, the conveyance of each part is chargeable in respect of the distinct part of the consideration therein specified: sect. 74 (2). In the case of a sub-sale from a purchaser who has not obtained a conveyance to himself, the *ad valorem* duty on the conveyance to the sub-purchaser is payable in respect of the consideration for the sub-sale: and any subsequent conveyance to the sub-purchaser of the legal estate is exempt from *ad valorem* duty: sect. 74 (3, 4 & 5).

Where there are several assurances, the *ad valorem* duty is payable on the principal assurance: sect 76. As to stamp duty on duplicates or counterparts, see the Table of Duties, *post*, p. 123.

As to comprising several conveyances in one deed, see *ante*, p. 30.

Extraneous matter.

A conveyance chargeable with *ad valorem* duty, containing a mortgage or other matter not incident to the conveyance, must have a stamp sufficient to cover such matter; but where the consideration is partly money and partly something else not chargeable with *ad valorem* duty, matter relating to the non-pecuniary consideration is not extraneous to the conveyance. Therefore, a surrender of a lease in consideration of money and of an agreement to grant a new lease, requires no stamp in respect of the agreement: *Doe* v. *Phillipps*, 11 A. & E. 796. *Vide ante*, p. 29.

*Exemptions.*]—Conveyances on sale under the following Acts, not otherwise relating to stamp duty, are specially exempted from such duty:—

Church Building Acts: 3 Geo. 4, c. 72, s. 28.

Commissioners of Woods and Forests: 10 Geo. 4, c. 50, s. 77.

Consecration of Churchyards Act: 30 & 31 Vict. c. 133, s. 6.

Education (Scotland) Act: 35 & 36 Vict. c. 62, s. 39.
Land Tax Redemption Act: 42 Geo. 3, c. 116, s. 173.
Military Forces Localization Act: 35 & 36 Vict. c. 68, s. 12.
Militia Law Amendment Act: 17 & 18 Vict. c. 105, s. 20.
Post Office Land Act: 44 & 45 Vict. c. 20, s. 5.
Public Health (Scotland) Act: 10 Geo. 4, c. 50, s. 77.

### 13. Copies—Secondary Evidence.

Attested copies.

A copy of or extract from an instrument which is attested, or in any manner authenticated, is charged with a duty of 1*s*. An attested copy can only be used as secondary evidence. The regular mode of proving the contents of a document by secondary evidence is by a witness who produces a copy, and swears that he has examined it with the original, the copy being in fact used to refresh his memory as to the contents of the original. A copy may be so used, although it happens to be an attested copy, and is unstamped: *Ditcher* v. *Kenrick*, 1 C. & P. 161. See *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; *Doe* v. *Freeman*, 12 M. & W. 844, where an unstamped copy of a court roll was admitted. And so, if the existence of an original instrument, itself inadmissible for want of a stamp, does not preclude parol evidence of the matter which it would prove if read (*e.g.*, a receipt for money), a witness may refresh his memory by the unstamped instrument itself: *Maugham* v. *Hubbard*, 8 B. & C. 14; *Jacob* v. *Lindsay*, 1 East, 460; *R.* v. *St. Martins*, 2 A. & E. 210. For cases in which the existence of an unstamped writing does not preclude parol evidence of matter which might be proved by the writing, see *Ashby* v. *Ashby*, 3 Moo. & P. 186; *R.* v. *Inhabitants of Holy Trinity, Kingston-upon-Hull*, 7 B. & C. 611; *Strother* v. *Barr*, 2 Moo. & P. 207; *Wilson* v. *Vysar*, 4 Taunt. 288; *Green* v. *Davies*, 4 B. & C. 235; *Singleton* v. *Barrett*, 2 Cr. & J. 368.

No secondary evidence where original was unstamped.

Witness may refresh his memory by an unstamped original.

Parol evidence.

Stamp Act, 1870, &c.

13. *Copies.*

Presumption as to instruments lost, or not produced.

It will be presumed, against the party refusing or failing to produce an instrument, that it was properly stamped: *Crisp* v. *Anderson*, 1 Stark. 35. See *R.* v. *Long Buckby*, 7 East, 45; *Pooley* v. *Goodwin*, 4 A. & E. 94; *Hart* v. *Hart*, 1 Hare, 1; *Crowther* v. *Solomons*, 6 C. B. 758. But if it be proved that at a particular time an instrument was unstamped, then the burden of proof lies on the party who relies on the instrument to prove that it was duly stamped: *Marine Investment Co.* v. *Haviside*, L. R., 5 H. L. 624. If it appear, by any means, that the original was not duly stamped, all secondary evidence of its contents is of course excluded: *R.* v. *Castle Martin*, 3 B. & Al. 588; *Crowther* v. *Solomons*, 6 C. B. 758; *Rose* v. *Clarke*, 1 Y. & C. C. C. 534; even though the objecting party has himself, by destroying the instrument, rendered it impossible to remedy the defect: *Rippiner* v. *Wright*, 2 B. & Al. 478. However, in the case of an *agreement*, for the stamping of which the law allowed twenty-one days after execution, the defendant having fraudulently got possession of the instrument within the twenty-one days, and retained possession, though requested to deliver it up to be stamped, and subsequently destroyed or suppressed it, as the plaintiff had been guilty of no offence, the Court ordered, that, if a copy duly stamped were produced, it should not be objected to: *Bousfield* v. *Godfrey*, 5 Bing. 418. In *Blair* v. *Ormond*, 1 De G. & Sm. 428, *Knight Bruce*, V.-C., went further, and directed the draft of a lost bond, which had not been sufficiently stamped, to be stamped, and then received it in evidence.

Stamping a copy.

Production for stamping.

The rule, that the party in possession of an instrument is bound to produce it for the purpose of being stamped, does not apply if it appears that two parts were interchangeably executed, unless it is proved that one of the parts has been lost, or cannot be procured, and the applicant does not ask for an inspection: *Travis* v. *Collins*, 2 Cr. & J. 625; *Neale* v. *Swind*, Id. 278; *Woodcock* v. *Worthington*, 2 Y. & J. 4. And the production by a defendant of an agreement between himself and a third person, will not in general be enforced: *Lawrence* v. *Hooker*,

2 Moo. & P. 9. See *Bateman* v. *Phillips*, 4 Taunt. 157; *Hall* v. *Bainbridge*, 2 D. & L. 92 (where the plaintiff was considered to have an interest in the instrument); *Dyke* v. *Brewer*, 2 C. & K. 828.

Stamp Act, 1870, &c.
13. *Copies.*

## 14. Copyholds.

The Stamp Act, 1870, enacts as to copyholds and customary estates as follows :— Copyholds.

Sect. 81. "(1.) The copy of Court roll of a surrender or grant made out of Court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor in the face of such copy shall be sufficient evidence. Payment of duty to be certified.

"(2.) The entry upon the Court rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant unless the surrender or grant, if made out of Court, or the memorandum thereof, or the copy of Court rolls of the surrender or grant, if made in Court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence."

Sect. 82. "No instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof several fines or fees are due to the lord or steward of the manor." Not to be charged more than once.

Sect. 83 requires all the facts and circumstances affecting the liability to duty to be fully and truly stated in a note to be delivered to the steward before the surrender or grant is made; and subjects any person surrendering before such note is delivered, or omitting to make the required statement, to heavy penalties. Sect. 83 forbids (under similar penalties) the acceptance of any surrender or making of any grant until such note has been delivered, or the admittance of any person except under a duly stamped surrender, grant, or deed. By sect. 85, the steward is required, within five months from the date of any surrender or grant, to make out and deliver a duly stamped copy thereof; an omission so to do renders him liable to a penalty of 50*l.*, and also to pay the

Stamp Act, 1870, &c.
14. *Copyholds.*

duty. But by sect. 86, the steward is empowered to refuse to proceed, except on payment of his fees and of the stamp duty.

## 15. Leases.

Leases.

The sections (ss. 93 and 96 to 100) of the Stamp Act, 1870, relating to Leases and Agreements for Leases, are set out fully *ante*, Vol. III., pp. 336 *et seq.*, sub tit. Leases. For the *ad valorem* duties on leases, &c., imposed by the Schedule to the Act, see *post*, p. 126.

Leases for more than three years to be by deed.

The stat. 8 & 9 Vict. c. 106, s. 3, enacts that every lease, required by law to be in writing, shall be void at law unless made by deed; so that the question, formerly so frequent (see *ante*, Vol. III., p. 99 *et seq.*), whether a writing in the form of an agreement for a tenancy operates as an actual demise, can only arise in respect of agreements by deed, and agreements not under seal for terms not exceeding three years from the making thereof at a rent amounting to two-thirds at the least of the full improved value. An agreement for a lease may, of course, be made under seal without operating as a demise; and an express declaration that the instrument shall not operate as a demise will be sufficient to prevent the instrument from so operating: *Perring* v. *Blake*, 7 C. & P. 360. But this is immaterial unless the term for which the lease is agreed to be granted exceeds 35 years, as otherwise, agreements for leases and actual leases are under the present law subject to the same *ad valorem* duties.

An agreement for the herbage of a close at a gross sum, with possession until Michaelmas day, was held to be a lease chargeable with the *ad valorem* conveyance duty on the premium: *Cattell* v. *Gamble*, 6 Sc. 733.

Assignment in form of a lease.

An instrument in the form of an indenture of lease, but passing the whole term of the grantor, must, of course, be stamped as an assignment: see *Baker* v. *Gostling*, 1 Sc. 58.

Duty on premium expressed.

The *ad valorem* duty on leases in respect of the

premium is charged on the premium expressed in the lease : *Duck* v. *Braddyll,* 13 Price, 455 ; but the duty in respect of the rent is charged on the rent reserved, whether the amount appear on the lease or be only ascertainable by reference to some other document or evidence. Where, in a lease, a rent of 50*l.* was reserved, and it was agreed that the lessor should insure the premises for 1000*l.*, and add the premiums to the rent, it was held that a stamp of 1*l.* 10*s.*, which, under the law then in force, would cover a rent of 100*l.*, was sufficient. It lay on the party objecting to show that the rent increased by the premiums might exceed 100*l.* : *Wilson* v. *Smith,* 12 M. & W. 401. The premiums of insurance were, perhaps, scarcely to be regarded as rent. It had been contended that the lease was liable as a lease not otherwise charged. It may be doubted, however, whether any *ad valorem* duty is payable in respect of a rent which, at the time of making the lease, is wholly uncertain and unlimited by any ascertainable minimum. In *Parry* v. *Dere,* 5 B. & Ad. 551, two closes were demised by one agreement, one of them at a rent of 200*l.*, the other at a rent described only as the same rent which was paid by the tenant then in possession, which was proved to amount to 94*l.* The instrument was admitted with a stamp of 3*l.*, sufficient for a rent of 294*l.* It had been contended that it required a stamp as a lease not otherwise charged in respect of the close of which the rent was stated by reference only.

Duty on rent, whether expressed or not.

A single instrument containing several demises of distinct properties for different terms, at distinct rents, and with special stipulations as to each, requires only a single stamp on the aggregate amount of the rents : *Blount* v. *Pearman,* 1 Sc. 55 ; *Boase* v. *Jackson,* 3 Br. & B. 185. See *Reg.* v. *Hockworthy,* 7 A. & E. 492.

Several demises in one deed.

The *ad valorem* duty was formerly only charged on *yearly* rents ; and a lease at a rent for a shorter term than a year, or from week to week, or for any holding which may not endure for a year, was liable to a duty of 1*l.* 15*s.*, as a lease not otherwise charged ; under the present Act, however, the duty is

Rent for less than a year.

Stamp Act, 1870, &c.

15. *Leases.*

charged on the "average rate" of the rent, whether reserved as a yearly rent or otherwise: see Schedule.

Money to be laid out in improvements not a premium.

A covenant to execute or to expend money in improvements does not subject a lease to *ad valorem* duty on the sum covenanted to be expended: *Nicholls* v. *Cross*, 14 M. & W. 42; but a deed stamp will be required in addition to the *ad valorem* duty in respect of the rent: *Re Bolton's Lease*, L. R. 5 Ex. 82.

Penal rent.

Penal rents were not chargeable, and are, by the present Act, expressly exempted from *ad valorem* duty.

Extraneous matter in leases.

As to extraneous matter in leases, see pp. 28, 29. And as to alterations in terms of tenancies, see *ante*, p. 25. A redemise in a mortgage deed at a rent for the purpose of securing the interest, or merely until default, does not require a lease stamp: see *Walker* v. *Giles*, 6 C. B. 662.

Counterpart.

A counterpart is primary evidence against the lessee of the contents of the original lease, and it will be presumed that it was duly executed by the lessor and properly stamped: *Hughes* v. *Clark*, 10 C. B. 905; *Houghton* v. *Kœnig*, 18 C. B. 235. A lessee who has executed a counterpart of a lease, cannot object to its being read, on the ground that the lease itself is unstamped: *Paul* v. *Meek*, 2 Y. & J. 116. So where the defendant had admitted the execution of a document described as a counterpart of a lease, which appeared to have been executed by the lessor, it was held that he was precluded by his admission from objecting that it was not stamped as a lease: *Doe* v. *Smith*, 8 A. & E. 255.

*Exemptions.*]—Leases and agreements for leases under the following Acts are exempt from stamp duty:—

Battersea Park Act: 9 & 10 Vict. c. 38.

Church Building (Scotland) Act: 5 Geo. 4, c. 90.

Commissioners of Woods and Forests Act: 10 Geo. 4, c. 50.

Militia Law Amendment Act, 1854: 17 & 18 Vict. c. 105.

Land Law (Ireland) Act, sects. 8 (6) and 20 (2): 45 & 46 Vict. c. 72.

## 16. Letter of Attorney.

A letter of attorney is an authority to do what the principal could have done in his own person, and may still do while the authority remains unexercised. An authority to the steward of a manor to vacate a conditional surrender of copyholds is therefore not a letter of attorney, for the surrenderee cannot do the act himself. And an authority to distrain has been held not to require a stamp: *Pyle* v. *Partridge*, 15 M. & W. 20.

What is a letter of attorney.

An authority by A. to B., to indorse A.'s name on three bills of exchange in B.'s possession, with an undertaking to pay if not duly honoured, was held to require a stamp as a letter of attorney: *Walker* v. *Remmett*, 2 C. B. 850. See *Langman* v. *Holmes*, 2 W. Bl. 990.

Authority to indorse a bill.

A proxy to vote at a meeting of shareholders is a letter of attorney: *Monmouthshire Canal Co.* v. *Kendall*, 4 B. & Al. 453. A general proxy must have a stamp of 10*s.*: *Trinity House, Hull*, v. *Beadle*, 13 Jur. 557. So an authority by certain landowners to a person to act for them in the appointment of a special commissioner under a local Act was held to be liable to duty as a power of attorney: *Reg.* v. *Kelk*, 12 A. & E. 559. But a proxy for a single meeting is charged with a duty of one penny: see the Schedule to the Stamp Act, 1870.

Proxy.

*Exemptions.*]—The following Acts, not otherwise relating to stamp duty, confer special exemptions from such duty on certain letters or powers of attorney:—

Bankruptcy Act (England), sect. 144: 46 & 47 Vict. c. 52.

Bankruptcy Act (Ireland), sect. 400: 20 & 21 Vict. c. 600.

Bankruptcy Act (Scotland), sect. 184: 19 & 20 Vict. c. 79.

Building Societies' Act: 37 & 38 Vict. c. 42, s. 41.

Friendly Societies' Act: 38 & 39 Vict. c. 60, s. 50 (2).

Inclosure Act: 8 & 9 Vict. c. 118, s. 163.

Stamp Act, 1870, &c.

16. *Letter of Attorney.*

Land Tax Act: 42 Geo. 3, c. 116, s. 173.
Landed Property (Ireland) Act: 10 & 11 Vict. c. 32, s. 59.
Poor Law (Scotland) Act: 8 & 9 Vict. c. 83, s. 22.
Public Health (Scotland) Act: 30 & 31 Vict. c. 101, s. 120.
Savings Bank Act: 26 & 27 Vict. c. 87, s. 50.
Savings Bank Annuities Act: 16 & 17 Vict. c. 46, s. 29.
Tithes Commutation Act: 6 & 7 Wm. 4, c. 71, s. 91.

## 17. Mortgages.

A table of the duties imposed by the Schedule to the Stamp Act, 1870, will be found, *post*, pp. 153 *et seq.*

See also Vol. III., p. 988, where the sections of the Act relating to such duties are also fully set out.

Definition of mortgage.

A "mortgage," for the purposes of the Act, means "a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be:" sect. 105.

By the words "any definite and certain sum" is meant the principal sum mentioned in the mortgage, and no additional stamp is required in respect of commission: *Frith* v. *Rotherham*, 15 M. & W. 39; or costs incurred either in recovering the moneys secured by the mortgage, or in maintaining the value of the security by obtaining the renewal of a lease, or otherwise: *Doe* v. *Smith*, 8 Bing. 146; *Doe* v. *Larder*, 3 Bing. N. C. 92; *Wroughton* v. *Turtle*, 11 M. & W. 561; or in respect of interest: *Barker* v. *Smack*, 7 M. & W. 590; *Pierpoint* v. *Gower*, 4 M. & Gr. 795; *Daines* v. *Heath*, 3 C. B. 938; even though the interest is turned into principal on transfer of a mortgage: *Doe* v. *Maple*, 6 L. J. (N. S.) C. P. 271, see *post*, p. 91; or in respect of premiums on policies and costs of effecting

new policies; *Lawrance* v. *Boston*, 7 Exch. 28; *Halse* v. *Peters*, 2 B. & Ad. 807; or taxes, rates, duties, and assessments affecting the mortgaged property: *Doe* v. *Bragg*, 8 A. & E. 620.

Among the instruments enumerated by sect. 105, as included under the term mortgage, are conditional surrenders and further charges affecting any lands, estate, or property (*y*); conveyances upon trust for sale of any property (*z*) by way of security, except conveyances for the benefit of creditors either generally, or specified, if exceeding five in number; defeasances, declarations, &c., defeating, making redeemable or qualifying conveyances and dispositions, apparently absolute but intended only as security; and agreements, contracts, and bonds, accompanied by deposit of title-deeds.

Conveyance for benefit of creditors.

*Pooley* v. *Goodwin.*

In *Pooley* v. *Goodwin*, 4 A. & E. 94, a debtor, being entitled to a commission or percentage on the execution of certain works, assigned the same to a creditor upon trust in the first place to pay thereout a sum of 150*l.*, due to another creditor, and to retain the residue towards payment of the sum of 297*l.* due to him, the assignee. The deed contained a power of attorney to recover the commission, and a covenant to pay the 297*l.*, and was stamped with a 5*l.* stamp. The amount of commission actually recovered or recoverable under the deed was proved to be not more than 482*l.* The Court said: "We think this deed was not a mortgage, but an absolute assignment of the commission due to the plaintiff (defendant), and, as it was proved that this did not amount to 500*l.*, the stamp was sufficient." This decision, like some others that have been hastily made on the Stamp Acts, seems to be open to serious question. It treats a security for a debt as a sale, and the

(*y*) The principle on which these cases were decided appears to be that "the expression in the instrument of that which the law implies has no effect as to the necessity for a further stamp: *Expressio eorum quæ tacite insunt nihil operatur.* Here the fines and costs of renewal would be a charge on the property without the stipulation in question." See the judgment in *Wroughton* v. *Turtle*, *post*, p. 88.

(*z*) As to what is property within the meaning of the Stamp Act, see *ante*, p. 67.

Stamp Act, 1870, &c.

17. *Mortgages.*

*ad valorem* duty as being regulated, not by the express consideration of the sum secured, but by the amount which the thing conveyed eventually realises.

Redemption.

It is well settled that every security for a debt is redeemable in equity, even though there be an express stipulation to the contrary: see *Williams* v. *Owen*, 5 My. & C. 306; *Perry* v. *Meadowcroft*, 4 Beav. 197.

*Coates* v. *Perry.*

In *Coates* v. *Perry*, 6 Moo. 188; 3 Br. & B. 48, A. assigned crops, goods, and effects to M., C., and W., upon trust to sell, and upon trust out of the proceeds of sale, to retain a debt owing to the trustees with interest, and to apply the residue in satisfaction of the several debts owing by A. to other creditors rateably; and, after full payment thereof, to pay the residue to A. It was held that this was properly stamped with a deed stamp, not being a conveyance on a sale, and, as a mortgage, coming within the exemption in favour of conveyances for the benefit of creditors generally, notwithstanding the priority given to the debts of the trustees: see *Hudson* v. *Revett*, 2 Moo. & P. 663.

A conveyance in trust for sale for the benefit of five or more creditors is exempt from *ad valorem* duty, if it is accepted in full satisfaction for all the debts then owing to them by the debtor: see sect. 105.

Defeasance.

A defeasance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney: *Cawthorne* v. *Holben*, 1 B. & P. N. R. 279.

Declaration of trust.

*Haywood* v. *Bibby.*

Where an indenture recited that in consideration of 400*l.* (part of 500*l.* agreed to be advanced by the plaintiff to the defendant) paid to certain mortgagees by the plaintiff in discharge of their claim, the mortgagees surrendered into the hands of the lord certain lands to the intent that he might re-grant the same to the plaintiff in trust to sell the same and retain the 500*l.*; and the defendant covenanted with the plaintiff to pay to him 500*l.* with interest on a certain day, and that in default the plaintiff might enter on the land. It was held that this was not "a declaration or deed for defeating or making redeemable or qualifying any covenant, &c.," within the meaning of the Stamp Act then in force (53

Geo. 3, c. 184), but a mere declaration of trust of the personal surrender, and that it did not require an *ad valorem* stamp: *Haywood* v. *Bibby*, 11 M. & W. 812.

In the case of mortgages effected by means of a defeasance to an apparently absolute assurance, it seems clear that, as the *ad valorem* duty is charged on the defeasance, the absolute conveyance will require an ordinary deed stamp of 10*s.*, unless, indeed, such conveyance states the consideration, in which case the instrument will appear on the face of it to be a conveyance by way of sale, and be chargeable with *ad valorem* duty accordingly (*a*). This mode of effecting mortgages has fallen almost entirely into disuse.

Agreement.

An agreement to make a mortgage is not charged unless it is accompanied with a deposit of title-deeds. However, in *Wrench* v. *Lord*, 4 Sc. 381, the following resolution of the churchwardens and overseers in vestry—"The undersigned consent to the liquidation of the debt due to Dr. W., amounting to 53*l.* 7*s.*, to be charged on the arrears of the church land,"—was considered to be a charge on the land requiring a mortgage stamp.

Memorandum of deposit.

A memorandum of the fact and object of a deposit of deeds, whether contemporaneous with or subsequent to the deposit, does not require a mortgage stamp, unless, in the former case, it contains an agreement to make a mortgage or to pledge the property or deeds. See *Harris* v. *Birch*, 9 M. & W. 591; *Pyle* v. *Partridge*, 15 M. & W. 20. The *ad valorem* duty chargeable under the Stamp Act, 1870, on agreements and memoranda relating to deposits of deeds are now done away with, and, in lieu thereof, such documents are subjected to an *ad valorem* duty at the rate of 1*s.* per cent. on the amount secured: see sect. 15 of the Customs and Inland Revenue Act, 1888, *post*, p. 105. A memorandum of deposit of goods with a pawnbroker, authorising him to sell

(*a*) There is no necessity for stating the consideration in the absolute conveyance; it is only facts and circumstances affecting the liability of an instrument to *ad valorem* duty which are required to be stated: see sect. 15 of the Stamp Act, 1870, *ante*, p. 12.

Stamp Act, 1870, &c.

17. *Mortgages.*

them is not chargeable with duty as a mortgage: *Attenborough* v. *Commissioners of Inland Revenue*, 11 Exch. 461.

Letter accompanying bill of lading and policy delivered as a security not a mortgage.

*Harris* v. *Birch.*

A memorandum, that "Mr. H. has advanced me 12*l.* on furniture delivered to him at Stratford," was held at Nisi Prius not to require a stamp: *Huxley* v. *O'Connor*, 8 C. & P. 204. A letter to A., stating that, in consideration of his accepting their draft, the writers handed him therewith the bill of lading and policy of insurance of wines expected to arrive, which would afford him security beyond the amount of the bill, and engaging to land and warehouse the wines, to be held at A.'s disposal, was held not to require a stamp either as an actual mortgage or as an agreement accompanied with a deposit of title-deeds: *Harris* v. *Birch*, 9 M. & W. 591. The bill of lading was indorsed generally. *Parke*, B., said, "This transaction certainly does not amount to a mortgage, because that can only be by a regular instrument of conveyance. Nor do I think that this transaction can be considered to fall within the other clause of the schedule, which comprehends 'any agreement, contract, or bond, accompanied with a deposit of title-deeds, for making a mortgage, wadset, or any other such security or conveyance as aforesaid.' A bill of lading bears no resemblance to the instruments mentioned in that clause; it is a well-known mercantile mode of transferring the property in goods. Neither can the transaction be considered as falling within the terms of a preceding clause as a 'defeasance,' because that applies to deeds or writings for 'defeating or making redeemable, or explaining or qualifying, any conveyance, disposition,' &c., which, on the face of it, appears to be absolute, but, in truth, is intended as a security only. The indorsement on a bill of lading does not amount to a conveyance." *Alderson*, B., concurred, and added, that the transaction was a pledge.

Parol evidence of deposit.

It is presumed that an agreement for a mortgage not referring to any deposit of deeds, and without an "equitable mortgage" stamp, would be rejected, if it were shown that a deposit of title-deeds accompanied the execution of the agreement. An un-

stamped agreement accompanying a deposit of deeds does not, however, exclude parol evidence of the intention of the deposit: *Hiern* v. *Mill*, 13 Ves. 184.

Bond accompanying deposit.

Where an agreement for making a mortgage, accompanied with a deposit of deeds, and not duly stamped, was also accompanied with a bond which was merely conditioned for payment of the money, and did not refer to the deposit or intended mortgage, it was held, that the bond did not require a mortgage stamp: *Blair* v. *Ormond*, 14 Jur. 191.

Promissory note and memorandum of deposit.

A promissory note may contain a memorandum of the deposit of title-deeds. An instrument, in these words,—"On demand, I promise to pay to Mr. J. G. J., or order, the sum of 120*l.*, with lawful interest for the same, for value received; and I have deposited in his hands title-deeds to lands purchased from W. T. as a collateral security for the same—W. C.,"—which, at the time of making, was duly stamped as a promissory note, and was afterwards stamped as a mortgage on payment of the penalty, was admitted, in an action by an indorsee, without a transfer stamp: *Wise* v. *Charlton*, 4 A. & E. 786. No question arose as to the sufficiency of the mortgage stamp, and the paper would have been equally admissible as a note without any mortgage stamp: *Fancourt* v. *Thorne*, 9 Q. B. 312.

Deposit of land certificate.

An agreement or memorandum in writing relating to the deposit of a land certificate under the Transfer of Land Act, 1862, is chargeable with the same stamp duty as an agreement accompanied with a deposit of title-deeds would be chargeable with: 25 & 26 Vict. c. 53, s. 73.

Mortgage with conveyance, or settlement of equity of redemption.

A mortgage deed is not liable to any further duty than the *ad valorem* duty as a mortgage by reason of the equity of redemption being conveyed or limited otherwise than to or in trust for, or by the direction of a purchaser: sect. 3. So where a deed was expressed to be made as a security for an advance and also for the purpose of settling the property, and accordingly limited the equity of redemption to several persons successively, it was held that no duty was chargeable except the *ad valorem* duty on the mortgage: *Dawson* v. *Medhurst*, 14 L. T. N. S.) 622.

Stamp Act, 1870, &c.

17. *Mortgages.*

Future advances.

*Security for "Repayment of Money to be lent, &c., upon an Account Current."*]—The expenses of fire insurance and of life insurance in an annuity deed were exempted by the old Acts; and the present Act also exempts the expenses of such insurances, and also of renewals of leases, &c., comprised in the security: see sect. 107 set out *ante*, Vol. III., p. 988. A security for money which may become due on an account current, where the total amount is in any way limited, is chargeable with duty on the amount so limited; under the present Act there is no specific stamp for a security for unlimited advances, but the amount to be recovered is regulated by the stamp for the time being on the deed: sect. 107. The tendency in the modern cases has been to construe the revenue laws strictly in favour of the subject; in the language of *Alderson*, B., "to raise a valid objection to a document for want of a proper stamp, you must hit the bird in the eye:" *Phillips* v. *Morrison*, 8 Jur. 343. See *Doe* v. *Snaith*, 1 Moo. & S. 237; *Doe* v. *Larder*, 3 Sc. 410; *Marquis of Chandos* v. *Commissioners of Inland Revenue*, 6 Exch. 479; *Rushbrooke* v. *Hood*, 5 C. B. 131. A security for the price of goods to be furnished or work to be done at a future time under a specific contract, and not as part of an account current, not being a security either for an existing debt, for a present loan, or for the "repayment" of money to be advanced, would not, it seems, be liable to the mortgage stamp duty: see *per* Cur., *Doe* v. *Maple*, 6 L. J. (N. S.) C. P. at p. 272; a case, however, which is nearly unintelligible as reported.

Revenue laws construed strictly.

Payment for future labour, &c.

*Wroughton v. Turtle.*

In *Wroughton* v. *Turtle*, 11 M. & W. 561, the Court dwelt upon the particular language of the provisions in respect of securities for past or present and future advances, and said, "These two classes appear to embrace mortgages for all descriptions of *debts:* the first, present; the second, future. The first class in express terms embraces present loans and *debts* only. The second ought to be construed in the same way—to apply to future loans and debts only, for there is no reason why a mortgage for the same description of payment should be subject to duty in one case and not in another; why it should

Securities for debts.

be subject to duty if made after the execution of the instrument, and not if made before. By holding that the word 'paid' means so paid as to constitute a debt, and the repayment of which the mortgage is to secure, the whole enactment is rendered reasonable and consistent."

Future interest.

A security for future interest on a principal sum, whether such principal sum be included in the security or not, would seem to be within the same implied exemption: see *Taylor* v. *Steele*, 16 M. & W. 665.

Security for further advances.

Where the total amount of further advances is in any way limited the duty is payable for the amount so limited. Where such amount is unlimited, the security is available for such an amount only as the duty will cover. See sect. 107; and see *Morgan* v. *Pike*, 14 C. B. 473. As to insurance moneys, see sect. 107.

Unlimited advance.

Where a mortgage is expressed to be for an unlimited sum, but contains a subsequent proviso limiting the amount to be advanced, the duty is payable on the amount so limited: *Doe* v. *Warner*, 2 C. & K. 1014; see also *Williams* v. *Rawlinson*, 10 Moo. 375; *Lloyd* v. *Heathcote*, 1 Cr. & M. 36. And if an amount to be advanced is limited for the purposes of stamp duty the security is not available for a sum beyond that amount: *Richards* v. *Moulesfield*, 10 L. J. Ch. 329.

Indemnity by way of mortgage.

Where an indemnity was given to a surety for a debt by means of a bond (which was duly stamped), to secure to him the repayment of any moneys he might be obliged to pay, with interest, and also of an assignment of property, with a power of sale, it was held that the assignment required an *ad valorem* mortgage stamp: *Watson* v. *Macguire*, 5 C. B. 837. Mr. Tilsley, in his valuable work on Stamps (p. 399), has pointed out that the deed of indemnity was held exempt, because it was in respect of a bond debt, on which the *ad valorem* duty had been paid (*a*). In

(*a*) The assignment in this case bore a deed stamp of 1*l.* 15*s.*, which was held to be sufficient; the instrument would now under similar circumstances require an *ad valorem* stamp as a collateral or auxiliary security.

Stamp Act, 1870, &c.

17. *Mortgages.*

*Lord Canning* v. *Raper,* 1 E. & B. 164, it was held that a mortgage to indemnify a surety of the mortgagor was chargeable with *ad valorem* duty as a security for payment of money to be thereafter lent.

Single instrument securing several debts.

*Reed* v. *Wilmott.*

Joint security for several debts.

Copyholds, with other property.

*Distinct Securities in one Deed.*]—Where distinct sums are secured to different persons by the same deed, two or more separate stamps will be required: see sect. 8 of the Stamp Act, 1870, *ante,* p. 26. But if the mortgage is for an aggregate sum contributed by several persons, so that though they have several interests, there is a community of subject, the security will be sufficiently stamped if stamped with *ad valorem* duty for the aggregate amount. An assignment of barges by A. to B., C., and D., jointly, as a security to them and the survivors or survivor of them, their executors or administrators, for 365*l.*, stated on the deed to be due to them from A., was held to be sufficiently stamped with an *ad valorem* stamp covering the aggregate sum, although it appeared (but not on the face of the deed) that the amount was made up of their separate debts: *Reed* v. *Wilmott,* 5 Moo. & P. 553. But the point was not necessary for decision, as the stamp, though sufficient in amount, was held to have been placed on the wrong instrument, namely, on a surrender of copyholds which were included in the security,—it being required, that, where copyholds are mortgaged with other property, the *ad valorem* duty shall be charged on the instrument relating to the other property. See also *Doe* v. *Govier,* 5 L. T. 37, where in the case of a mortgage for an aggregate sum, which was indorsed with a memorandum stating that part of the money was advanced by a person not party to the deed, it was held that the deed was sufficiently stamped with *ad valorem* duty on the aggregate amount.

Transfer.

*Transfer of Mortgage.*]—A transfer of a mortgage, to which the mortgagor is a party, reciting the mortgage, is admissible in evidence upon a transfer stamp, without producing the original mortgage,

or showing that it was stamped: *Doe* v. *Maple*, 5 Sc. 35. See *Doe* v. *Brooks*, 3 A. & E. 513; *Quin* v. *King*, 1 M. & W. 42.

Mortgage and promissory note.

Where a memorandum of deposit of deeds was also a promissory note, and was duly stamped as such and as a mortgage, it was held that an indorsee might sue upon it, although it bore no transfer stamp: *Wise* v. *Charlton*, 4 A. & E. 786. The deeds constituted the mortgage security, and these the indorsement did not transfer; or if it did operate as a transfer, it was not produced to prove a transfer: see p. 9. It has been doubted whether an absolute transfer of a mortgage in consideration of a smaller sum than the amount due is not liable to the *ad valorem* duty on a sale. But it is as much a transfer of a mortgage as if the exact sum had passed, and a transfer for the exact sum is as much a sale as if less had been given.

Transfer for less than sum due.

Transfer for less than amount of mortgage debt.

In *Doe* v. *Tom*, 4 Q. B. 615, a deed was executed by a mortgagor, professing to be a transfer of a mortgage for 150*l.*, and a security for a further advance of 70*l.*, on which sum the stamp was calculated; but, as the original mortgagee did not execute it, an objection was raised that the deed in fact amounted to an original mortgage for 220*l.* The Court held, however, that it could not fairly be said so to operate, and that the stamp was sufficient.

Transfer with charge of arrears of interest.

In the case of *Doe* v. *Maple*, 6 L. J. (N. S.), C. P. 271, a deed of transfer of a mortgage for 1,500*l.*, to which the mortgagor was a party, containing a further charge of costs and arrears of interest paid by the transferee to the transferor and converted into principal, was admitted upon a transfer stamp only. The point is not noticed in the reports of the same case in 5 Sc. 35, and 3 Bing. (N. S.), 832.

The 109th section of the present Act enacts, that no transfer of a mortgage, with or without a further advance, and no instrument of further charge, shall require an additional stamp, "by reason of containing any further or additional security for the old debt, or any new covenant, proviso, power, stipulation, agreement in relation thereto, or any

Stamp Act, 1870, &c.

17. *Mortgages.*

Effect of new proviso for redemption, &c.

further assurance of the property comprised in the transferred or previous security" (*b*).

It was formerly doubted whether, when a new proviso for redemption and a new covenant for payment are introduced into a transfer, the instrument would not be considered thereby in effect a new mortgage, so as to be liable to the *ad valorem* duty as a mortgage on the whole amount. The point was raised and decided in the negative in the case of *Wale* v. *Commissioners of Inland Revenue*, 4 Ch. D. 270. In that case, by an indenture reciting a previous mortgage of lands to secure 350*l.*, it was witnessed that in consideration of 350*l.* paid by S. to the mortgagees at the request of the mortgagor, in satisfaction of the mortgage debt, and in consideration of the further sum of 120*l.* paid by S. to the mortgagor, the mortgagees conveyed and the mortgagor confirmed to S. in fee the lands comprised in the original mortgage, discharged from the proviso for redemption therein contained, but subject to a new proviso for redemption on payment by the mortgagor to S. of the two sums of 350*l.* and 120*l.*, making together 470*l.* And the mortgagor thereby covenanted with S. for payment of 470*l.* and interest. It was urged on behalf of the Crown that there being no assignment of the old debt, and the covenants to pay it being released, that debt was extinguished; and that the test was the new proviso for redemption; it was held, though there was no formal assignment of the old debt, and though that debt and the old equity of redemption were extinguished, yet the instrument was in substance merely a transfer of mortgage so far as related to the original debt of 350*l.*, and was liable to duty accordingly on that sum, with further *ad valorem*

*Wale* v. *Commissioners of Inland Revenue.*

(*b*) This enactment will be found set out fully *ante*, Vol. III., p. 1198, n. Its provisions are virtually identical with those of sect. 9 of the Stamp Act, 1850 (13 & 14 Vict. c. 97). As to the former law on the subject, see *Doe* v. *Gray*, 3 A. & E. 89; *Lant* v. *Pearce*, 8 A. & E. 248; *Brown* v. *Pegg*, 6 Q. B. 1; *Doe* v. *Guttridge*, 11 Q. B. 409; *Humberstone* v. *Jones*, 16 M. & W. 763. See also Sweet's Supp. to the 3rd edition of Byth. & Jarm. Conv., p. 142 *et seq.*

duty as a "mortgage" on the 120*l.* only; *Kelly*, C.B., in the course of his judgment said, "When we look at sect. 109 of the Stamp Act, 1870, it is clear that the object of the legislature was not to multiply taxation, but, although the securities might be varied and additional security given, to look at the substance of the transaction."

*Exemptions.*]—Mortgages of ships and shares in ships are exempt from stamp duty by the Schedule to the Act of 1870; and special exemptions of certain mortgages are enforced by the following Acts:—

Dispensary House (Ireland) Act, 1879: 42 & 43 Vict. c. 25.

Glebe Loan (Ireland) Act, 1870: 33 & 34 Vict. c. 112.

Militia Law Amendment Act: 17 & 18 Vict. c. 105.

National School Teachers' Residences (Ireland) Act, 1875: 38 & 39 Vict. c. 82.

Poor Law Acts: 4 & 5 Will. 4, c. 76; 7 & 8 Vict. c. 101; and as to Ireland, 1 & 2 Vict. c. 56.

Debentures of loan societies are also free from liability to stamp duty: see stat. 3 & 4 Vict. c. 110; and as to Ireland see stat. 6 & 7 Vict. c. 91.

Securities on which the funds of friendly societies are invested are not exempt under the Friendly Societies Act, 18 & 19 Vict. c. 63, sect. 37: *Re Royal Liver Friendly Society*, L. R. 5 Ex. 78.

As to benefit building societies, see stats. 10 Geo. 4, c. 56; 6 & 7 Will. 4, c. 32; see also *Att.-Gen.* v. *Gilpin*, L. R. 6 Ex. 193; *Thorn* v. *Croft*, L. R. 3 Eq. 193.

## 18. Receipts.

Interpretation of term.

The instruments charged as receipts with a duty of 1*d.* (which may be denoted by an adhesive stamp), are described in the Schedule to the Stamp Act, 1870, as "receipts given for or upon payment of money amounting to 2*l.* or upwards," and are thus defined in sect. 120 of the Act:—

Stamp Act, 1870, &c.

18. *Receipts.*

"Any note, memorandum, or writing whatsoever, whereby any sum of money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards is acknowledged or expressed to have been received, or deposited, or paid, or whereby any debt or demand of the amount of two pounds or upwards is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person."

Any expression importing payment is sufficient to constitute a receipt within the Act; as the word "settled" on a bill of parcels: *Spawforth* v. *Alexander*, 2 Esp. 621; "Paid, A. B.": *Reg.* v. *Houseman*, 8 C. & P. 180. The Act expressly includes receipts given on payment by bills or promissory notes: see *Scholey* v. *Walsby*, Peake 24.

Time of payment.

A receipt or acknowledgment is not charged if it is not given for or upon payment of money, &c. And the words "for or upon" mean, at the same time, with or as part of the same transaction. An acknowledgment of the balancing of accounts, not purporting or shewn to have been given on the payment of money, does not require a receipt stamp: *Tebbut* v. *Ambler*, 9 C. & P. 66; *Finney* v. *Tootell*, 5 C. B. 504. So, an acknowledgment by the plaintiff of the correctness of an account made out by the defendant (who had received money to the plaintiff's use) of payments and disbursements made at different times by the defendant to or for the plaintiff's use, was received without a stamp: *Wellard* v. *Moss*, 7 Moo. 503. On the other hand, an account made up of various entries acknowledging the payment of money, which entries were made from time to time as the payments were made, was rejected for want of a receipt stamp on each entry. The Court distinguished the case from that of an account containing admissions of past payments: *Wright* v. *Shawcross*, 2 B. & Al. 501, n. So, in *Jacob* v. *Lindsay*, 1 East, 460, receipts from time to time signed in a book of account as the payments were made, were considered to require receipt stamps. And in *Reg.* v. *Overton*, 18 Jur. 134, where a book contained columns for names of persons to whom money was

Admission of past payment.

from time to time paid, dates of payment, and amounts paid to such persons respectively, and upon payment the several persons used to sign their names opposite the amount received, thereby implying though not expressing an acknowledgment of payment of the money, it was held that each signature amounted to a receipt liable to stamp duty. It has been held that the initialling of a brief by counsel to signify payment of the fee is not liable to duty: *Re Beavan,* 5 De G. M. & G. 40.

Receipt signed abroad to be delivered here.

It is sometimes necessary for a person abroad to send a receipt to this country, to be delivered by his agent on payment. It is conceived that such a receipt, which is not within the letter of the Stamp Act, would not be liable to duty, especially as English stamps are not to be procured abroad.

Receipt, with other matter.

A receipt, stamped as a receipt only, but containing other matter which requires a different stamp, is admissible to prove the payment: *Grey* v. *Smith,* 1 Camp. 387; and the fact that a writing includes a receipt does not prevent its reception for other purposes: *Jacob* v. *Lindsay,* 1 East, 460; *Brookes* v. *Davies,* 2 C. & P. 186; and see *ante,* p. 9. On the other hand, a receipt may be read as such though endorsed on an instrument not duly stamped: *Odge* v. *Cookney,* M. & Rob. 577.

Witness may look at unstamped receipt.

An unstamped receipt may be looked at by a witness, or read to a blind witness, to refresh his memory: *Jacob* v. *Lindsay,* 1 East, 460; *Catt* v. *Howard,* 3 Stark. 3; *Maugham* v. *Hubbard,* 8 B. & Cr. 14. So also an unstamped receipt may be admissible in evidence to prove the state of accounts at a particular time, where there is no question raised as to payment: *Matheson* v. *Ross,* 2 Cl. & F. (N. S.) 286, *ante,* p. 9.

Exemption of receipt indorsed on or annexed to bond, &c.

Receipts indorsed on instruments, &c., for the money secured by them, "or therein mentioned," are exempt. If the instrument is so covered by indorsements that there is no room for a receipt, it may be written on a paper annexed, and will have the benefit of the exemption: *Orme* v. *Young,* 4 Camp. 336. The exemption under the former Act, 13 & 14 Vict. c. 97, only extended to receipts for h e money secured by, or the consideration expressed

Stamp Act, 1870, &c.

18. *Receipts.*

in, the deed. If, therefore, a conveyance of part of the property included in a purchase, at an apportioned price, mentions the price agreed upon for the whole, a receipt for the entire consideration money indorsed on such conveyance will now be within the exemption, which formerly would not apparently have been the case.

*Exemptions.*]—Receipts given in certain cases are exempted from duty by the Schedule to the Act of 1870. And by the Revenue Act, 1882 (45 & 46 Vict. c. 72), sect. 6, it is provided that no stamp duty shall be payable upon any receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom. Special exemptions are also conferred by the following Acts:—

Building Societies' Act: 37 & 38 Vict. c. 42, s. 41.

Church Building Acts: 3 Geo. 4, c. 72, s. 28.

Income Tax Act: 5 & 6 Vict. c. 35, s. 179.

Land Tax Acts: 42 Geo. 3, c. 116, s. 173.

Landed Property (Ireland) Act: 10 & 11 Vict. c. 32, s. 59.

Loan Societies' Act (England): 3 & 4 Vict. c. 110, s. 14.

Loan Societies' Act (Ireland): 6 & 7 Vict. c. 91, s. 26.

Militia Law Amendment Act: 17 & 18 Vict. c. 105, s. 20.

Naval Agency and Distribution Act: 27 & 28 Vict. c. 24, s. 16.

Parochial Stipends (Scotland) Act: 50 Geo. 3, c. 84, s. 22.

Poor Law (Ireland) Act: 1 & 2 Vict. c. 56, s. 96.

Post Office Land Act: 44 & 45 Vict. c. 20, s. 25.

Public Health (Scotland) Act: 30 & 31 Vict. c. 101, s. 120.

Public Works (Ireland) Act: 1 & 2 Wm. 4, c. 33; or 9 & 10 Vict. c. 86, s. 8.

Savings Bank Act: 26 & 27 Vict. c. 87, s. 50.

Savings Bank Annuities Act: 16 & 17 Vict. c. 45, s. 29.

## 19. Release or Renunciation.

Any deed or instrument of release or renunciation of lands or other property real or personal, not otherwise charged, is charged with the same duty as a deed. This means an instrument giving up some right or estate actually vested in the person executing it, and does not, it is conceived, extend to a mere disclaimer of ever having had a title. As to the distinction between a release, implying an existing title, and a disclaimer, see *Crewe* v. *Dicken*, 4 Ves. 97; *Nicolson* v. *Wordsworth*, 2 Swanst. 365; and as to disclaimers, see also *Doe* v. *Harris*, 16 M. & W. 517; *Wetherell* v. *Langston*, 1 Exch. 637; *Watson* v. *Pearson*, 2 Exch. 585; *Haigh* v. *Jaggar*, 3 Exch. 54, 69. In *Doe* v. *Stagg*, 7 Sc. 690, an unsealed writing to the following effect was held to be a surrender, and not a mere disclaimer of title, and therefore to require a stamp: "We, the undersigned executrixes, &c., do hereby renounce and disclaim, and also surrender and yield up, unto the churchwardens and overseers of H., all right, title, term and possession of and in all that messuage, &c., formerly in the possession of J. C. [the testator], as tenant to the said parish." An agreement to deliver up possession of land, if merely executory, is chargeable as an agreement: *Weddell* v. *Capes*, 1 M. & W. 50; otherwise, as a surrender: *Williams* v. *Sawyer*, 6 Moo. 226. See the title in the Table, *post*, p. 136.

Distinction between a renunciation and a disclaimer.

## 20. Schedule.

A schedule, inventory, document, of any kind whatsoever, referred to, in, or by, and intended to be used or given in evidence as part of or as material to, any other instrument liable to duty, is charged with a duty. No alteration is made by the present Act in this respect, except in the amount of duty.

Detached schedules.

In *Duck* v. *Braddyll*, 13 Price, 455, the point was decided, that an instrument executed for an independent purpose, and not duly stamped as

Unstamped original used as schedule.

Stamp Act, 1870, &c.
20. *Schedule.*

such, may be read as a schedule to an instrument to which it is annexed, and bearing a stamp sufficient to cover its contents. The present Act makes no alteration in this respect. So, the incorporation of an agreement by reference, in another indorsed on it, renders proof of the execution of the first unnecessary: *Fishmongers' Co.* v. *Dimsdale*, 6 C. B. 896.

Indorsement on unstamped writing.

In *Atwood* v. *Small*, 7 B. & C. 390, 1 M. & Ry. 246, an agreement, duly stamped, was abandoned, and a substituted agreement was indorsed on it, and incorporated by reference an arbitration clause contained in the former: Lord *Tenterden*, C. J., held, that the new agreement did not require a stamp in respect of the matter in the agreement on which it was indorsed, and said, "In *Lake* v. *Ashwell* the schedule was *annexed to* the deed in the very words of the Act of Parliament. In the present case, the words of the clause of reference [to arbitration] were not in the instrument, nor in any schedule, instrument, or other matter put or indorsed thereon, or annexed thereto." This is simply unintelligible, unless it can be said, that when a horse is taken to a cart and harnessed to it, the cart is not annexed to the horse. The case is within the present enactment.

Reference to expired lease.

In *Strutt* v. *Robinson*, 3 B. & Ad. 395, an agreement for a tenancy adopted, by reference, the terms of an expired lease, which was held not to require a fresh stamp as a schedule.

Unstamped lease annexed.

In *Pearce* v. *Cheslyn*, 4 A. & E. 225, an agreement amounting to a lease, and duly stamped as such, referred to and adopted the stipulations contained in an abandoned lease which was not stamped. It was argued that the abandoned lease could not be read in evidence; but the Court held, that "that argument was not well founded, as the lease was incorporated with the second agreement, which was stamped with a lease stamp." It seems, from the report in 4 A. & E., that the instruments were annexed; so that the decision was correct, no question having been raised as to the progressive duty. But, during the argument, Lord *Denman*, C. J., asked whether, if a lease referred to and incorporated

Reference to

the contents of a Form in "The Attorney's Pocket

Stamp Act, 1870, &c.
20. *Schedule.*

Book," it would be necessary to have the Attorney's Pocket Book stamped? If a particular copy of the book were referred to and annexed to the lease, it would be necessary that the stamp on the latter should cover so much of the book as was referred to, (*Wickens* v. *Evans*, 4 C. & P. 359); and if not annexed, the copy would require a schedule stamp on the part referred to. But a mere reference to a published work, without specifying any copy, is a reference to an incorporeal thing (*Millar* v. *Taylor*, 4 Burr. 2303; *Donaldson* v. *Beckett*, 2 B. P. C. 129), and not to any piece of paper, parchment, or vellum, within the Stamp Act.

a printed book.

Verbal agreement by reference to unstamped writing.

In *Drant* v. *Brown*, 3 B. & C. 665, it was properly held, that a writing referred to as containing the terms of a subsequent *verbal* contract, did not require a stamp. See *Turner* v. *Power*, 7 B. & C. 625, *ante*, p. 62, contrà. And see *Edgar* v. *Blick*, 1 Stark. 464; *Bethell* v. *Blencowe*, 3 Sc. N. R. 568.

For the cases where several writings have been held to constitute an agreement requiring but one stamp, see p. 30.

Effect of not stamping schedule.

The want of a stamp on a detached schedule does not render the principal instrument inadmissible: *Daines* v. *Heath*, 3 C. B. 940; *Dyer* v. *Green*, 1 Exch. 71.

Inventory not chargeable, if not referred to.

The duty on inventories is frequently evaded by avoiding any reference to an existing document in the principal instrument, and by appending to the inventory an acknowledgment that the matters enumerated in it are the matters mentioned in the principal instrument.

## 21. Settlement.

Settlement of definite sum of money or stock for any vested interest.

A settlement, whether voluntary or upon any consideration not pecuniary, whereby any *definite and certain* principal sum of money, whether charged on land or not, and whether to be laid out in land or not, or of any definite and certain amount, stock, or any security, is charged with an *ad valorem* duty on the amount or value of such money or stock.

It would seem clear that a settlement of stock

Stamp Act, 1870, &c.

21. *Settlement.*

upon trust to be laid out in the purchase of lands would be liable to the duty equally with a settlement of money upon a similar trust.

Where part of property agreed to be settled by marriage articles was land purchased by the trustees of an earlier settlement with moneys subject thereto, and the land was subject to trusts for resale under that settlement, and was in the meantime to be considered in equity as money, it was held that the articles were not liable to duty as a settlement of a definite and certain principal sum of money: *Re Stuckley's Settlement*, L. R. 5 Ex. 85.

Where an instrument chargeable as a settlement contains provisions settling or agreeing to settle property other than that in respect of which the *ad valorem* duty is payable, it would seem to be chargeable also with a deed stamp of 10*s.* in respect of such provisions, as a deed of a kind not described in the schedule: see *Clayton* v. *Burtenshaw*, 5 B. & C. 41; and see sect. 8 of the Act, *ante*, p. 27.

Settlement by Court.

An order of the Court making a settlement must be stamped as a settlement: *Re Gowan, Gowan* v. *Gowan*, 17 Ch. D. 778.

## 22. Rates of Duties.

*Present Stamp Duties.*]—The following is a Table of the Stamp Duties now payable in the United Kingdom:—

### Table of Duties (*a*).

| | Duty. £ | *s.* | *d.* |
|---|---|---|---|
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) Admission in England, Scotland, or Ireland of any person— | | | |
| As an advocate in any court . . . . . | 50 | 0 | 0 |

(*a*) The statutes referred to in the marginal notes to the following pages are those by which the several duties set out in this table are imposed. The dates are those on which these duties respectively became payable. The parts of the table which are enclosed in brackets are taken from the first schedule to the Customs and Inland Revenue Act, 1888, and relate to instruments

| | Duty. £ | s. | d. |
|---|---|---|---|
| *Exemption.* | | | |
| Where a person has been duly admitted as an advocate in any court in England, Scotland, or Ireland, his admission as an advocate in any other court in the same country is exempt from duty. | | | |
| And see sections 29 and 30. | | | |
| ADMISSION in England or Ireland of any person— | | | |
| To the degree of barrister-at-law. | | | |
| If he has been previously duly admitted to the said degree in Ireland, or in England, as the case may be . . . . . | 10 | 0 | 0 |
| In any other case . . . . . | 50 | 0 | 0 |
| And see sections 29, 30, and 31. | | | |

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which are within the provisions of sect. 18 of that Act. That section enacts as follows:—

Provision as to the stamping of instruments.

"(1.) The following provisions shall have effect in relation to instruments executed after the passing of this Act which are chargeable with *ad valorem* duty as specified in the first schedule hereto.

"(*a.*) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper *ad valorem* duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the Commissioners of Inland Revenue, with respect to the amount of duty with which the instrument is chargeable, has, before such expiration, been required under the provisions of section eighteen of the Stamp Act, 1870.

"(*b.*) In case the opinion of the said Commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the Commissioners within fourteen days after the date of notice of such assessment.

"(*c.*) If any such instrument is not duly stamped in conformity with the foregoing provisions, the person on that behalf specified in the first schedule hereto shall forfeit the sum of ten pounds, and in addition to the penalty payable by law on stamping the instrument, there shall be paid an additional penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping or for the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the said Commissioners, or of the court, judge, arbitrator, or referee before whom it is produced."

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | ADMISSION as an advocate in Scotland of any person previously duly admitted to the degree of a barrister-at-law in Ireland and *vice versâ* . . . . . | 10 | 0 | 0 |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) 37 & 38 Vict. c. 19, sect. 1. (1st July, 1874.) | ADMISSION of any person— To be a member of either of the four Inns of Court in England, or a student of the Society of King's Inns in Dublin . . . . . | 25 | 0 | 0 |
| | *Exemptions.* (1.) Where a person has been duly admitted a member of one of the Inns of Court in England, his admission as a member of any other of the said Inns is exempt from duty. (2.) Where a person has been duly admitted a student of the Society of King's Inns in Dublin, his admission as a member of any of the Inns of Court in England is exempt from duty (*b*). And see sections 29, 30, 31, and 32. | | | |
| | ADMISSION of any person— To be a member of either of the Societies commonly called Inns of Chancery in England . And see sections 29 and 30. | 3 | 0 | 0 |
| | ADMISSION in England or Ireland of any person— As an attorney, solicitor, or proctor in any court | 25 | 0 | 0 |
| | *Exemption.* Where a person has been duly admitted as an attorney, solicitor, or proctor in any court in England or Ireland, his admission to act in either of those capacities in any other court in the same country is exempt from duty. And see sections 29 and 30. | | | |
| | ADMISSION in Scotland of any person— (1.) As a writer to the signet, or as a solicitor, agent, or attorney in the Court of Session, Justiciary, or Commission of Teinds: If he has previously paid the sum of 60*l.* for duty upon his articles of clerkship | 25 | 0 | 0 |

(*b*) No duty is payable on the admission as barristers in England of persons previously duly admitted as advocates in Scotland, and *vice versâ*: see stat. 37 & 38 Vict. c. 19.

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. 22. *Present Stamp Duties.* |
|---|---|---|---|---|
| If he has been previously duly admitted as a procurator or solicitor in any inferior court . . . . . | 30 | 0 | 0 | 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) |
| In any other case . . . . . | 85 | 0 | 0 | |
| (2.) As a procurator or solicitor in any inferior court: | | | | |
| If he has previously paid the sum of 2*s.* 6*d.* for duty on his articles of clerkship . . . . . | 54 | 17 | 6 | |
| In any other case . . . . . | 55 | 0 | 0 | |
| *Exemptions.* | | | | |
| (1.) Where a person has been duly admitted as a writer to the signet, or as a solicitor, agent, or attorney in the Court of Session, Justiciary, or Commission of Teinds, his admission to act in either of those capacities in any other of the said courts, or as a procurator or solicitor in any inferior court, is exempt from duty. | | | | |
| (2.) Where a person has been duly admitted as a procurator or solicitor in any inferior court, his admission as a procurator or solicitor in any other inferior court is exempt from duty. | | | | |
| And see sections 29 and 30. | | | | |
| ADMISSION to act as a notary public. See "*Faculty.*" | | | | |
| ADMISSION of any person— | | | | |
| As a Fellow of the College of Physicians in England, Scotland or Ireland . . . . . | 25 | 0 | 0 | |
| And see sections 29 and 30. | | | | |
| ADMISSION to the degree of doctor of medicine in either of the universities in Scotland . . . . . | 10 | 0 | 0 | |
| And see sections 29 and 30. | | | | |
| ADMISSION in England or Ireland of any person— | | | | |
| As a burgess, or into any corporation or company, in any city, borough, or town corporate. | | | | |
| In respect of birth, apprenticeship, or marriage, or, in Ireland, in respect of being engaged in any trade, mystery, or handicraft . . . . . | 1 | 0 | 0 | |
| Upon any other ground . . . . . | 3 | 0 | 0 | |

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871.)

| | Duty. £ | s. | d. |
|---|---|---|---|
| *Exemption (c).* | | | |
| Admission of any person to the freedom of the city of London by redemption. | | | |
| And see sections 29 and 30. | | | |
| ADMISSION in Scotland of any person— | | | |
| As a burgess, or into any corporation or company, in any burgh . . . . . | 0 | 5 | 0 |
| *Exemption.* | | | |
| Admission of a craftsman or other person into any corporation within any royal burgh, burgh of royalty, or burgh of barony incorporated by the magistrates and council of such burgh, provided such craftsman or other person has been previously duly admitted a freeman or burgess of the burgh. | | | |
| And see sections 29 and 30. | | | |
| ADMISSION to ecclesiastical benefices in Scotland. | | | |
| See "*Appointment*," &c., to ecclesiastical benefices. | | | |
| ADMISSION and APPOINTMENT or GRANT by any writing— | | | |
| To or of any office or employment— | | | |
| Where the annual salary, fees, or emoluments appertaining to such office or employment do not exceed 100*l.* . . . . . | 2 | 0 | 0 |
| Exceed 100*l.* and do not exceed 150*l.* . . | 4 | 0 | 0 |
| „ 150*l.* „ „ 200*l.* . . | 6 | 0 | 0 |
| „ 200*l.* „ „ 250*l.* . . | 8 | 0 | 0 |
| „ 250*l.* „ „ 300*l.* . . | 10 | 0 | 0 |
| „ 300*l.*— | | | |
| for every 100*l.*, and also for any fractional part of 100*l.* . . . . . | 5 | 0 | 0 |
| *Exemptions.* | | | |
| (1.) Admission proceeding upon a duly stamped appointment or grant. | | | |
| (2.) First appointment of any person to the office or employment of out-door officer, boatman, waterman, or watchman in the service of the Customs. | | | |

(*c*) For special exemptions see stats. 5 & 6 Will. 4, c. 76; 1 & 2 Vict. c. 35; 3 & 4 Vict. c. 101; and 26 Vict. c. 18.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| (3.) Periodical re-admission or re-appointment to any office or employment of any person who has been once duly admitted to such office or employment. | | 22. *Present Stamp Duties.* |
| And see sections 29, 30, 33, 34, and 35. | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) |
| AFFIDAVIT, or STATUTORY DECLARATION made under the provisions of 5 & 6 Will. 4, c. 62 (*d*) . . | 0 2 6 | |
| *Exemptions* (*e*). | | |
| (1.) Affidavit made for the immediate purpose of being filed, read, or used in any court, or before any judge, master, or officer of any court. | | |
| (2.) Affidavit or declaration made upon a requisition of the commissioners of any public board of revenue, or any of the officers acting under them, or required by law, and made before any justice of the peace. | | |
| (3.) Affidavit or declaration which may be required at the Bank of England or the Bank of Ireland to prove the death of any proprietor of any stock transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stock. | | |
| (4.) Affidavit or declaration relating to the loss, mutilation, or defacement of any bank note or bank post bill. | | |
| (5.) Declaration required to be made pursuant to any Act relating to marriages in order to a marriage without licence. | | |
| AGREEMENT for a lease or tack, or for any letting. See "*Lease* or *Tack*," and section 96. | | |
| AGREEMENT or CONTRACT made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways . | 0 0 6 | |
| AGREEMENT or MEMORANDUM under hand only (*f*) re- | | 51 Vict. c. 8, s. 15. (16th May, 1888.) |

(*d*) An affidavit cannot be re-sworn and used for a second purpose without a fresh stamp: *Chitty* v. *Bishop*, 4 Moo. 413.

(*e*) Declarations on applications for patents are exempt from duty: see stat 47 & 48 Vict. c. 62, sect. 9. There are also other special statutory exemptions.

(*f*) Previous to the passing of the Customs and Inland Revenue Act of 1888 agreements or contracts accompanied by

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | lating to the depost of any title-deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property, for every 100*l.*, and any fractional part of 100*l.*, of the amount secured by the equitable mortgage . . | 0 | 1 | 0 |
| 51 Vict. c. 8, s. 14. (16th May, 1888.) | AGREEMENT or INSTRUMENT (*ff*) under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan . | 0 | 0 | 6 |
| | AGREEMENT or INSTRUMENT (*ff*) under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable value . . . . . | 0 | 0 | 6 |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) | AGREEMENT, or any MEMORANDUM of an AGREEMENT, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument . . . . . | 0 | 0 | 6 |

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a deposit were subject to the *ad valorem* duty chargeable on mortgages under the Stamp Act, 1870: see sect. 105 of that Act.

By sub-sect. 2 of sect. 15 of the Act of 1888 it is enacted that,

"Where the total amount which may be at any time secured by any equitable mortgage is unascertained or unlimited in the first instance, and the *ad valorem* stamp duty impressed on the agreement or memorandum in conformity with this section is available under section one hundred and seven of the Stamp Act, 1870, for such an amount only as such duty extends to cover, such agreement or memorandum shall for the purpose of stamp duty be deemed to be a new and separate agreement or memorandum, bearing date on the day on which any advance or loan is made in excess of the amount covered by the duty impressed thereon."

These instruments are within the provisions of sect. 18 of the Customs and Inland Revenue Act, 1888, and the person specified by the schedule to that Act as liable to the penalty thereby imposed is "the mortgagee."

(*ff*) Every such instrument is to be deemed an agreement. A release or discharge of any such instrument is not chargeable with *ad valorem* duty.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| *Exemptions (g).* | | 22. *Present Stamp Duties.* |
| (1.) Agreement or memorandum the matter whereof is not of the value of 5*l.* | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) |
| (2.) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant. | | |
| (3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise. | | |
| (4.) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom. | | |
| And see section 36 (*h*). | | |
| ALLOTMENT. See "*Letter of Allotment.*" | | |
| ANNUITY, conveyance in consideration of. See "*Conveyance on Sale,*" and section 72. | | |
| purchase of. See "*Conveyance on Sale,*" and section 75. | | |
| creation of, by way of security. See "*Mortgage,*" &c., and section 108. | | |
| instruments relating to, upon any other occasion. See "*Bond, Covenant,*" &c. | | |
| APPLICATION for certificate of incorporation under the Charitable Trustees Incorporation Act, 1872 . . | 0 10 0 | 35 & 36 Vict. c. 24, s. 9. (27th June, 1872.) |
| APPOINTMENT, whether by way of Donation, Presentation, or Nomination, and ADMISSION, COLLATION, or INSTITUTION to or LICENCE TO HOLD— Any ecclesiastical benefice, dignity, or promotion, or any perpetual curacy. | | |
| In England. | | |
| If the net yearly value thereof exceeds— | | |
| 50*l.* and does not exceed 100*l.* . . . | 1 0 0 | |
| 100*l.* „ „ 150*l.* . . . | 2 0 0 | |
| 150*l.* „ „ 200*l.* . . . | 3 0 0 | |
| 200*l.* „ „ 250*l.* . . . | 4 0 0 | |

(*g*) See as to those exemptions, and also as to exemptions created by various statutes not otherwise relating to stamp duties, *ante*, pp. 41 *et seq.*

(*h*) By sect. 36 the duty of 6*d.* may be denoted by an adhesive stamp, to be cancelled by the person by whom the agreement is first executed.

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | 250*l.* and does not exceed 300*l.* . . . | 5 | 0 | 0 |
| | 300*l.* . . . . . | 7 | 0 | 0 |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) | And also (if such yearly value exceeds 300*l.*) for every 100*l.* of such yearly value over and above 200*l.* a further duty of . . . . . | 5 | 0 | 0 |
| | In Scotland . . . . . | 2 | 0 | 0 |

*Exemptions.*

Admission, collation, institution, or licence proceeding upon a duly stamped donation, presentation, or nomination.

And see section 37.

APPOINTMENT of a new trustee, and APPOINTMENT in execution of a power of any property, or of any use, share, or interest in any property, by any instrument not being a will . . . . . 0 10 0

And see section 78 (*i*).

APPOINTMENT of a gamekeeper.

See "*Deputation.*"

APPOINTMENTS to offices or employments.

See "*Admission.*"

APPRAISEMENT or VALUATION of any property, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificer's work whatsoever.

| | | | |
|---|---|---|---|
| Where the amount of the appraisement or valuation does not exceed 5*l.* . . . . . | 0 | 0 | 3 |
| Exceeds 5*l.* and does not exceed 10*l.* . . . | 0 | 0 | 6 |
| „ 10*l.* „ 20*l.* . . . . | 0 | 1 | 0 |
| „ 20*l.* „ 30*l.* . . . | 0 | 1 | 6 |
| „ 30*l.* „ 40*l.* . . . | 0 | 2 | 0 |
| „ 40*l.* „ 50*l.* . . . | 0 | 2 | 6 |
| „ 50*l.* „ 100*l.* . . . | 0 | 5 | 0 |
| „ 100*l.* „ 200*l.* . . . | 0 | 10 | 0 |
| „ 200*l.* „ 500*l.* . . . | 0 | 15 | 0 |
| „ 500*l.* . . . . . | 1 | 0 | 0 |

*Exemptions.*

(1.) Appraisement or valuation made for, and for the information of, one party only, and not

(*i*) See Vol. I., p. 34.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| being in any manner obligatory as between parties either by agreement or operation of law. | | 22. *Present Stamp Duties.* |
| (2.) Appraisement or valuation made in pursuance of the order of any Court of Admiralty or Vice-Admiralty, or of any Court of Appeal, from any sentence, adjudication, or judgment of any Court of Admiralty or Vice-Admiralty. | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871.) |
| (3.) Appraisement or valuation of any property made for the purpose of ascertaining the legacy or succession duty payable in respect thereof. | | |
| And see section 38. | | |
| APPRENTICESHIP, instrument of (*k*). | | |
| Where there is no premium or consideration . | 0 2 6 | |
| In any other case— | | |
| For every 5*l.*, and also for any fractional part of 5*l.*, of the amount or value of the premium or consideration . . . . . | 0 5 0 | |
| *Exemptions.* | | |
| (1.) Instrument relating to any poor child apprenticed by or at the sole charge of any parish or township, or by or at the sole charge of any public charity, or pursuant to any Act for the regulation of parish apprentices. | | |
| (2.) Instrument of apprenticeship in Ireland, where the value of the premium or consideration does not exceed 10*l.* | | |
| And see sections 39 and 40. | | |
| ARTICLES OF CLERKSHIP whereby any person first becomes bound to serve as a clerk in order to his admission— | | |
| (1.) As an attorney or solicitor in any of Her Majesty's courts at Westminster or in Ireland, or as a proctor in the High Court of Admiralty, or any Ecclesiastical Court in England or Ireland . . . . . | 80 0 0 | |
| (2.) As an attorney or solicitor in any of the courts of the counties palatine of Lancaster | | |

(*k*) See *ante*, pp. 48 *et seq.*

Stamp Act. 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871.)

| | Duty. £ | s. | d. |
|---|---|---|---|
| and Durham, or as a writer to the signet, or as a solicitor, agent, or attorney in the Court of Session, Justiciary, or Commission of Teinds in Scotland . . . | 60 | 0 | 0 |
| (3.) As a procurator or solicitor in any inferior court in Scotland . . . . . | 0 | 2 | 6 |
| And see sections 41, 42, 43, and 44. | | | |
| ARTICLES OF CLERKSHIP whereby any person, having been before bound by duly stamped articles to serve as a clerk in order to his admission in any of the courts aforesaid, and not having completed his service so as to be entitled to such admission, becomes bound afresh for the same purpose . . . | 0 | 10 | 0 |
| ASSIGNMENT or ASSIGNATION (*l*). | | | |
| By way of security, or of any security. See "*Mortgage*," &c. | | | |
| Of marketable security. See "*Transfer*." | | | |
| Upon a sale, or otherwise. See "*Conveyance*." | | | |
| ASSURANCE or INSURANCE. See "*Policy*." | | | |
| ATTESTED COPY. See "*Copy*." | | | |
| ATTORNEY, LETTER or POWER of. See "*Letter of Attorney*." WARRANT of. See "*Warrant of Attorney*." | | | |
| AWARD in England or Ireland, and AWARD or DECREET ARBITRAL in Scotland. | | | |
| Where the amount or value of the matter in dispute does not exceed 5*l*. . . . . | 0 | 0 | 3 |

(*l*) By sect. 19 of the Customs and Inland Revenue Act, 1888, it is enacted as follows:

Provision as to the stamp duty on assignments of policies of life assurance.

"(1) No assignment of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless such assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

"(2) If any payment shall be made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to Her Majesty from the company or person by whom such payment is made, and shall be recoverable as such accordingly.

| | Duty. £ | s. | d. |
|---|---|---|---|
| Exceeds 5*l.* and does not exceed 10*l.* | 0 | 0 | 6 |
| „ 10*l.* „ 20*l.* | 0 | 1 | 0 |
| „ 20*l.* „ 30*l.* | 0 | 1 | 6 |
| „ 30*l.* „ 40*l.* | 0 | 2 | 0 |
| „ 40*l.* „ 50*l.* | 0 | 2 | 6 |
| „ 50*l.* „ 100*l.* | 0 | 5 | 0 |
| „ 100*l.* „ 200*l.* | 0 | 10 | 0 |
| „ 200*l.* „ 500*l.* | 0 | 15 | 0 |
| „ 500*l.* „ 750*l.* | 1 | 0 | 0 |
| „ 750*l.* „ 1,000*l.* | 1 | 5 | 0 |
| And where it exceeds 1,000*l.*, and in any other case not above provided for | 1 | 15 | 0 |

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871.)

BACK BOND. See "*Mortgage*," &c., and section 105.

BANK NOTE—

| | | | |
|---|---|---|---|
| For money not exceeding 1*l.* | 0 | 0 | 5 |
| Exceeding 1*l.* and not exceeding 2*l.* | 0 | 0 | 10 |
| „ 2*l.* „ 5*l.* | 0 | 1 | 3 |
| „ 5*l.* „ 10*l.* | 0 | 1 | 9 |
| „ 10*l.* „ 20*l.* | 0 | 2 | 0 |
| „ 20*l.* „ 30*l.* | 0 | 3 | 0 |
| „ 30*l.* „ 50*l.* | 0 | 5 | 0 |
| „ 50*l.* „ 100*l.* | 0 | 8 | 6 |

And see sections 45, 46, and 47.

BILL OF EXCHANGE—

| | | | |
|---|---|---|---|
| Payable on demand (*m*) | 0 | 0 | 1 |

BILL OF EXCHANGE of any other kind whatsoever (*except a Bank Note*) and PROMISSORY NOTE of any kind whatsoever (*except a Bank Note*)—drawn, or expressed to be payable, or actually paid, or endorsed, or in any manner negotiated in the United Kingdom.

| | | | |
|---|---|---|---|
| Where the amount or value of the money for which the bill or note is drawn or made does not exceed 5*l.* | 0 | 0 | 1 |
| Exceeds 5*l.* and does not exceed 10*l.* | 0 | 0 | 2 |
| „ 10*l.* „ 25*l.* | 0 | 0 | 3 |
| „ 25*l.* „ 50*l.* | 0 | 0 | 6 |
| „ 50*l.* „ 75*l.* | 0 | 0 | 9 |
| „ 75*l.* „ 100*l.* | 0 | 1 | 0 |
| „ 100*l.*— | | | |

(*m*) This fixed duty of 1*d.* may be denoted by an adhesive stamp: see sect. 50.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871.)

| | Duty. £ s. d. |
|---|---|
| for every 100*l.*, and also for any fractional part of 100*l.*, of such amount or value . . | 0 1 0 |

*Exemptions* (*n*).

(1.) Bill or note issued by the Governor and Company of the Bank of England or Bank of Ireland.

(2.) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

(3.) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf.

(4.) Letter of credit granted in the United Kingdom, authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5.) Draft or order drawn by the Accountant General of the Court of Chancery in England or Ireland.

(6.) Warrant or order for the payment of any annuity granted by the Commissioners for the reduction of the National Debt, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.

(7.) Bill drawn by the Lords Commissioners of the Admiralty, or by any person under

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(*n*) For special exemptions from duty under other statutes, see *ante*, p. 61.

As to compositions by bankers in lieu of stamp duty on notes and bills issued by them, see, as to England, stat. 9 Geo. 4, c. 23 : as to Scotland, stat. 16 & 17 Vict. c. 63, sect. 7 : and as to Ireland, stats. 9 Geo. 4, c. 80 ; 5 & 6 Vict. c. 82 ; 16 & 17 Vict. c. 59, sect. 20 ; and 30 & 31 Vict. c. 89.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| their authority, under the authority of any Act of Parliament, upon and payable by the Accountant General of the Navy. | | 22. *Present Stamp Duties.* |
| (8.) Bill drawn (according to a form prescribed by Her Majesty's orders by any person duly authorized to draw the same) upon and payable out of any public account for any pay or allowance of the army or other expenditure connected therewith. | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| (9.) Coupon or warrant for interest attached to and issued with any security. | | |
| And see sections 48, 49, 50, 51, 52, 53, 54, and 55 (*o*). | | |
| BILL OF LADING of or for any goods, merchandise, or effects to be exported or carried coastwise . . . | 0 0 6 | |
| And see section 56. | | |
| BILL OF SALE— | | |
| Absolute. See "*Conveyance on Sale.*" | | |
| By way of security. See "*Mortgage,*" &c. | | |
| And see section 57. | | |
| BOND for securing the payment or repayment of money or the transfer or retransfer of stock. See "*Mortgage,*" &c. | | |
| BOND in relation to any annuity upon the original creation and sale thereof. See "*Conveyance on Sale,*" and section 75. | | |
| [BOND, COVENANT, or INSTRUMENT of any kind whatsoever. | | 51 Vict. c. 8, Sched. (*p*) (16th May, 1888). |

(*o*) See these sections set out and considered, *ante*, pp. 56 *et seq.*

(*p*) The person specified in this schedule as liable to the penalty imposed by sect. 18 of the Act (see *ante*, p. 101) is "the obligee, covenantee, or other person taking the security."

These duties (except as regards superannuation annuities) were imposed by the Stamp Act, 1870, and have been payable on bonds, &c., executed on or after the 1st of January, 1871.

By the stat. 45 & 46 Vict. c. 72, s. 8, a duty of 6*d.* was charged on every grant or contract for payment of a superannuation annuity, *i.e.* "a deferred life annuity granted or secured by contract to any person in consideration of annual premiums payable until he should attain any specified age, and so as to commence on his attaining that age."

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

51 Vict. c. 8, Sched. (16th May, 1888).

Duty.

(1.) Being the only or principal or primary security for any annuity other than a superannuation annuity as hereinafter mentioned (*except upon the original creation thereof by way of sale or security*), or of any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained. — The same ad valorem duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period.

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable . . . . . £ s. d. 0 2 6

(2.) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained . . . — The same ad valorem duty as a bond or covenant of the same kind for such total amount.

In case of a superannuation annuity as defined by section 8 of the Revenue, Friendly Societies, and National Debt Act, 1882, and in any other case:

For every 5*l.*, and also for any fractional part of 5*l.*, of the annuity or sum periodically payable . . . . . £ s. d. 0 0 6]

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

Bond given pursuant to the directions of any Act of Parliament, or by the directions of the Commissioners of Customs or Inland Revenue, or any of their officers, for or in respect of any of the duties of customs or excise, or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto.

Where the penalty of the bond does not exceed 150*l.* — The same ad valorem duty as a bond for the amount of the penalty.

£ s. d.

And in any other case . . . . . 0 5 0

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| | | 22. *Present Stamp Duties.* |
| | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| *Exemption* (*q*). | | |
| Bond given as aforesaid upon, or with relation to, the receiving or obtaining, or for entitling any person to receive or obtain, any drawback of any duty or duties, or part of any duty or duties, of customs or excise, for or in respect of any goods, wares, or merchandise exported or shipped to be exported from the United Kingdom to any parts beyond the seas, or upon or with relation to the obtaining of any debenture or certificate for entitling any person to receive any such drawback as aforesaid. | | |
| And see section 58. | | |
| BOND on obtaining letters of administration in England or Ireland, or a confirmation of testament in Scotland . . . . . | 0 5 0 | |
| *Exemptions* (*q*). | | |
| (1.) Bond given by the widow, child, father, mother, brother or sister, of any common seaman, marine or soldier, slain or dying in the service of Her Majesty, her heirs or successors. | | |
| (2.) Bond given by any person where the estate to be administered does not exceed 100*l.* in value. | | |
| BOND of any kind whatsoever not specifically charged with any duty: | | |
| Where the amount limited to be recoverable does not exceed 300*l.* . . . . . | The same ad valorem duty as a bond for the amount limited. | |
| | £ s. d. | |
| In any other case . . . . . | 0 10 0 | |
| BOND, accompanied with a deposit of title deeds, for making a mortgage, wadset, or other security on any estate or property therein comprised. | | |
| See "*Mortgage*," &c., and section 105. | | |
| BOND, DECLARATION, or other DEED or WRITING for making redeemable any disposition, assignation, or tack, apparently absolute, but intended only as a security. | | |
| See "*Mortgage*," &c., and section 105. | | |

(*q*) For special exemptions from stamp duty under other statutes, see *ante*, p. 65.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

Duty.

CERTIFICATE to be taken out yearly—

(1.) By every person admitted or inrolled in England or Ireland as an attorney, solicitor, proctor, or notary public.

(2.) By every person admitted or inrolled in Scotland as a writer to the signet, solicitor, agent, attorney, procurator, or notary public.

(3.) By every other legally qualified person who carries on business in England or Ireland as a conveyancer, special pleader, or draftsman in equity, and is obliged by law to take out such a certificate.

| If such person practises or carries on his business | If he has been admitted or inrolled, or has carried on business, for three years or upwards. | If he has not been so long admitted or inrolled, or has not so long carried on business. |
|---|---|---|
| | £ s. d. | £ s. d. |
| In England, within ten miles from the General Post Office in the city of London . . . | 9 0 0 | 4 10 0 |
| In Scotland, within the city or shire of Edinburgh . . . | | |
| In Ireland, in the city of Dublin, or within three miles therefrom | | |
| In England, Scotland, or Ireland, beyond the above-mentioned limits . . . . . | 6 0 0 | 3 0 0 |
| And see sections 59, 60, 61, 62, 63, and 64. | | |

| | £ s. d. |
|---|---|
| CERTIFICATE of any goods, wares, or merchandise, having been duly entered inwards, which shall be entered outwards for exportation at the port of importation, or be removed from thence to any other port for the more convenient exportation thereof, where such certificate is issued for enabling any person to obtain a debenture or certificate entitling him to receive any drawback of any duty or duties of customs, or any part thereof . . . . . | 0 4 0 |

42 Vict. c. 6 (28th March, 1879).

CERTIFICATE of District Auditor as to correctness of financial statement under the District Auditors Act, 1879.

(For rates of duties see the 1st Schedule to the Act.)

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| CERTIFICATE of incorporation under the Charitable Trustees Incorporation Act, 1872 . . . . | 0 | 10 | 0 | 22. *Present Stamp Duties.* |
| CERTIFICATE of the registration of a design . . . And see section 65. | 5 | 0 | 0 | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| CHARTER of resignation, or of confirmation, or of novodamus, or upon apprising, or upon a decreet of adjudication, or sale of any lands, or other heritable subjects in Scotland . . . . . | 0 | 5 | 0 | 35 & 36 Vict. c. 24, sect. 9 (27th June, 1872). |
| CHARTER-PARTY, or any agreement or contract for the charter of any ship or vessel, or any memorandum, letter, or other writing, between the captain, master, or owner of any ship or vessel, and any other person, for or relating to the freight or conveyance of any money, goods, or effects on board of such ship or vessel . . . . . And see sections 66, 67, and 68 (*r*). | 0 | 0 | 9 | |
| CLARE CONSTAT. See "*Precept.*" | | | | |
| COLLATION. See "*Appointment*," &c., to ecclesiastical benefices. | | | | |
| COMMISSION granted by Her Majesty, her heirs or successors, or by any person or persons duly authorized by her or them, to any officer in the army, or in the corps of Royal Marines . . . . . | 1 | 10 | 0 | |
| COMMISSION granted by the Lords Commissioners of the Admiralty to any officer in the navy . . . | 0 | 5 | 0 | |
| COMMISSION or DEPUTATION granted by the Commissioners of Inland Revenue . . . . . | 1 | 10 | 0 | |
| COMMISSION OF LUNACY . . . . . | 0 | 5 | 0 | |
| COMMISSION to act as a notary public in Scotland. See "*Faculty.*" | | | | |
| COMMISSION in the nature of a power of attorney in Scotland. See "*Letter or Power of Attorney.*" | | | | |
| CONDITIONAL SURRENDER of any copyhold or customary estate by way of mortgage. See "*Mortgage*," &c., and sections 105 and 110. | | | | |
| CONGÉ D'ELIRE. See "*Grant.*" | | | | |
| CONSTAT of Letters Patent. See "*Exemplification.*" | | | | |
| CONTRACT. See "*Agreement.*" | | | | |
| CONTRACT NOTE—Any note, memorandum, or writing, commonly called a "contract note," or by whatever | | | | |

(*r*) The duty may be denoted by an adhesive stamp: see sect. 66. A guarantee for performance of a charter-party does not require to be stamped as a charter-party: *Rein* v. *Lane*, L. R. 2 Q. B. 144.

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | name the same may be designated, for or relating to the sale or purchase of any stock or marketable security of the value of 5*l.* or upwards . . . | 0 | 0 | 6 (*s*) |
| | And see section 69. | | | |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871), and 51 Vict. c. 8, sect. 14 (16th May, 1888). | CONVEYANCE or TRANSFER, whether on sale or otherwise:— | | | |
| | (1.) Of any stock of the governor and company of the Bank of England . . . . . | 0 | 7 | 9 |
| | (2.) Of any stock of the East India Company . | 1 | 10 | 0 |
| | (3.) Of any debenture stock or funded debt of any company or corporation (*t*). For every 100*l.*, and also for any fractional part of 100*l.*, of the nominal amount transferred . . . . | 0 | 2 | 6 |
| | And see section 78 (*u*). | | | |
| 51 Vict. c. 8, Sched. (16th May, 1888). | [CONVEYANCE or TRANSFER on sale, | | | |
| | Of any property (*except such stock or debenture stock or funded debt as aforesaid*) (*w*), | | | |
| | Where the amount or value of the consideration for the sale does not exceed 5*l.* . . | 0 | 0 | 6 |
| | Exceeds 5*l.*, and does not exceed 10*l.* . . | 0 | 1 | 0 |
| | „ 10*l.* „ 15*l.* . . | 0 | 1 | 6 |
| | „ 15*l.* „ 20*l.* . . | 0 | 2 | 0 |
| | „ 20*l.* „ 25*l.* . . | 0 | 2 | 6 |
| | „ 25*l.* „ 50*l.* . . | 0 | 5 | 0 |
| | „ 50*l.* „ 75*l.* . . | 0 | 7 | 6 |

(*s*) This duty was 1*d.* under the Stamp Act, 1870, but has been increased to 6*d.* by the Customs and Inland Revenue Act, 1888; the duty may be denoted by an adhesive stamp: see sect. 14 of that Act. For a definition of "contract note" see sect. 15 of that Act.

(*t*) Also Canada Government Stock inscribed in this country (37 & 38 Vict. c. 26, sect. 2), and registered Colonial Stock (40 & 41 Vict. c. 59, sect. 2). As to compositions for transfer duty, see 43 & 44 Vict. c. 20, sects. 53, 54.

(*u*) See *ante*, Vol. V., pp. 369 *et seq.*; and for exemptions from liability to stamp duty under various statutes, see *ante*, p. 74.

(*w*) These duties were imposed by the Stamp Act, 1870, and have been payable on conveyances (except as mentioned in the text) executed since the 1st of January, 1871. Conveyances or transfers *on sale* of stock or debenture stock or funded debt (except only stock of the Governor and Company of the Bank of England), as well as of other property, are subject to the provisions of sect. 18 of the Customs and Inland Revenue Act, 1888; and by the schedule to the Act the person specified as liable to the penalty is "the vendee or transferee."

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| Exceeds 75*l.*, and does not exceed 100*l.* . . | 0 | 10 | 0 | 22. *Present Stamp Duties.* 51 Vict. c. 8, Sched. (16th May, 1888). |
| „ 100*l.* „ 125*l.* . . | 0 | 12 | 6 | |
| „ 125*l.* „ 150*l.* . . | 0 | 15 | 0 | |
| „ 150*l.* „ 175*l.* . . | 0 | 17 | 6 | |
| „ 175*l.* „ 200*l.* . . | 1 | 0 | 0 | |
| „ 200*l.* „ 225*l.* . . | 1 | 2 | 6 | |
| „ 225*l.* „ 250*l.* . . | 1 | 5 | 0 | |
| „ 250*l.* „ 275*l.* . . | 1 | 7 | 6 | |
| „ 275*l.* „ 300*l.* . . | 1 | 10 | 0 | |
| „ 300*l.* For every 50*l.*, and also for any fractional part of 50*l.*, of such amount or value . . . | 0 | 5 | 0] | |

And see sections 70, 71, 72, 73, 74, 75, 76 and 77 of the Stamp Act, 1870 (*x*).

CONVEYANCE or TRANSFER by way of security of any property (*except such stock or debenture stock or funded debt as aforesaid*), or of any security. 33 & 34 Vict. c. 97, Sched. (1st January, 1871).

See "*Mortgage*," &c.

CONVEYANCE or TRANSFER of any kind not hereinbefore described . . . . . 0 10 0

And see section 78.

See also "*Transfer*," &c., (*y*).

COPY or EXTRACT (*attested or in any manner authenticated*) of or from—

(1.) An instrument chargeable with any duty.

(2.) An original will, testament, or codicil.

(3.) The probate or probate copy of a will or codicil.

(4.) Any letters of administration or any confirmation of a testament.

(5.) Any public register (*except any register of births, baptism, marriages, deaths, or burials*).

(6.) The books, rolls, or records of any court.

In the case of an instrument chargeable with any duty not amounting to one shilling . . . . . } The same duty as such instrument.

In any other case . . . . . 0 1 0

(*x*) See *ante*, Vol. V., pp. 369 *et seq.*; and for exemptions from liability to stamp duty under various statutes, see *ante*, p. 74.

(*y*) As to compositions in lieu of stamp duties on conveyances, or transfers of stock or funded debt, see stat. 43 & 44 Vict. c. 20, sects. 53, 54.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

| | Duty. £ s. d. |
|---|---|
| *Exemptions.* | |
| (1.) Copy or extract of or from any law proceedings. | |
| (2.) Copy or extract in Scotland of or from the commission of any person as a delegate or representative to the convention of royal burghs or the general assembly or any presbytery or church court. | |
| And see section 79. | |
| COPY or EXTRACT (*certified*) of or from any register of births, baptisms, marriages, deaths, or burials . | 0 0 1 |
| *Exemptions.* | |
| (1.) Copy or extract furnished by any clergyman, registrar, or other official person pursuant to and for the purposes of any Act of Parliament, or furnished to any general or superintending registrar under any general regulation. | |
| (2.) Copy or extract for which the person giving the same is not entitled to any fee or reward. | |
| And see section 80 (*z*). | |
| COPYHOLD and CUSTOMARY ESTATES—Instruments relating thereto. | |
| Upon a sale thereof. See "*Conveyance on Sale.*" | |
| Upon a mortgage thereof. See "*Mortgage,*" &c. | |
| Upon a demise thereof. See "*Lease or Tack.*" | |
| Upon any other occasion. | |
| Surrender or grant made out of court, or the memorandum thereof, | |
| and copy of court roll of any surrender or grant made in court . . . . . | 0 10 0 |
| And see sections 81, 82, 83, 84, 85, and 86. | |
| COST BOOK MINES. See "*Transfer.*" | |
| COUNTERPART. See "*Duplicate.*" | |
| COVENANT for securing the payment or repayment of money, or the transfer or retransfer of stock. See "*Mortgage,*" &c. | |

(*z*) By this section it is provided that the duty may be denoted by an adhesive stamp.

Duty. — Stamp Act, 1870, &c. — 22. *Present Stamp Duties.* — 33 & 34 Vict. c. 97, Sched. (1st January, 1871).

COVENANT in relation to any annuity upon the original creation and sale thereof.

See "*Conveyance on Sale*," and section 75.

COVENANT in relation to any annuity (*except upon the original creation and sale thereof*) or to other periodical payments.

See "*Bond*," "*Covenant*," &c.

COVENANT. Any separate deed of covenant (*not being an instrument chargeable with ad valorem duty as a conveyance on sale or mortgage*) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid.

| | Duty |
|---|---|
| Where the ad valorem duty in respect of the consideration or mortgage money does not exceed 10*s.* | A duty equal to the amount of such ad valorem duty. |
| | £ *s.* *d.* |
| In any other case | 0 10 0 |

CURACY (*Perpetual*) licence to hold. Nomination to.

See "*Appointment*," &c., to ecclesiastical benefices.

CUSTOMARY ESTATES. See "*Copyhold*."

DEBENTURE for securing the payment or repayment of money or the transfer or retransfer of stock.

See "*Mortgage*," &c.

DEBENTURE or CERTIFICATE for entitling any person to receive any drawback of any duty or duties, or part of any duty or duties, of customs or excise, or any bounty payable out of the revenue of customs or excise, for or in respect of any goods, wares, or merchandise exported or shipped to be exported from any part of the United Kingdom to any part beyond the sea.

| | £ *s.* *d.* |
|---|---|
| Where the drawback or bounty to be received does not exceed 10*l.* | 0 1 0 |
| Exceeds 10*l.* and does not exceed 50*l.* | 0 2 6 |
| Exceeds 50*l.* | 0 5 0 |

DECLARATION of any use or trust of or concerning any property by any writing, not being a deed or will, or an instrument chargeable with ad valorem duty as a settlement | 0 10 0

DECLARATION (*Statutory*). See "*Affidavit*."

| Stamp Act, 1870, &c. | | Duty. £ s. d. |
|---|---|---|
| 22. *Present Stamp Duties.* | DECREET ARBITRAL. See "*Award.*" | |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871). | DEED whereby any real burden is declared or created on lands or heritable subjects in Scotland. See "*Mortgage,*" &c., and section 105. | |
| | DEED containing an obligation to infeft any person in heritable subjects in Scotland, under a clause of reversion, as a security for money. See "*Mortgage,*" &c., and section 105. | |
| | DEED containing an obligation to infeft or seize in an annuity to be uplifted out of heritable subjects in Scotland. See "*Bond,*" "*Covenant,*" &c. | |
| | DEED of any kind whatsoever, not described in this schedule . . . . . | 0 10 0 |
| | DEFEAZANCE. Deed or other instrument of defeazance of any conveyance, disposition, assignation, or tack, apparently absolute, but intended only as a security for money or stock. See "*Mortgage,*" &c., and section 105. | |
| | DELIVERY ORDER . . . . . And see sections 87, 89, 90, and 91 (*a*). | 0 0 1 |
| | DEPOSIT of title deeds. See "*Mortgage,*" &c., and section 105. | |
| | DEPUTATION by the Commissioners of Inland Revenue. See "*Commission.*" | |
| | DEPUTATION or APPOINTMENT of a gamekeeper . . | 0 10 0 |
| | DISPENSATION. See "*Faculty.*" | |
| | DISPOSITION of heritable property in Scotland to singular successors or purchasers. See "*Conveyance on Sale.*" | |
| | DISPOSITION of heritable property in Scotland to a purchaser, containing a clause declaring all or any part of the purchase-money a real burden upon, or affecting, the heritable property thereby disposed, or any part thereof. See "*Conveyance on Sale,*" "*Mortgage,*" &c., and section 105. | |

(*a*) This duty may be denoted by an adhesive stamp: sect. 89.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| DISPOSITION in Scotland containing constitution of feu or ground annual right. See "*Conveyance on Sale*," and section 72. | | 22. *Present Stamp Duties.* |
| DISPOSITION in security in Scotland. See "*Mortgage*," &c. | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| DISPOSITION of any wadset, heritable bond, &c. See "*Mortgage*," &c. | | |
| DISPOSITION in Scotland of any property or of any right or interest therein not described in this schedule . . . . . | 0 10 0 | |
| DOCK WARRANT. See "*Warrant for Goods.*" | | |
| DOCKET made on passing any instrument under the Great Seal of the United Kingdom . . . | 0 2 0 | |
| DONATION of any ecclesiastical benefice, dignity, or promotion. See "*Appointment*," &c., to ecclesiastical benefices. | | |
| DRAFT for money. See "*Bill of Exchange*," and section 48. | | |
| DUPLICATE or COUNTERPART of any instrument chargeable with any duty. Where such duty does not amount to 5*s*. . . | The same duty as the original instrument. | |
| | £ s. d. | |
| In any other case . . . . . | 0 5 0 | |
| And see section 93. | | |
| ECCLESIASTICAL BENEFICE. See "*Appointment*," &c., to ecclesiastical benefices. | | |
| EIK to a reversion. See "*Mortgage*," &c., and section 105. | | |
| EQUITABLE MORTGAGE. See "*Agreement*," "*Mortgage*," &c. | | |
| EXCHANGE or EXCAMBION—Instruments effecting. In the case specified in section 94 see that section. | | |
| In any other case . . . . . | 0 10 0 | |
| EXEMPLIFICATION or CONSTAT, under the Great Seal of the United Kingdom of Great Britain and Ireland, of any letters patent or grant made or to be made by Her Majesty, her heirs or successors, or by any of her royal predecessors, of any honour, dignity, promotion, franchise, liberty, or privilege, or of any lands, office, or other thing whatsoever . | 5 0 0 | |

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | EXEMPLIFICATION under the seal of any court in England or Ireland of any record or proceeding therein . . . . . | 3 | 0 | 0 |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871). | EXTRACT. See "*Copy or Extract.*" | | | |
| | FACTORY, in the nature of a letter or power of attorney in Scotland. See "*Letter or Power of Attorney.*" | | | |
| | FACULTY, LICENCE, COMMISSION, or DISPENSATION for admitting or authorising any person to act as a notary public: | | | |
| | In England . . . . . | 30 | 0 | 0 |
| | In Scotland or Ireland . . . . . | 20 | 0 | 0 |
| | FACULTY or DISPENSATION of any other kind: | | | |
| | In England . . . . . | 30 | 0 | 0 |
| | In Ireland . . . . . | 25 | 0 | 0 |
| | FEU CONTRACT in Scotland. See "*Conveyance on Sale,*" and section 72. | | | |
| 51 Vict. c. 8, sect. 12 (16th May, 1888). | FOREIGN or COLONIAL SHARE CERTIFICATE, or any other document whatever, being *primâ facie* evidence of the title of any person as proprietor of, or as having the beneficial interest in, any share or shares, or stock or debenture stock, or funded debt of any foreign or colonial company or corporation, where such person is not registered in respect thereof in a register duly kept in the United Kingdom: | | | |
| | On the occasion of the first delivery thereof in the United Kingdom on or after the first day of July in the year one thousand eight hundred and eighty-eight, and on the occasion of the first delivery thereof in the United Kingdom in any year after the year in which such first delivery shall happen— | | | |
| | Where the nominal amount in money of the share or shares or stock or debenture stock or funded debt does not exceed twenty-five pounds . . . . . | 0 | 0 | 3 |
| | Where such nominal amount exceeds twenty-five pounds and does not exceed fifty pounds . . . . . | 0 | 0 | 6 |
| | Where such nominal amount exceeds fifty | | | |

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| pounds, for every fifty pounds and any fractional part of fifty pounds thereof . | 0 0 6(*b*) | 22. *Present Stamp Duties.* |
| FOREIGN SECURITY. See "*Security to Bearer.*" | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| FURTHER CHARGE or FURTHER SECURITY. See "*Mortgage,*" &c., and section 109. | | |
| GRANT or LETTERS PATENT under the Great Seal of the United Kingdom of Great Britain and Ireland, or of the Great Seal of Ireland, or the Seal of the Duchy or County Palatine of Lancaster, or under the Seal kept and used in Scotland in place of the Great Seal formerly used there: | | |
| (1.) Of the honour or dignity of a duke . . | 350 0 0 | |
| ,, ,, of a marquis . . | 300 0 0 | |
| ,, ,, of an earl . . | 250 0 0 | |
| ,, ,, of a viscount . . | 200 0 0 | |
| ,, ,, of a baron . . | 150 0 0 | |
| ,, ,, of a baronet . . | 100 0 0 | |
| (2.) Of a congé d'élire to any dean and chapter for the election of an archbishop or bishop | | |
| (3.) Of the Royal Assent to, or signification of, the election made by any dean and chapter, or of the nomination and presentation by Her Majesty, her heirs or successors, in default of such election, of any person to be an archbishop or bishop | 30 0 0 | |
| (4.) Of or for the restitution of the temporalities to any archbishop or bishop . . . | | |
| (5.) Of any other honour, dignity, or promotion whatsoever . . . . . | | |
| (6.) Of any franchise, liberty, or privilege to any person or body politic or corporate . . | | |

(*b*) Sect. 12 (1) of the Customs and Inland Revenue Act, 1888, contains the following proviso with regard to the charge of duty on foreign share certificates:

"Provided that where the holder of any foreign or colonial share certificate bearing the stamp for any year in conformity with this section shall, in the course of such year, cause himself to be registered in the register of the foreign or colonial company or corporation, and shall obtain a new certificate consequent upon such registration, it shall be lawful for the Commissioners of Inland Revenue to stamp such new certificate for the same year without payment of duty, subject to such regulations as they may prescribe.

"(3.) The duties under this section are to be denoted by ad-

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st Jannary, 1871).

| *Exemptions.* | Duty. £ | s. | d. |
|---|---|---|---|
| (1.) Commissions of rebellion in process. | | | |
| (2.) Letters patent or briefs for collecting charitable benevolences. | | | |
| (3.) Letters patent for confirming any dispensation hereinbefore charged with duty. | | | |
| (4.) Letters patent appointing sheriffs in England or Ireland, and the writs of assistance accompanying such letters patent. | | | |
| And see section 95. | | | |
| GRANT or WARRANT OF PRECEDENCE to take rank among nobility, under the sign manual of Her Majesty, her heirs or successors . . . . . | 100 | 0 | 0 |
| GRANT or LICENCE under the sign manual to take and use a surname and arms, or a surname only. | | | |
| In compliance with the injunctions of any will or settlement . . . . . | 50 | 0 | 0 |
| Upon any voluntary application . . . . . | 10 | 0 | 0 |
| GRANT of arms or armorial ensigns only, under the sign manual, or by any of the Kings of Arms of England, Scotland, or Ireland . . . . . | 10 | 0 | 0 |
| GRANT of copyhold or customary estates. See "*Conveyance—Copyhold.*" | | | |
| GRANT of the custody of the person or estate of any lunatic . . . . . | 2 | 0 | 0 |
| GRANT of superannuation annuity. See "*Bond.*" | | | |
| HERITABLE BOND. See "*Mortgage,*" &c., and section 105. | | | |
| INSTITUTION. See "*Appointment,*" &c., to ecclesiastical benefices. | | | |
| INVENTORY. See "*Schedule.*" | | | |
| LEASE OR TACK— | | | |
| (1.) For any definite term less than a year: | | | |
| (*a.*) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum (*c*) | 0 | 0 | 1 |

hesive stamps appropriated by words and figures on the face thereof to such duties and to each year.

"(4.) Every person who delivers or transfers, or is concerned as broker or agent in delivering or transferring any instrument chargeable with duty under this section, and not being duly stamped, shall forfeit the sum of *twenty pounds.*"

(*c*) The duty in these cases may be denoted by adhesive stamps: sect. 99.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

51 Vict. c. 8, Sched. (*e*) (16th May, 1888).

| | Duty. £ s. d. |
|---|---|
| (*b.*) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.* (*d*) . . . . . | 0 2 6 |
| [(*c.*) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid . . . . . (The same duty as a lease for a year at the rent reserved for the definite term.) | |
| (2.) For any other definite term or for any indefinite term: | |
| Of any lands, tenements, or heritable subjects— | |
| Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security: | |
| In respect of such consideration . (The same duty as a conveyance on a sale for the same consideration.) | |
| Where the consideration or any part of the consideration is any rent: | |
| In respect of such consideration: | |
| If the rent whether reserved as a yearly rent or otherwise, is at a rate or average rate: | |

| | If the term is definite, and does not exceed 35 years, or is indefinite. | | | If the term being definite exceeds 35 years, but does not exceed 100 years. | | | If the term being definite exceeds 100 years. | | |
|---|---|---|---|---|---|---|---|---|---|
| | £ | s. | d. | £ | s. | d. | £ | s. | d. |
| Not exceeding 5*l.* per annum . | 0 | 0 | 6 | 0 | 3 | 0 | 0 | 6 | 0 |
| Exceeding— | | | | | | | | | |
| 5*l.* and not exceeding 10*l.* . | 0 | 1 | 0 | 0 | 6 | 0 | 0 | 12 | 0 |
| 10*l.* „ „ 15*l.* . | 0 | 1 | 6 | 0 | 9 | 0 | 0 | 18 | 0 |
| 15*l.* „ „ 20*l.* . | 0 | 2 | 0 | 0 | 12 | 0 | 1 | 4 | 0 |
| 20*l.* „ „ 25*l.* . | 0 | 2 | 6 | 0 | 15 | 0 | 1 | 10 | 0 |
| 25*l.* „ „ 50*l.* . | 0 | 5 | 0 | 1 | 10 | 0 | 3 | 0 | 0 |
| 50*l.* „ „ 75*l.* . | 0 | 7 | 6 | 2 | 5 | 0 | 4 | 10 | 0 |
| 75*l.* „ „ 100*l.* . | 0 | 10 | 0 | 3 | 0 | 0 | 6 | 0 | 0 |
| For every full sum of 50*l.*, and also for any fractional part of 50*l.* thereof . . . | 0 | 5 | 0 | 1 | 10 | 0 | 3 | 0 | 0] |

(*d*) The duty in these cases may be denoted by adhesive stamps: sect. 99.

(*e*) The person specified in this schedule as liable to the penalty imposed by sect. 18 of this Act (see *ante*, p. 101) is "the lessee."

These duties were imposed by the Stamp Act, 1870, and have been payable on leases executed on or after the 1st January, 1871.

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | (3.) Of any other kind whatsoever not hereinbefore described . . . . . | 0 | 10 | 0 |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871). | And see sections 96, 97, 98, 99, and 100 of the Stamp Act, 1870 (*f*). | | | |
| | LETTER OF ALLOTMENT or LETTER OF RENUNCIATION, or any other document having the effect of a letter of allotment (*g*): | | | |
| | (1.) Of any share of any company or proposed company . . . . . | | | |
| | (2.) In respect of any loan raised, or proposed to be raised, by any company or proposed company, or by any municipal body or corporation . . . . . | | | |
| | (3.) Issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company . . . . | 0 | 0 | 1 |
| | And SCRIP CERTIFICATE, SCRIP, or other document (*g*): | | | |
| | (1.) Entitling any person to become the proprietor of any share of any company or proposed company . . . . . | | | |
| | (2.) Issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company . | 0 | 0 | 1 |
| | (3.) Denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation . . . . . | | | |
| | (4.) Issued or delivered in the United Kingdom, and denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be | | | |

(*f*) See *ante*, Vol. III., pp. 337 *et seq.* And as to exemptions from stamp duty under various statutes, see *ante*, p. 80.

(*g*) These duties may be denoted by adhesive stamps: see stat. 43 & 44 Vict. c. 20, sect. 56.

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| raised by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company . . . . . | 0 | 0 | 1 | 22. *Present Stamp Duties.* 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| And see section 101. | | | | |
| LETTER OR POWER OF ATTORNEY, or COMMISSION, FACTORY, MANDATE, or other instrument in the nature thereof: | | | | |
| (1.) For the sole purpose of appointing or authorizing any one person to vote as a proxy at any one meeting at which votes may be given by proxy (*i*) . . . . . | 0 | 0 | 1 | |
| (2.) By any petty officer, seaman, marine or soldier serving as a marine, or by the executors or administrators of any such person, for receiving prize money or wages . | 0 | 1 | 0 | |
| (3.) For the receipt of the dividends or interest of any stock: | | | | |
| Where made for the receipt of one payment only . . . . . | 0 | 1 | 0 | |
| In any other case . . . . . | 0 | 5 | 0 | |
| (4.) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money, not exceeding 20*l.*, or any periodical payments not exceeding the annual sum of 10*l.* (*not being hereinbefore charged*) . . . . . | 0 | 5 | 0 | |
| (5.) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds: | | | | |
| Where the value of such stocks or funds does not exceed 20*l.* . . . . | 0 | 5 | 0 | |
| In any other case . . . . . | 0 | 10 | 0 | |
| (6.) Of any kind whatsoever not hereinbefore described . . . . . | 0 | 10 | 0 | |
| *Exemptions* (*j*). | | | | |
| (1.) Letter or power of attorney for the receipt of dividends of any definite and certain share of the Government or Parliamentary | | | | |

(*i*) This duty may be denoted by an adhesive stamp: see Stamp Act, 1870, sect. 102.

(*j*) As to special exemptions from stamp duty under other statutes, see *ante*, p. 81.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

| | Duty. £ | s. | d. |
|---|---|---|---|
| stocks or funds producing a yearly dividend of less than 3*l*. | | | |
| (2.) Letter or power of attorney or proxy filed in the Court of Probate in England or Ireland, or in any ecclesiastical court. | | | |
| (3.) Letter or power of attorney for voting on any election of directors of the East India Company. | | | |
| And see sections 102, 103, and 104. | | | |
| LETTERS OF MARQUE AND REPRISAL . . . . | 5 | 0 | 0 |
| LETTERS PATENT. See "*Grant.*" | | | |
| LETTER OF REVERSION in Scotland. See "*Mortgage*," &c., and section 105. | | | |
| LICENCE for marriage. | | | |
| Special— | | | |
| In England or Ireland . . . . . | 5 | 0 | 0 |
| Not special— | | | |
| In England . . . . . | 0 | 10 | 0 |
| LICENCE under the seal of any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court in England or Ireland, or by any presbytery or other ecclesiastical power in Scotland : | | | |
| (1.) To hold the office of lecturer, reader, chaplain, church clerk, chapel clerk, parish clerk, or sexton . . . . . | | | |
| (2.) For licensing a building for the performance of divine service within an ecclesiastical district formed under the provisions of the New Parishes Act . . . . . | 0 | 10 | 0 |
| (3.) For licensing any chapel for the solemnization of marriages therein, pursuant to the provisions of the Act 6 & 7 Will. 4, c. 85 | | | |
| (4.) For any other purpose (*except a licence to hold a perpetual curacy*) . . . . . | 2 | 0 | 0 |
| *Exemptions.* | | | |
| (1.) Licence granted to any spiritual person to perform divine service in any building approved by the archbishop or bishop in lieu of any church or chapel whilst the same is under repair or is rebuilding, or in any building so approved for the convenience of the inhabitants of a parish resident at a distance from the church or consecrated chapel. | | | |

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| (2.) Licence to a stipendiary curate, wherein the annual amount of the stipend is specified. | | 22. *Present Stamp Duties.* |
| (3.) Licence for the purpose of authorizing or enabling any person to preach or exercise any other spiritual function, not being a licence to hold the office of lecturer, reader, or chaplain, and there being no salary or emolument for or attached to the exercise of the function for which such licence is granted. | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| (4.) Licence for authorizing any matter relating to a consecrated building or ground, or anything to be constructed, set up, taken down, or altered therein. See stat. 41 & 42 Vict. c. 15. | | |
| LICENCE to act as a notary public. See "*Faculty.*" | | |
| LICENCE to use surname or arms. See "*Grant.*" | | |
| MARRIAGE CONTRACT. See "*Settlement.*" | | |
| MARRIAGE LICENCE. See "*Licence.*" | | |
| MEMORANDUM OF ASSOCIATION of a company under the Companies Act, 1862 . . . . . | 0 10 0 | |
| MEMORIAL to be registered pursuant to any Act of Parliament, made or to be made, for the public registering of deeds and conveyances in England or Ireland : | | |
| Where the instrument registered is chargeable with any duty not amounting to 2*s.* 6*d.* . . | The same duty as the registered instrument | |
| | £ s. d. | |
| In any other case . . . . . | 0 2 6 | |
| [MORTGAGE, BOND, DEBENTURE, COVENANT, WARRANT OF ATTORNEY to confess and enter up judgment (*k*). | | 51 Vict. c. 8, Sched. (*l*) (16th May, 1888). |

(*k*) By the stat. 34 & 35 Vict. c. 4, sect. 15, the following duty was imposed :

MORTGAGE of any Stock or marketable security :

| | £ s. d. |
|---|---|
| For every 5000*l.*, and also for every fractional part of 5000*l.* of the total amount or value of the money at any time secured . . . . | 0 10 0 |

But this duty is now repealed, and any deed operating as a mortgage of any stock or marketable security is chargeable, in respect of such operation, with the *ad valorem* duty chargeable upon a mortgage under the Stamp Act, 1870 : 51 Vict. c. 8, sect. 14 (5).

(*l*) The persons specified in this schedule as liable to the

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

51 Vict. c. 8, Sched. (16th May, 1888).

| | Duty. £ | s. | d. |
|---|---|---|---|
| (1.) Being the only or principal or primary security for— | | | |
| The payment or repayment of money not exceeding 25*l.* . . . . | 0 | 0 | 8 |
| Exceeding 25*l.* and not exceeding 50*l.* . | 0 | 1 | 3 |
| „ 50*l.* „ 100*l.* . | 0 | 2 | 6 |
| „ 100*l.* „ 150*l.* . | 0 | 3 | 9 |
| „ 150*l.* „ 200*l.* . | 0 | 5 | 0 |
| „ 200*l.* „ 250*l.* . | 0 | 6 | 3 |
| „ 250*l.* „ 300*l.* . | 0 | 7 | 6 |
| „ 300*l.* | | | |
| For every 100*l.*, and also for any fractional part of 100*l.*, of such amount | 0 | 2 | 6 |
| (2.) Being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped: | | | |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured . . . . . | 0 | 0 | 6 |
| (3.) Transfer, Assignment, Disposition, or Assignation of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment: | | | |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the amount transferred, assigned, or disponed . | 0 | 0 | 6 |

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penalty imposed by section 18 of this Act (see *ante*, p. 101) are as follows:

In the case of a mortgage, bond, &c., "the mortgagee or obligee;"

In the case of a transfer, assignment, &c., "the transferee, assignee, or disposee;"

In the case of a reconveyance, release, &c., "the transferee, or other person redeeming the security."

These duties were imposed by the Stamp Act, 1870, and have been payable on all mortgages, &c., executed on or after the 1st of January, 1871.

| | Duty. | Stamp Act, 1870, &c. — 22. *Present Stamp Duties.* |
|---|---|---|
| And also where any further money is added to the money already secured . . . . . | The same duty as a principal security for such further money. | |
| (4.) Reconveyance, Release, Discharge, Surrender, Resurrender, Warrant to Vacate, or Renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured: | | 51 Vict. c. 8, Sched. (16th May, 1888). |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the total amount or value of the money at any time secured . . . . . | £ *s.* *d.* 0 0 6] | |
| And see sections 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, and 115 of the Stamp Act, 1870 (*m*). | | |
| MORTGAGE, equitable. See "*Agreement.*" | | |
| MUTUAL DISPOSITION or Conveyance in Scotland. See "*Exchange*," or "*Excambion.*" | | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| NOTARIAL ACT (*n*) of any kind whatsoever (*except a protest of a bill of exchange or promissory note or any notarial instrument to be expeded and recorded in any register of sasines*) . . . . . | 0 1 0 | |
| And see "*Protest*," "*Seisin*," and section 116. | | |
| ORDER for the payment of money. See "*Bill of Exchange*," and section 48. | | |
| PARTITION or DIVISION—Instruments effecting. | | |
| In the case specified in section 94, see that section. | | |
| In any other case . . . . . | 0 10 0 | |
| PASSPORT . . . . . | 0 0 6 | |
| PERPETUAL CURACY. See "*Appointment*," &c., to Ecclesiastical Benefices. | | |
| POLICY OF INSURANCE (*o*)— | | |
| (1.) Upon any life or lives, or upon any event or contingency relating to or depending upon | | |

(*m*) See *ante*, Vol. III., pp. 988 *et seq.* And as to exemptions from stamp duty under various statutes, see *ante*, p. 93.

(*n*) This duty may be denoted by an adhesive stamp: sect. 116.

(*o*) The Stamp Act, 1870, does not apply to policies of sea insurance: see sect. 117. Such policies are regulated by the stats. 30 & 31 Vict. c. 23; 33 & 34 Vict. c. 97, sect. 117; 39 & 40 Vict. c. 6, sects. 1, 2; and 47 & 48 Vict. c. 62, sect. 8. All the duties here set out may be denoted by adhesive stamps: sect. 119.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

| | Duty. £ | s. | d. |
|---|---|---|---|
| any life or lives (*except for the payment of money upon the death of any person only from accident or violence, or otherwise than from a natural cause*): | | | |
| Where the sum insured does not exceed 10*l.* | 0 | 0 | 1 |
| Exceeds 10*l.* but does not exceed 25*l.* . | 0 | 0 | 3 |
| Exceeds 25*l.* but does not exceed 500*l.*: | | | |
| For every full sum of 50*l.*, and also for any fractional part of 50*l.*, of the amount insured . . . . . | 0 | 0 | 6 |
| Exceeds 500*l.* but does not exceed 1,000*l.*: | | | |
| For every full sum of 100*l.*, and also for any fractional part of 100*l.*, of the amount insured . . . . . | 0 | 1 | 0 |
| Exceeds 1,000*l.*: | | | |
| For every full sum of 1,000*l.*, and also for any fractional part of 1,000*l.*, of the amount insured . . . . . | 0 | 10 | 0 |
| (2.) For any payment agreed to be made upon the death of any person, only from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury or by way of indemnity against loss or damage of or to any property . . . . | 0 | 0 | 1 |
| And see sections 117, 118, and 119. | | | |
| Power of Attorney. See "*Letter of Attorney.*" | | | |
| Precept of Clare Constat to give seisin of lands or other heritable subjects in Scotland . . . . | 0 | 5 | 0 |
| Presentation to any ecclesiastical benefice, dignity, or promotion. See "*Appointment,*" &c., to Ecclesiastical Benefices. | | | |
| Procuration, deed, or other instrument of . . | 0 | 10 | 0 |
| Promissory Note. See "*Bank Note,*" "*Bill of Exchange,*" and section 49. | | | |
| Protest of any bill of exchange or promissory note: | | | |
| Where the duty on the bill or note does not exceed 1*s.* . . . . . | The same duty as the bill or note. | | |
| | £ | s. | d. |
| In any other case . . . . . | 0 | 1 | 0 |
| And see section 116 (*p*). | | | |

(*p*) This section provides that the duty may be denoted by an adhesive stamp.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| PROXY. See "*Letter or Power of Attorney.*" | | 22. *Present Stamp Duties.* |
| RECEIPT given for, or upon the payment of, money amounting to 2*l.* or upwards (*q*) . . . . . | 0 0 1 | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |

*Exemptions.*

(1.) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.

(2.) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.

(3.) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of Her Majesty.

(4.) Receipt given by the Accountant General of the Navy for any money received by him for the service of the navy.

(5.) Receipt given by any agent for money imprested to him on account of the pay of the army.

(6.) Receipt given by any officer, seaman, marine or soldier, or his representatives, for or on account of any wages, pay or pension, due from the Admiralty or Army Pay Office.

(7.) Receipt given for the consideration money for the purchase of any share in any of the Government or Parliamentary stocks or funds, or in stock of the East India Company, or in the stocks and funds of the Secretary of State in Council of India, or of the governor and company of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively.

(8.) Receipt given for any principal money or interest due on an exchequer bill.

(9.) Receipt written upon a bill of exchange or promissory note duly stamped.

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(*q*) This duty may be denoted by an adhesive stamp: sect. 121.

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

| | Duty. £ s. d. |
|---|---|
| (10.) Receipt given upon any bill or note of the governor and company of the Bank of England or the Bank of Ireland. | |
| (11.) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned. | |
| (12.) Receipt given for drawback or bounty upon the exportation of any goods or merchandise from the United Kingdom. | |
| (13.) Receipt given for the return of any duties of customs upon certificates of over entry. | |
| (14.) Receipt indorsed upon any bill drawn by the Lords Commissioners of the Admiralty, or by any person under their authority, or under the authority of any Act of Parliament upon and payable by the Accountant General of the Navy. | |
| And see sections 120, 121, 122, and 123 (*r*). | |
| RECONVEYANCE, RELEASE, or RENUNCIATION of any security. See "*Mortgage*," &c. | |
| RELEASE or RENUNCIATION of any property, or of any right or interest in any property— | |
| Upon a sale. See "*Conveyance on Sale.*" | |
| By way of security. See "*Mortgage*," &c. | |
| In any other case . . . . . | 0 10 0 |
| RENUNCIATION. See "*Reconveyance*" and "*Release.*" | |
| RESIGNATION (*s*). Principal or original instrument of resignation, or service of cognition of heirs, or charter or seisin of any houses, lands, or other heritable subjects in Scotland holding burgage, or of burgage tenure . . . . . | 0 5 0 |
| And instrument of resignation of any lands or | |

(*r*) As to special exemptions of certain receipts from stamp duty under various statutes, see *ante*, p. 96.

(*s*) Instruments of resignation are rendered unnecessary by the Conveyancing, &c. (Scotland), Act, 1874 (37 & 38 Vict. c. 94), sect. 26.

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| other heritable subjects in Scotland not of burgage tenure . . . . . | 0 | 5 | 0 | 22. *Present Stamp Duties.* |
| REVOCATION of any use or trust of any property by deed, or by any writing, not being a will . . . | 0 | 10 | 0 | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| SCHEDULE, INVENTORY, or document of any kind whatsoever, referred to in or by, and intended to be used or given in evidence as part of, or as material to, any other instrument charged with any duty, but which is separate and distinct from, and not indorsed on or annexed to, such other instrument: | | | | |
| Where such other instrument is chargeable with any duty not exceeding 10*s.* . . . . | The same duty as such other instrument. | | | |
| | £ | s. | d. | |
| In any other case . . . . . | 0 | 10 | 0 | |
| *Exemptions.* | | | | |
| (1.) Printed proposals published by any corporation or company respecting insurances, and referred to in or by any policy of insurance issued by such corporation or company. | | | | |
| (2.) Any public map, plan, survey, apportionment, allotment, award, and other parochial or public document and writing, made under or in pursuance of any Act of Parliament, and deposited or kept for reference in any registry, or in any public office, or with the public books, papers, or writings of any parish. | | | | |
| SCRIP CERTIFICATE or SCRIP. See "*Letter of Allotment.*" | | | | |
| SECURITY TO BEARER. Upon any security for money given to a subscriber in respect of a loan raised by any company or corporation and transferable by delivery, and upon a foreign security transferable by delivery: | | | | 48 & 49 Vict. c. 51, sect. 21 (6th August, 1885). |
| For every 10*l.* and also for any fractional part of 10*l.* of the money thereby secured . . . | 0 | 1 | 0 | |
| Upon any such security given in substitution for a like security, duly stamped in conformity with the law in force at the time when such last-mentioned security became subject to duty: | | | | |
| For every 20*l.*, and also for every fractional part of 20*l.* of the money thereby secured . | 0 | 0 | 6 | |

| Stamp Act, 1870, &c. | | Duty. £ s. d. |
|---|---|---|
| 22. *Present Stamp Duties.* 51 Vict. c. 8, sect. 12 (*t*) (16th May, 1888). | SECURITY for money of any company or corporation (being a marketable security and transferable by delivery) or security for money by or on behalf of any foreign or colonial State, Government, municipal body, corporation, or company being a marketable security and transferable by delivery, whatever may be the date thereof, or of the issue thereof, and wherever it may have been made or issued, or the interest may be payable:— | |
| | On the occasion of the first transfer thereof by delivery in the United Kingdom on or after the first day of July in the year one thousand eight hundred and eighty-eight, and on the occasion of the first transfer thereof by delivery in the United Kingdom in any year after the year in which such first transfer by delivery shall happen— | |
| | Where the amount secured does not exceed twenty-five pounds . . . . . | 0 0 3 |
| | Where such amount exceeds twenty-five pounds and does not exceed fifty pounds . | 0 0 6 |
| | Where such amount exceeds fifty pounds, for every fifty pounds and any fractional part of fifty pounds thereof . . . | 0 0 6 |
| 33 & 34 Vict. c. 97, Sched. (1st January, 1871). | SEISIN. Instrument of seisin given upon any charter, precept of clare constat, or precept from chancery, or upon any wadset, heritable bond, disposition, ap- | |

(*t*) Sect. 12 (1) of the Customs and Inland Revenue Act, 1888, contains the following provisions with regard to bonds, &c., transferable by delivery:

"Provided that duty under this section upon a security shall not be payable in the case of any security duly stamped with the duty of one shilling for every ten pounds, and also for any fractional part of ten pounds of the money thereby secured in conformity with the Customs and Inland Revenue Act, 1885, but shall be payable upon every other security, transferable by delivery, and in the case of any stamp duty having been heretofore paid upon any such security, in addition to such stamp duty.

"(3.) The duties under this section are to be denoted by adhesive stamps appropriated by words and figures on the face thereof to such duties and to each year.

"(4.) Every person who delivers or transfers, or is concerned as broker or agent in delivering or transferring any instrument chargeable with duty under this section, and not being duly stamped, shall forfeit the sum of twenty pounds."

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| prizing, adjudication or otherwise of any lands or heritable subjects in Scotland not of burgage tenure | 0 | 5 | 0 | 22. *Present Stamp Duties.* |
| And any NOTARIAL INSTRUMENT to be expeded and recorded in any register of sasines . . . | 0 | 5 | 0 | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| [SETTLEMENT. Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever: | | | | 51 Vict. c. 8, Sched. (*u*) (16th May, 1888). |
| For every 100*l.*, and also for any fractional part of 100*l.*, of the amount or value of the property settled or agreed to be settled . . | 0 | 5 | 0] | |
| *Exemption.* | | | | |
| Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, created by a previous settlement stamped with *ad valorem* duty in respect of the same property, or by will, where probate duty has been paid in respect of the same property as personal estate of the testator. | | | | |
| And see sections 124, 125, and 126 of the Stamp Act, 1870 (*x*). | | | | |
| SHARE CERTIFICATE. See "*Foreign or Colonial Share Certificate.*" | | | | |
| SHARE WARRANT issued under the provisions of "The Companies Act, 1867." | | | | |
| See section 33 of that Act, "*Conveyance on Sale,*" and section 127 of the Stamp Act, 1870. | | | | |

(*u*) The person specified in this schedule as liable to the penalty imposed by sect. 18 of this Act (see *ante*, p. 101) is "the settlor."

This duty was imposed by the Stamp Act, 1870, and was thereby made payable on all settlements executed on or after the 1st of January, 1871.

(*x*) For these sections, see *ante*, sub tit. SETTLEMENTS. As to repayment of stamp duty on settlements in certain cases, see stat. 44 & 45 Vict. c. 12, sect. 38 (3).

| Stamp Act, 1870, &c. | | Duty. £ | s. | d. |
|---|---|---|---|---|
| 22. *Present Stamp Duties.* | STATEMENT. Every statement (to be delivered to the registrar of joint stock companies in England, Scotland or Ireland) of the amount of nominal capital to be raised by shares of any company to be registered with limited liability, and every statement of the amount of any increase of registered capital of any company registered or to be registered with limited liability (to be delivered to the said registrar)— | | | |
| 51 Vict. c. 8, sect. 11 (16th May, 1888). | For every 100*l.* and any fraction of 100*l.* over any multiple of 100*l.* of the amount of such capital or increase of capital, as the case may be . . . . . | 0 | 2 | 0 |
| | SURRENDER— | | | |
| | Of copyholds. See "*Copyhold.*" | | | |
| | Of any other kind whatsoever not chargeable with duty as a conveyance on sale or mortgage | 0 | 10 | 0 |
| | TACK of lands, &c., in Scotland. See "*Lease* or *Tack.*" | | | |
| | TACK IN SECURITY. See "*Mortgage,*" &c. | | | |
| | TRANSFER. See "*Conveyance* or *Transfer.*" | | | |
| | TRANSFER. Any request or authority to the purser or other officer of any mining company, conducted on the cost book system, to enter or register any transfer of any share, or part of a share, in any mine, or any notice to such purser or officer of any such transfer . . . . . | 0 | 0 | 6 |
| | And see section 128. | | | |
| 51 Vict. c. 8, sect. 13 (*y*) (16th May, 1888). | TRANSFER, assignment, disposition, or assignation otherwise than on mortgage, of any mortgage, bond, debenture or covenant (being a marketable security) for money by or on behalf of any foreign or colonial State, Government, municipal body, corporation, or company (being a marketable security): | | | |

(*y*) By sub-sect. 2 of sect. 13 of this Act it is enacted that, "The duties under this section shall be in substitution for the duty of sixpence for every one hundred pounds, and also for any fractional part of one hundred pounds, of the amount transferred, assigned, or disponed in any case in which such duty is imposed by the Stamp Act, 1870."

| | Duty. | | | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| Where the transfer, assignment, disposition or assignation is on sale . . . . . | The same ad valorem duties as are now charged under the Stamp Act, 1870, upon a conveyance or transfer on sale of any property by relation to the amount or value of the consideration of the sale. | | | 22. *Present Stamp Duties.* 51 Vict. c. 8, sect. 13 (16th May, 1888). |
| Where the transfer, assignment, disposition or assignation is of any other kind than on sale or mortgage . . . . . | £ 0 | *s.* 10 | *d.* 0 | |
| VALUATION. See "*Appraisement.*" | | | | |
| VOTING PAPER. Any instrument for the purpose of voting by any person entitled to vote at any meeting<br>And see section 102. | 0 | 0 | 1 | 33 & 34 Vict. c. 97, Sched. (1st January, 1871). |
| WADSET. See "*Mortgage,*" &c. | | | | |
| WARRANT OF ATTORNEY to confess and enter up a judgment given as a security for the payment or repayment of money, or for the transfer or retransfer of stock.<br>See "*Mortgage,*" &c. | | | | |
| WARRANT OF ATTORNEY of any other kind . . | 0 | 10 | 0 | |
| WARRANT FOR GOODS . . . . . | 0 | 0 | 3 | |
| *Exemptions.*<br>(1.) Any document or writing given by any inland carrier acknowledging the receipt of goods conveyed by such carrier.<br>(2.) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.<br>And see sections 88, 89, and 92. | | | | |
| WARRANT under the sign manual of Her Majesty, her heirs or successors . . . . . | 0 | 10 | 0 | |
| WRIT—<br>(1.) Of acknowledgment under "The Registration of Leases (Scotland) Act" . .<br>(2.) Of acknowledgment by any person infeft of lands in Scotland in favour of the heir or disponee of a creditor fully vested in right of an heritable security constituted by infeftment . . . . . .<br>(3.) Of Resignation, Confirmation, Clare Constat, | 0 | 5 | 0 | |

Stamp Act, 1870, &c.

22. *Present Stamp Duties.*

33 & 34 Vict. c. 97, Sched. (1st January, 1871).

| | Duty. £ | s. | d. |
|---|---|---|---|
| or Investiture under "The Titles to Land Consolidation (Scotland) Act, 1868" (z) . | 0 | 5 | 0 |

General Exemptions from all Stamp Duties.

(1.) Transfers of shares in the Government or Parliamentary stocks or funds.

(2.) Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel.

(3.) Instruments of apprenticeship, bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of Her Majesty's colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer.

(4.) Testaments, testamentary instruments, and dispositions *mortis causâ* in Scotland.

(5.) Bonds given to sheriffs or other persons upon the replevy of any goods or chattels, and assignments of such bonds.

(6.) Commissions granted to officers of militia, yeomanry, or volunteers.

(7.) Instruments made by, to, or with the Commissioners, or the First Commissioner, of Her Majesty's Works and Public Buildings, for any of the purposes of the Act 15 & 16 Vict. c. 28.

See also as to the exemption of deeds and documents relating to the estates of bankrupts, and proceedings in bankruptcy, sect. 144 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

Stamp duties under repealed Acts.

*Repealed Stamp Duties.*]—Inasmuch as claims of the Crown are not bound by time, it is important on a purchase, mortgage, or other dealing with property to ascertain that the documents of title bear the proper stamps, denoting that the duties in force at their respective dates have been duly paid.

Tables of the stamp duties payable under the

(z) These writs are now rendered unnecessary by the Conveyancing, &c., (Scotland) Act, 1874 (37 & 38 Vict. c. 94).

Stamp Act, 1870, &c.

22. *Repealed Duties.*

earlier Stamp Acts, prior to 1815, will be found in Sweet's Supplement to Byth. & Jarm. Conv. (1850); but the necessity for such information is of such rare and exceptional occurrence in practice, that it has not been thought worth while to reproduce those Tables in this place.

From the 1st September, 1815, to the 10th October, 1850, the stamp duties payable in England were regulated by the stat. 55 Geo. 3, c. 184, with only an amendment by the stat. 7 & 8 Vict. c. 21, reducing the duty on agreements: see *post*, p. 144, note (*a*). The Act of Geo. 3 was, however, materially amended by the stat. 13 & 14 Vict. c. 97, which came into operation on the 11th October, 1850, and substituted (except in a few special cases) a uniform progressive duty of 10*s.* for every 1080 words for the various progressive duties imposed by the former Act, and also reduced the duties payable upon many instruments of frequent use, and especially upon small conveyances by way of sale, mortgages, and settlements. By the stat. 17 & 18 Vict. c. 83 (11th October, 1854), differential rates of duties were imposed in respect of rents reserved on leases according as the terms were for an indefinite period, or for periods not exceeding thirty-five years, or for periods exceeding thirty-five years but not exceeding one hundred years, or for periods exceeding one hundred years; these rates of duties were re-imposed by the Stamp Act, 1850, and continue in force at the present time. The Act of 1850 was further amended by the stat. 28 & 29 Vict. c. 96, which (amongst other alterations in the rates of duties) substituted the rate of duties now in force for the duties imposed by the former Acts in respect of Awards and Conveyances on Sale. And by the Stamp Act, 1870 (33 & 34 Vict. c. 97), sect. 2, all the duties imposed by previous Stamp Acts were repealed, and the duties now in force were imposed in lieu thereof.

The following statement shows the stamp duties payable on assurances and certain other instruments under the stat. 55 Geo. 3, c. 184 (as amended by the several Acts above referred to), from the 1st

Stamp Act, 1870, &c.

22. *Repealed Duties.*

September, 1815, to the 31st December, 1869, both inclusive. In the text are given the duties imposed by the Schedule to the Act of 1850, with the incorporation of the retained duties imposed in the schedule to the stat. 55 Geo. 3, c. 184. In the notes are noticed the superseded duties formerly payable under the Act of Geo. 3, as also the alterations introduced by the amending Acts prior to 1870.

| | | Duty. £ | s. | d. |
|---|---|---|---|---|
| Agreement. | AGREEMENT under hand only (*a*) . . . . . | 0 | 2 | 6 |
| | Containing 2,160 words or upwards, for every 1,080 words above the first 1,080, a further progressive duty of . . . . . | 0 | 2 | 6 |
| Appointment. | APPOINTMENT, in execution of a power of any property, or any use or interest therein, not being a deed or will . . . . . | 1 | 15 | 0 |
| | Progressive duty . . . . . | 0 | 10 | 0 |
| | If made by deed, see "*Deed.*" | | | |
| Assignment. | ASSIGNATION or ASSIGNMENT of property, not otherwise charged . . . . . | 1 | 15 | 0 |
| | Progressive duty . . . . . | 0 | 10 | 0 |
| Award. | AWARD (*b*) . . . . . | 1 | 15 | 0 |
| | Progressive duty . . . . . | 0 | 10 | 0 |
| Bargain and Sale. | BARGAIN and SALE (*b*) (to be enrolled) of any estate of freehold, in lands or other hereditaments, upon any other occasion . . . . . | 5 | 0 | 0 |
| | Progressive duty . . . . . | 0 | 10 | 0 |

55 Geo. 3, c. 184.

(*a*) Under the 55 Geo. 3, c. 184, the duties on agreements were :—

| | £ | s. | d. |
|---|---|---|---|
| Where the same did not contain more than 1,080 words . . . . . | 1 | 0 | 0 |
| And where the same contained more than 1,080 words . . . . . | 1 | 15 | 0 |
| And for every 1,080 words above the first 1,080 words, a further *progressive* duty of . . . | 1 | 5 | 0 |

7 & 8 Vict. c. 21.

By the 7 & 8 Vict. c. 21, the duty on agreements not containing more than 1,080 words was reduced to 2*s.* 6*d.*—the time for stamping without penalty limited to 14 days, and the penalty fixed at 10*l.* The reduced duty commenced on the 6th June, 1844.

28 & 29 Vict. c. 96.

(*b*) By the stat. 28 & 29 Vict. c. 96, the scale of duties now in force (see *ante*, p. 108) was imposed in lieu of this duty.

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| | | | | 22. *Repealed Duties.* |
| BOND, as a security for the payment of any definite and certain sum of money: | | | | |
| Not exceeding 50*l.* | 0 | 1 | 3 | Bond. |
| Exceeding 50*l.* and not exceeding 100*l.* | 0 | 2 | 6 | |
| „ 100*l.* „ 150*l.* | 0 | 3 | 9 | |
| „ 150*l.* „ 200*l.* | 0 | 5 | 0 | |
| „ 200*l.* „ 250*l.* | 0 | 6 | 3 | |
| „ 250*l.* „ 300*l.* | 0 | 7 | 6 | |
| And where the same exceeds 300*l.*, for every 100*l.* or fractional part of 100*l.* | 0 | 2 | 6 | |
| CONVEYANCE in a sale (*d*): | | | | Conveyance on sale. |
| Purchase-money not exceeding 25*l.* | 0 | 2 | 6 | |
| Exceeding 25*l.* and not exceeding 50*l.* | 0 | 5 | 0 | |
| „ 50*l.* „ 75*l.* | 0 | 7 | 6 | |
| „ 75*l.* „ 100*l.* | 0 | 10 | 0 | |
| „ 100*l.* „ 125*l.* | 0 | 12 | 6 | |
| „ 125*l.* „ 150*l.* | 0 | 15 | 0 | |
| „ 150*l.* „ 175*l.* | 0 | 17 | 6 | |
| „ 175*l.* „ 200*l.* | 1 | 0 | 0 | |
| „ 200*l.* „ 225*l.* | 1 | 2 | 6 | |
| „ 225*l.* „ 250*l.* | 1 | 5 | 0 | |
| „ 250*l.* „ 275*l.* | 1 | 7 | 6 | |
| „ 275*l.* „ 300*l.* | 1 | 10 | 0 | |
| „ 300*l.* „ 350*l.* | 1 | 15 | 0 | |
| „ 350*l.* „ 400*l.* | 2 | 0 | 0 | |
| „ 400*l.* „ 450*l.* | 2 | 5 | 0 | |
| „ 450*l.* „ 500*l.* | 2 | 10 | 0 | |
| „ 500*l.* „ 550*l.* | 2 | 15 | 0 | |
| „ 550*l.* „ 600*l.* | 3 | 0 | 0 | |
| And where the purchase or consideration-money exceeds 600*l.*, for every 100*l.* or fractional part of 100*l.* | 0 | 10 | 0 | |
| And see "*Progressive Duty.*" | | | | |
| CONVEYANCE in trust for sale, only as a security. See "*Mortgage.*" | | | | |
| CONVEYANCE of any kind whatever, not otherwise charged (*e*) | 1 | 15 | 0 | |
| And see "*Progressive Duty.*" | | | | |

(*d*) By the stat. 28 & 29 Vict. c. 96, the rates of duties now in force (see *ante*, p. 108) were imposed in lieu of these duties. 28 & 29 Vict. c. 96.

(*e*) The 55 Geo. 3, c. 184, had the following:— 55 Geo. 3, c. 184.

"And where any freehold lands or hereditaments in England

Stamp Act, 1870, &c.

22. *Repealed Duties.*

Copy.

| | Duty. |
|---|---|
| COPY (*f*), attested, authenticated or declared to be a true copy, or made for the purpose of being given in evidence as a true copy of any agreement, contract, bond, conveyance, or deed, together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto, or of any part thereof respectively; | |
| Where made for the security or use of any person being a party to, or taking any benefit or interest immediately under such instrument . | The same duty or duties as for the original instrument. |
| And where made for the security or use of any other person . . . . . | £ 0 s. 1 d. 0 |
| And for every 720 words above the first 720 words, a further progressive duty of . . . | 0 1 0 |
| COPY, attested or authenticated as aforesaid, or made for the purpose of being given in evidence as a true copy of any original will, testament, or codicil, or of the probate or probate copy of any will or codicil, or of any letters of administration . . | 0 1 0 |
| And for every 720 words above the first 720 words, a further progressive duty of . . . | 0 1 0 |
| COPY or extract of any memorial or of the register of any memorial register pursuant to Act of Parliament . . . . . | 0 5 0 |
| And for every piece of vellum, parchment, or paper upon which any such copy or extract is | |

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Feoffment or bargain and sale.

shall be conveyed by a deed of feoffment, with or without any letter or letters of attorney therein contained, to deliver or receive seisin, or by a deed of *bargain and sale enrolled*, such deed of feoffment or bargain and sale, unless accompanied with a lease and release, shall be charged with a *further* duty as follows:—

| | £ | s. | d. |
|---|---|---|---|
| If the purchase or consideration-money therein or thereupon expressed shall be under 20*l.* . . | 0 | 10 | 0 |
| If it shall amount to 20*l.* and not amount to 50*l.* . | 0 | 15 | 0 |
| If it shall amount to 50*l.* and not amount to 150*l.* . | 1 | 0 | 0 |
| If it shall amount to 150*l.* or upwards . . . | 1 | 15 | 0 |

But if there shall be both a feoffment and a bargain and sale enrolled, then the said further duty shall not attach on either.

NOTE.—The purchase or consideration-money is to be truly expressed and set forth in words at length in or upon every such principal or only deed or instrument of conveyance."

(*f*) All attested or authenticated copies made for the private use only of any person having the custody of the original instruments, or of his or her counsel, attorney, or solicitor, are exempt from stamp duty.

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| written, after the first, a further progressive duty of . . . . . | 0 | 5 | 0 | 22. *Repealed Duties.* |
| COPY or extract of any deed or of any other instrument not falling under the description of law proceedings, made or taken from the rolls or records of any of her Majesty's Courts . . . . . | 0 | 2 | 0 | |
| And for every piece of vellum, after the first, a further progressive duty of . . . . . | 0 | 2 | 0 | |
| COPYHOLD and customary estates (*g*) passing by surrender and admittance or by admittance only, and not by deed: instruments relating thereto upon the sale or mortgage of any such estates (that is to say): | | | | |
| Admittance out of court, or the memorandum thereof, or the copy of court roll of any admittance in court . . . . . | 0 | 2 | 6 | |
| Progressive duty . . . . . | 0 | 2 | 6 | |
| COPYHOLD and customary estates passing by surrender and admittance or by admittance only, and not by deed: instruments relating thereto, not otherwise charged above or under the head of Mortgage or of Conveyance (*g*) upon the sale of lands, viz.: | | | | Copyholds, instruments relating to. |
| Surrender made in or out of court, or the memorandum thereof, clear yearly value exceeding 20*s.* . . . . . | 1 | 0 | 0 | |
| Value not exceeding 20*s.* . . . . | 0 | 5 | 0 | |
| See also "*Conveyance*" upon the sale of lands, &c., and "*Mortgage.*" | | | | |
| Admittance in or out of court, or the memorandum thereof, clear yearly value exceeding 20*s.* . . . . . | 1 | 0 | 0 | |
| Value not exceeding 20*s.* (*g*) . . . . | 0 | 5 | 0 | |
| Progressive duty (*i*) . . . . . | 0 | 10 | 0 | |

(*g*) The following instruments relating to copyholds and customary lands are exempt from stamp duty:—

(1.) Original surrenders out of Court, and copies of Court roll of surrenders in Court, to the uses of a will, or to a trustee for the uses or purposes of a will.

(2.) The Court rolls or books of any manor wherein the proceedings relating thereto shall be entered or minuted.

(*i*) "One pound": 55 Geo. 3, c. 184.

Stamp Act, 1870, &c.

22. *Repealed Duties.*

| | Duty. £ s. d. |
|---|---|
| Voluntary grant by the lord or lady or steward of any manor, made in or out of court, or the memorandum thereof, with or without admittance thereon, clear yearly value exceeding 20*s.* | Twice 1 0 0 |
| Value not exceeding 20*s.* | Twice 0 5 0 |
| Progressive Duty | 0 10 0 |
| Licence to demise, or the memorandum thereof, if granted out of court, and the copy of court roll of any licence to demise if granted in court—where the clear yearly value of the estate shall exceed 20*s.* | 1 0 0 |
| Value not exceeding 20*s.* | 0 5 0 |
| Declaration. DECLARATION of uses or trusts, not being a deed or will, nor otherwise charged | 1 15 0 |
| Progressive duty (*k*) | 0 10 0 |
| If made by deed. See "*Deed.*" | |
| Deed. DEED of any kind not otherwise charged | 1 15 0 |
| Progressive duty (*k*) | 0 10 0 |
| Duplicate or counterpart. DUPLICATE (*l*) or counterpart of any deed or instrument chargeable with stamp duty: | |
| Where such stamp duty (exclusive of progressive duty) shall not amount to the sum of 5*s.* | The same duty as chargeable on the original instrument, including the progressive duty (if any). |
| And when the same (*exclusive as aforesaid*) shall amount to the sum of 5*s.* or upwards | £ s. d. 0 5 0 |
| Progressive duty | 0 2 6 |
| Exchange. EXCHANGE.—Any deed whereby any lands or hereditaments shall be conveyed, or any copyhold or customary lands or hereditaments shall be covenanted to be surrendered, in exchange for other lands or hereditaments: | |
| If no sum of money, or only a sum under 300*l.*, is paid or agreed to be paid for equality of exchange | 1 15 0 |

(*k*) "One pound": 55 Geo. 3, c. 184.

(*l*) By the stat. 55 Geo. 3, c. 184—

| | £ s. d. |
|---|---|
| If the deed is liable in the first instance to a duty of £1 15*s.* | 1 5 0 |
| Or if liable to a higher duty in the first instance | 1 0 0 |

| | Duty. | Stamp Act, 1870, &c. |
|---|---|---|
| And if a sum of 300*l.* or upwards shall be paid or agreed to be paid for equality of exchange . . . . . | The same ad valorem duty as for a conveyance on the sale of lands for a sum equal to the sum so paid or agreed to be paid. | 22. *Repealed Duties.* |
| | £ s. d. | |
| Progressive duty (*m*) . . . . . | 0 10 0 | |
| FEOFFMENT of lands or hereditaments upon sale or mortgage. See "*Conveyance*," "*Mortgage*." | | Feoffment. |
| Feoffment not otherwise charged . . . . | 1 15 0 | |
| And when the same shall contain any letter or letters of attorney to receive or deliver, or receive seisin, a further duty of . . . . | 1 15 0 | |
| Progressive duty . . . . . | 0 10 0 | |
| FURTHER CHARGE. See "*Mortgage*." | | |
| GRANT (*n*) or conveyance under the seal of the duchy of Lancaster, made in pursuance of the Act 19 Geo. 3, c. 45, for enabling the chancellor and council of the duchy to sell certain rents and to enfranchise copyhold and customary tenements within their survey . . . . . | The same duty as for any other conveyance upon the sale of any property for a consideration of the like amount. See "*Conveyance*." | Grant of property of Duchy of Lancaster. |
| GRANT, lease, or other conveyance from her Majesty, her heirs or successors, of any lands, tenements, or hereditaments, or of any personal estate, being respectively the private property of her Majesty, her heirs or successors, and subject to her or their absolute disposal by virtue of the Act 39 & 40 Geo. 3, c. 88 . . . . . | The same duty as on a grant, lease, or conveyance of the like description from any of her Majesty's subjects. | Exemption of private property of the Sovereign. (No progressive duty). |
| LEASE or TACK of any lands, tenements or hereditaments (*o*), in consideration of a sum of money (*p*) by way of fine, without any yearly rent (*q*), or with any yearly rent under 20*l.* (*r*) . | The same duty as for a conveyance on the sale of lands for the same amount. | Fine without rent, or with rent, under 20*l.* |
| For the duty thereon, see "*Conveyance*." | | |

(*m*) This duty is the same as that now charged in respect of duplicates, except that no progressive duty is now payable.

(*n*) All grants and conveyances under the seal of the duchy of Lancaster, made in pursuance of the said Act 19 Geo. 3, c. 45, where the consideration-money paid for the same shall not exceed 10*l.*, are exempt from stamp duty, except on the receipt for the consideration-money. Exemptions.

(*o*) See *Paul* v. *Meek*, 2 Y. & J. 116 ; *Coster* v. *Cowling*, 5 Moo. & P. 399.

Notes (*p*), (*q*), (*r*) next page.

| Stamp Act, 1870, &c. | | Duty. £ s. d. |
|---|---|---|
| 22. *Repealed Duties.* | | |
| Except certain ecclesiastical leases, &c. | (Save and except leases and tacks for a life or lives not exceeding three or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and leases for a term absolute not exceeding twenty-one years granted by ecclesiastical corporations aggregate or sole (*s*), where duties on such leases and tacks respectively would, under the provisions of this act, amount to 1*l.* 15*s.* or upwards.) | |
| Rent without fine. | LEASE or TACK of any lands, tenements, or hereditaments at a yearly rent, without fine (*t*): | |
| | Yearly rent not exceeding 5*l.* . . . . | 0 0 6 |
| | Exceeding 5*l.* and not exceeding 10*l.* . . . | 0 1 0 |
| | „ 10*l.* „ 15*l.* . . . | 0 1 6 |
| | „ 15*l.* „ 20*l.* . . . | 0 2 0 |
| | „ 20*l.* „ 25*l.* . . . | 0 2 6 |
| | „ 25*l.* „ 50*l.* . . . | 0 5 0 |
| | „ 50*l.* „ 75*l.* . . . | 0 7 6 |
| | „ 75*l.* „ 100*l.* . . . | 0 10 0 |
| | And where the rent exceeds 100*l.*, then for every 50*l.* and also for any fractional part of 50*l.* . | 0 5 0 |
| Fine and rent. | LEASE or TACK of any lands, tenements or hereditaments in consideration of a fine, and also of a yearly rent amounting to 20*l.* or upwards . . (Save and except the leases and tacks hereinbefore excepted (*u*).) | Both the ad valorem duties payable for a lease in consideration of a fine only and for a lease in consideration of a rent only of the same amount. |

(*p*) The considerations mentioned under the head of "*Leases*," are *money*, corn, grain and victual. But under the head "*Conveyance*" *ad valorem* duty is charged on a consideration of stock, &c.

(*q*) *Cattell* v. *Gamble*, 6 Sc. 733.

(*r*) The same in 55 Geo. 3, c. 184.

(*s*) The saving in the old Act stopped here.

| 55 Geo. 3, c. 184. Rent. | | £ s. d. |
|---|---|---|
| | (*t*) Yearly rent not amounting to 20*l.* . . . | 1 0 0 |
| | Amounting to 20*l.* and not amounting to 100*l.* . . | 1 10 0 |
| | „ 100*l.* „ „ 200*l.* . . | 2 0 0 |
| | „ 200*l.* „ „ 400*l.* . . | 3 0 0 |
| | „ 400*l.* „ „ 600*l.* . . | 4 0 0 |
| | „ 600*l.* „ „ 800*l.* . . | 5 0 0 |
| | „ 800*l.* „ „ 1,000*l.* . . | 6 0 0 |
| | „ 1,000*l.* or upwards . . . . | 10 0 0 |

17 & 18 Vict. c. 83. The differential rates of duties in respect of leases for terms longer than 35 years were imposed as from the 11th October, 1854, by the stat. 17 & 18 Vict. c. 83.

(*u*) The same in 55 Geo. 3, c. 184. The subsequent clause

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| | | 22. *Repealed Duties.* |
| "LEASE or TACK of any *mine* or *minerals*, or other property of a like nature, either with or without any other lands, tenements, hereditaments, or heritable subjects, *where any portion of the produce* of such mines or minerals *shall be reserved to be paid in money or kind;* | | Lease of mines at a royalty; |
| If it shall be stipulated that the value of such portion of the produce *shall amount at least* to a given sum per annum, or if such value *shall be limited not to exceed* a given sum per annum, to be specified in such lease or tack, then the said *ad valorem* duty on leases shall be charged in respect of the *highest* of such sums so given or limited for any year during the term of such lease or tack. | | royalty to amount to or not to exceed a fixed sum; |
| And where any *yearly sum* shall be reserved in addition to or together with such produce relative to the yearly amount or value of which produce there shall be no such stipulation or limitation as aforesaid, the said *ad valorem* duty shall be charged in respect of such *yearly sum.* | | fixed rent, and no limit to royalty; |
| And where *both a certain yearly sum and also such produce* relative to the yearly amount or value of which there shall be such stipulation or limitation as aforesaid shall be reserved, the said *ad valorem* duty shall be charged on the *aggregate* of such yearly sum and also of the highest yearly amount or value of such produce" (*x*). | | fixed rent, and limit to royalty. |

in the text, except the clause stating the duty on leases not otherwise charged, are new.

(*x*) Here followed general regulations as to leases or tacks providing, (1) That where the fine or rent consisted wholly or in part of corn, grain, or victual, the duty should be ascertained either by the stipulated rate of conversion, or upon an average of twelve calendar months preceding the 1st January next before the lease: (2) That where several fines or rents were payable to lessors who were joint tenants, tenants in common, or co-parceners, the duties should be chargeable in respect of the aggregate amount of the fines or rents: and (3) That where the benefit of an agreement for a lease was purchased, the lease should be chargeable with duty on the purchase-money as well as with the fine or rent reserved to the lessor. Regulations.

| | | Duty. £ | s. | d. |
|---|---|---|---|---|
| Stamp Act, 1870, &c. — 22. *Repealed Duties.* | "LEASE or TACK, of any kind, not otherwise charged (*y*) | 1 | 15 | 0 |
| Lease not otherwise charged. | Provided always, that no *ad valorem* duty shall be chargeable in respect of any *penal rent* or increased rent in the nature of a penal rent reserved in any such lease or tack as aforesaid. | | | |
| Assignment of surrender of lease. | LEASE.—Any assignment or surrender of a lease or tack upon any other occasion than a sale or mortgage . . . . . (A duty equal to the ad valorem duty with which a similar lease or tack would be chargeable under this act.) | | | |
| | Provided always, that where a similar lease or tack would be chargeable under this act with any stamp duty amounting to 1*l.* 15*s.* or upwards, then such assignment or surrender shall be chargeable only with a duty of . . . | 1 | 15 | 0 |
| | Provided also, that no stamp duty except the said *ad valorem* duty shall be chargeable for or in respect of any lease, whether in possession, reversion, or remainder, expressed to be granted in consideration of the surrender of an existing lease and also of a sum of money. | | | |
| Progressive duty. | And in all the said several cases of lease or tack see '*Progressive Duty.*'" | | | |
| | LETTER or power of attorney . . . . . | 1 | 10 | 0 |
| | Progressive duty (*z*) . . . . . | 0 | 10 | 0 |
| Memorial of conveyance; | MEMORIAL to be registered pursuant to any Act of Parliament made or to be made for the public registering of deeds and conveyances in England or Ireland (that is to say): | | | |
| | For every piece of vellum, parchment, or paper | | | |

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| | | £ | s. | d. |
|---|---|---|---|---|
| 55 Geo. 3, c. 184. | (*y*) LEASE or tack of any kind not otherwise charged in this schedule . . . . . | 1 | 15 | 0 |
| Counterpart. | And for the counterpart or duplicate of any lease or tack hereby charged with a duty not exceeding 1*l.* . . . . . (The like duty as on the lease or tack.) | | | |
| | And for the counterpart or duplicate of any other lease or tack whatsoever . . . . . | 1 | 10 | 0 |
| Progressive Duty. | And where any such lease or tack, counterpart, or duplicate as aforesaid, together with any schedule, receipt, or other matter put or indorsed thereon or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further progressive duty of . . | 1 | 0 | 0 |

(*z*) "One pound": 55 Geo. 3, c. 184.

| | Duty. £ | s. | d. | Stamp Act, 1870, &c. |
|---|---|---|---|---|
| upon which any such memorial shall be written (*a*) . . . . . | 0 | 2 | 6 | 22. *Repealed Duties.* |
| MEMORIAL, to be registered or enrolled pursuant to Act of Parliament, of any deed or instrument, deeds or instruments, whereby any annuity shall be granted or secured . . . . . | 1 | 0 | 0 | of annuity. |
| And for every piece of vellum, parchment, or paper upon which any such memorial shall be written after the first, a further progressive duty of . . . . . | 1 | 0 | 0 | Progressive duty. |
| MORTGAGE (*b*) where made as a security for any definite and certain sum of money advanced or lent at the time, or previously owing, or forborne (*a*): | | | | Mortgage. |
| Not exceeding 50*l.* . . . . . | 0 | 1 | 3 | |
| Exceeding 50*l.* and not exceeding 100*l.* . . . | 0 | 2 | 6 | |
| „ 100*l.* „ 150*l.* . . . | 0 | 3 | 9 | |
| „ 150*l.* „ 200*l.* . . . | 0 | 5 | 0 | |
| „ 200*l.* „ 250*l.* . . . | 0 | 6 | 3 | |
| „ 250*l.* „ 300*l.* . . . | 0 | 7 | 6 | |
| And where the same shall exceed 300*l.*, then for every 100*l.* and also for any fractional part of 100*l.* . . . . . | 0 | 2 | 6 | |
| Where made to secure future advances (except insurance moneys and expenses of renewal in certain cases), if limited—the same duty as on a mortgage for such limited sum. | | | | |
| If unlimited, the security to be available for such amount only as the *ad valorem* stamp will cover. | | | | |
| Where made to secure stock, &c., the same duty as on a mortgage for a sum equal to the value of the stock. | | | | |
| Where made as security for a rent-charge or annuity by way of repayment or in redemption of money lent—the same duty as on a mortgage for the sum of money lent. | | | | |
| MORTGAGE, transfer of, where no further advance of money or stock (*c*), | | | | Mortgage, transfer of. |

(*a*) "Ten shillings": 55 Geo. 3, c. 184.

(*b*) The definition of mortgage in the stat. 14 & 15 Vict. c. 97, is practically identical with that given in sect. 105 of the Stamp Act, 1870.

(*c*) The stat. 55 Geo. 3, c. 184, had the following:— 55 Geo. 3, c. 184.

Stamp Act, 1870, &c.

22. *Repealed Duties.*

| | Duty. |
|---|---|
| If the principal already secured does not exceed in the whole 1,400*l.* . . . . . | The same duty as on a mortgage for the total amount or value of such principal. |
| And if such principal exceeds in the whole 1,400*l.* . . . . . | £ 1 *s.* 15 *d.* 0 |
| And where any further sum shall be added to the principal . . . . . | The same duty as on a mortgage for such further sum only. |
| And in every other case not provided for . . | £ 1 *s.* 15 *d.* 0 |

Mortgage by way of further assurance or security.

MORTGAGE, where made by way of further assurance of property already mortgaged, or by way of further security only,

| | |
|---|---|
| Where the total amount or value of the money or stock already secured and in respect whereof the *ad valorem* duty has been paid does not exceed 1,400*l.* . . . . | The same duty as on a mortgage for the amount or value of the said money or stock. |
| And in any other case . . . . . | £ 1 *s.* 15 *d.* 0 |

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Transfer of mortgage.

MORTGAGE, &c.—Any transfer or assignment, disposition or assignation of any mortgage or wadset, or of any such other security as aforesaid, or of the benefit thereof, *and* of the money or stock thereby secured, in all cases where the person entitled to the right of redemption or reversion shall not be made a party to such transfer or assignment, disposition or assignation; and also where the person who originally made the mortgage, wadset, or other security, shall continue entitled to the right of redemption or reversion, and shall be made a party to such transfer or assignment, disposition or assignation; provided no further sum of money or stock be added to the principal money or stock already secured . . . . . £ 1 *s.* 15 *d.* 0

(And a progressive duty of 1*l.* 5*s.*)

| | |
|---|---|
| And in all other cases such transfer or assignment, disposition or assignation, shall be charged with . . . . . | The same duty or duties as an original mortgage, wadset, or other security. |

3 Geo. 4, c. 117.

This was repealed from the 15th August, 1822, by the 3 Geo. 4, c. 117, which imposed on any transfer of any mortgage, &c. (as in the text), provided no further sum of money or stock were added to the principal money or stock already secured, a duty of 1*l.* 15*s.* with a progressive duty of 1*l.* 5*s.* (in Ireland 1*l.* and 10*s.* progressive duty); and if any further sum of money or stock were added to the money or stock already secured, the *ad valorem* duty on mortgages was to be charged only in respect of such further sum or stock.

| | Duty. | Stamp Act, 1870, &c. |
|---|---|---|
| MORTGAGE, reconveyance of, | | |
| Where the total amount of the principal money or stock secured does not exceed 1,400*l.* . | The same duty as on a mortgage for the amount or value of the said money or stock. | 22. *Repealed Duties.* Mortgage, reconveyance of. |
| | £ *s.* *d.* | |
| And in any other case . . . . . | 1 15 0 | |
| And in all cases of deeds and instruments chargeable under the head of "*Mortgage*" see "*Progressive Duty.*" | | |
| PARTITION DEED.—If no sum of money, or only a sum under 300*l.*, is paid or agreed to be paid for equality of partition . . . . . | 1 15 0 | Partition. |
| And if any money amounting to 300*l.* or upwards shall be paid or agreed to be paid for equality . . . . . | The same ad valorem duty as for a conveyance on the sale of lands for a sum equal to the amount so paid or agreed to be paid. | |
| | £ *s.* *d.* | |
| Progressive duty (*d*) . . . . . | 0 10 0 | |
| PROGRESSIVE DUTY; that is to say:—Where any deed or instrument of any description whatever chargeable with any stamp duty either under this schedule (*e*), or under any other act or acts now in force, together with any schedule, receipt or other matter put or indorsed thereon or annexed thereto, shall contain 2,160 words or upwards, then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, there shall be charged the further progressive duty following (that is to say): | | Progressive Duty. |
| Where such deed or instrument shall be chargeable with any *ad valorem* stamp duty or | | |

(*d*) If the deed be liable in the first instance to a duty of 1*l.* 15*s.* . . . . . £ 1 *s.* 5 *d.* 0 — 55 Geo. 3, c. 184.
Or if liable to a higher duty in the first instance . 1 0 0 — Duplicates.
And any duplicate of any such deed of partition or division shall be charged with the same duty or duties.

(*e*) That is to say, the schedule to the stat. 13 & 14 Vict. c. 97. The progressive duty under the stat. 55 Geo. 3, c. 184, was one pound on conveyances on sale, mortgages, and leases (not chargeable as bargains and sales); twenty-five shillings on bargains and sales, conveyances otherwise than on sales, transfers of mortgages, &c., and thirty-five shillings on settlements.

| Stamp Act, 1870, &c. — 22. *Repealed Duties.* | | Duty. £ | s. | d. |
|---|---|---|---|---|
| | duties not exceeding in the whole the sum of ten shillings, a further progressive duty equal to the amount of such *ad valorem* duty or duties. | | | |
| | And in every other case (except where any other progressive duty is by this schedule expressly charged thereon), a further progressive duty of | 0 | 10 | 0 |
| Release. | RELEASE and renunciation of lands or other property or any interest therein not otherwise charged . . | 1 | 15 | 0 |
| | Progressive duty (*f*) . . . . . | 0 | 10 | 0 |
| Revocation. | REVOCATION of uses or trusts not being a deed or will. | 1 | 15 | 0 |
| | Progressive duty (*f*) . . . . . | 0 | 10 | 0 |
| | If made by deed, see "*Deed.*" | | | |
| Schedule. | SCHEDULE or inventory referred to but separate and distinct from any instrument (*g*): | | | |
| | Where the instrument is chargeable with stamp duty not exceeding 10*s.*, exclusive of progressive duty . . . . . (The same duty as chargeable on such instrument.) | | | |
| | Where the instrument is chargeable with stamp duty exceeding 10*s.*, exclusive of progressive duty . . . . . | £ 0 | s. 10 | d. 0 |
| | Progressive duty . . . . . | 0 | 10 | 0 |
| Settlement. | SETTLEMENT.—Any deed or instrument, whether voluntary or upon good or valuable consideration other than a pecuniary consideration, whereby any *definite* sum or sums of money (whether charged or chargeable on land or not, or to be laid out in the purchase of land or not), or any *definite* share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Bank of England, or of Ireland, or of any other company or corporation, is settled or agreed to be settled: | | | |
| | If the money, or the value of the share or shares in stocks or funds settled or agreed to be settled, or both together, shall not exceed in the whole 100*l.* . . . . . | 0 | 5 | 0 |
| | Exceeding 100*l.*, for every 100*l.* or fractional part of 100*l.* . . . . . | 0 | 5 | 0 |

(*f*) "Twenty-five shillings": 55 Geo. 3, c. 184.

(*g*) The former duty was 1*l.* 5*s.*, with a progressive duty of the same amount.

| | Duty. £ s. d. | Stamp Act, 1870, &c. |
|---|---|---|
| | | 22. *Repealed Duties.* |
| And all instruments chargeable with the said *ad valorem* duty which also contain any settlement of lands or other property, or contain any other matter besides the settlement of such money or stock, are chargeable with such further stamp duty as any separate settlement of lands or other property, or other matter would have been chargeable with, exclusive of progressive duty. | | Money settlement, with other matter. |
| "And where there shall be more than one such deed or instrument for effecting any such settlement as aforesaid chargeable with any such duty or duties exceeding 1*l.* 15*s.*, one of them only shall be charged with the said *ad valorem* duty; And also where any settlement shall be made in pursuance of any previous articles chargeable with and which shall have paid any such duty or duties exceeding 1*l.* 15*s.*, such last-mentioned settlement shall not be chargeable with the said *ad valorem* duty; And the said deeds and instruments respectively not chargeable with the said *ad valorem* duty shall be charged with the duty to which the same may be liable under any more general description in this Schedule or in the Schedule annexed to the said Act of the fifty-fifth year of the reign of King George the Third; And on the whole being produced, duly executed and duly stamped as hereby required, the latter shall also be stamped with a particular stamp for denoting or testifying the payment of the said *ad valorem* duty." | | Several instruments. |
| | | Denoting stamp. |
| And see "*Progressive Duty*" (*h*). | | |
| SURRENDER, not otherwise charged . . . . . | 1 15 0 | |
| Progressive Duty (*i*) . . . . . | 0 10 0 | |

(*h*) Under the stat. 55 Geo. 3, c. 184, the progressive duty on settlements was 1*l.* 15*s.*

(*i*) "Twenty-five shillings": 55 Geo. 3, c. 184.

*Tables of Duties.*]—The following Tables show the *ad valorem* duties payable in England on securities, conveyances, settlements, and leases, payable under the successive Stamp Acts from the 15th September, 1815, to the present time :

## 1. TABLE OF AD VALOREM STAMP DUTIES

PAYABLE IN ENGLAND FROM THE 1ST SEPTEMBER, 1815, TO THE 10TH OCTOBER, 1850, BOTH INCLUSIVE, UNDER THE 55 GEO. 3, C. 184.

| DUTY. | BONDS, MORTGAGES, AND WARRANTS OF ATTORNEY. | | CONVEYANCES UPON SALES. | | SETTLEMENTS. | | DUTY. |
|---|---|---|---|---|---|---|---|
| | Exceeding | Not Exceeding | Amounting to | Not Amounting to | Amounting to | Not Amounting to | |
| £ s. d. | £ | £ | £ | £ | £ | £ | £ s. d. |
| 0 10 0 | ... | ... | ... | 20 | ... | ... | 0 10 0 |
| 1 0 0 | ... | 50 | 20 | 50 | ... | ... | 1 0 0 |
| 1 10 0 | 50 | 100 | 50 | 150 | ... | ... | 1 10 0 |
| 1 15 0 | ... | ... | ... | ... | ... | 1,000 | 1 15 0 |
| 2 0 0 | 100 | 200 | 150 | 300 | 1,000 | 2,000 | 2 0 0 |
| 3 0 0 | 200 | 300 | 300 | 500 | 2,000 | 3,000 | 3 0 0 |
| 4 0 0 | 300 | 500 | ... | ... | 3,000 | 4,000 | 4 0 0 |
| 5 0 0 | 500 | 1,000 | ... | ... | 4,000 | 5,000 | 5 0 0 |
| 6 0 0 | 1,000 | 2,000 | 500 | 750 | ... | ... | 6 0 0 |
| 7 0 0 | 2,000 | 3,000 | ... | ... | 5,000 | 7,000 | 7 0 0 |
| 8 0 0 | 3,000 | 4,000 | ... | ... | ... | ... | 8 0 0 |
| 9 0 0 | 4,000 | 5,000 | 750 | 1,000 | 7,000 | 9,000 | 9 0 0 |
| 12 0 0 | 5,000 | 10,000 | 1,000 | 2,000 | 9,000 | 12,000 | 12 0 0 |
| 15 0 0 | 10,000 | 15,000 | ... | ... | 12,000 | 15,000 | 15 0 0 |
| 20 0 0 | 15,000 | 20,000 | ... | ... | 15,000 | 20,000 | 20 0 0 |
| 25 0 0 | 20,000 | ... | 2,000 | 3,000 | 20,000 *or upwards* | ... | 25 0 0 |
| 35 0 0 | ... | ... | 3,000 | 4,000 | ... | ... | 35 0 0 |
| 45 0 0 | ... | ... | 4,000 | 5,000 | ... | ... | 45 0 0 |
| 55 0 0 | ... | ... | 5,000 | 6,000 | ... | ... | 55 0 0 |
| 65 0 0 | ... | ... | 6,000 | 7,000 | ... | ... | 65 0 0 |
| 75 0 0 | ... | ... | 7,000 | 8,000 | ... | ... | 75 0 0 |
| 85 0 0 | ... | ... | 8,000 | 9,000 | ... | ... | 85 0 0 |
| 95 0 0 | ... | ... | 9,000 | 10,000 | ... | ... | 95 0 0 |
| 110 0 0 | ... | ... | 10,000 | 12,000 | ... | ... | 110 0 0 |
| 130 0 0 | ... | ... | 12,500 | 15,000 | ... | ... | 130 0 0 |
| 170 0 0 | ... | ... | 15,000 | 20,000 | ... | ... | 170 0 0 |
| 240 0 0 | ... | ... | 20,000 | 30,000 | ... | ... | 240 0 0 |
| 350 0 0 | ... | ... | 30,000 | 40,000 | ... | ... | 350 0 0 |
| 450 0 0 | ... | ... | 40,000 | 50,000 | ... | ... | 450 0 0 |
| 550 0 0 | ... | ... | 50,000 | 60,000 | ... | ... | 550 0 0 |
| 650 0 0 | ... | ... | 60,000 | 80,000 | ... | ... | 650 0 0 |
| 800 0 0 | ... | ... | 80,000 | 100,000 | ... | ... | 800 0 0 |
| 1000 0 0 | ... | ... | 100,000 *or upwards* | ... | ... | ... | 1000 0 0 |

## 2. TABLE OF AD VALOREM DUTIES ON SECURITIES, CONVEYANCES, AND SETTLEMENTS,

PAYABLE FROM THE 11TH OCTOBER, 1850, TO THE 5TH JULY, 1865, BOTH INCLUSIVE, UNDER THE STATUTE 13 & 14 VICT. C. 97.

| Exceeding | Not Exceeding | Securities. | | | Conveyances. | | | Settlements. | | | Exceeding | Not Exceeding | Securities. | | | Conveyances. | | | Settlements. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| £ | £ | £ | s. | d. | £ | s. | d. | £ | s. | d. | £ | £ | £ | s. | d. | £ | s. | d. | £ | s. | d. |
| ... | 25 | 0 | 1 | 3 | 0 | 2 | 6 | 0 | 5 | 0 | 4,400 | 4,500 | 5 | 12 | 6 | 22 | 10 | 0 | 11 | 5 | 0 |
| 25 | 50 | 0 | 1 | 3 | 0 | 5 | 0 | 0 | 5 | 0 | 4,500 | 4,600 | 5 | 15 | 0 | 23 | 0 | 0 | 11 | 10 | 0 |
| 50 | 75 | 0 | 2 | 6 | 0 | 7 | 6 | 0 | 5 | 0 | 4,600 | 4,700 | 5 | 17 | 6 | 23 | 10 | 0 | 11 | 15 | 0 |
| 75 | 100 | 0 | 2 | 6 | 0 | 10 | 0 | 0 | 5 | 0 | 4,700 | 4,800 | 6 | 0 | 0 | 24 | 0 | 0 | 12 | 0 | 0 |
| 100 | 125 | 0 | 3 | 9 | 0 | 12 | 6 | 0 | 10 | 0 | 4,800 | 4,900 | 6 | 2 | 6 | 24 | 10 | 0 | 12 | 5 | 0 |
| 125 | 150 | 0 | 3 | 9 | 0 | 15 | 0 | 0 | 10 | 0 | 4,900 | 5,000 | 6 | 5 | 0 | 25 | 0 | 0 | 12 | 10 | 0 |
| 150 | 175 | 0 | 5 | 0 | 0 | 17 | 6 | 0 | 10 | 0 | 5,000 | 5,100 | 6 | 7 | 6 | 25 | 10 | 0 | 12 | 15 | 0 |
| 175 | 200 | 0 | 5 | 0 | 1 | 0 | 0 | 0 | 10 | 0 | 5,100 | 5,200 | 6 | 10 | 0 | 26 | 0 | 0 | 13 | 0 | 0 |
| 200 | 225 | 0 | 6 | 3 | 1 | 2 | 6 | 0 | 15 | 0 | 5,200 | 5,300 | 6 | 12 | 6 | 26 | 10 | 0 | 13 | 5 | 0 |
| 225 | 250 | 0 | 6 | 3 | 1 | 5 | 0 | 0 | 15 | 0 | 5,300 | 5,400 | 6 | 15 | 0 | 27 | 0 | 0 | 13 | 10 | 0 |
| 250 | 275 | 0 | 7 | 6 | 1 | 7 | 6 | 0 | 15 | 0 | 5,400 | 5,500 | 6 | 17 | 6 | 27 | 10 | 0 | 13 | 15 | 0 |
| 275 | 300 | 0 | 7 | 6 | 1 | 10 | 0 | 0 | 15 | 0 | 5,500 | 5,600 | 7 | 0 | 0 | 28 | 0 | 0 | 14 | 0 | 0 |
| 300 | 350 | 0 | 10 | 0 | 1 | 15 | 0 | 1 | 0 | 0 | 5,600 | 5,700 | 7 | 2 | 6 | 28 | 10 | 0 | 14 | 5 | 0 |
| 350 | 400 | 0 | 10 | 0 | 2 | 0 | 0 | 1 | 0 | 0 | 5,700 | 5,800 | 7 | 5 | 0 | 29 | 0 | 0 | 14 | 10 | 0 |
| 400 | 450 | 0 | 12 | 6 | 2 | 5 | 0 | 1 | 5 | 0 | 5,800 | 5,900 | 7 | 7 | 6 | 29 | 10 | 0 | 14 | 15 | 0 |
| 450 | 500 | 0 | 12 | 6 | 2 | 10 | 0 | 1 | 5 | 0 | 5,900 | 6,000 | 7 | 10 | 0 | 30 | 0 | 0 | 15 | 0 | 0 |
| 500 | 550 | 0 | 15 | 0 | 2 | 15 | 0 | 1 | 10 | 0 | 6,000 | 6,100 | 7 | 12 | 6 | 30 | 10 | 0 | 15 | 5 | 0 |
| 550 | 600 | 0 | 15 | 0 | 3 | 0 | 0 | 1 | 10 | 0 | 6,100 | 6,200 | 7 | 15 | 0 | 31 | 0 | 0 | 15 | 10 | 0 |
| 600 | 700 | 0 | 17 | 6 | 3 | 10 | 0 | 1 | 15 | 0 | 6,200 | 6,300 | 7 | 17 | 6 | 31 | 10 | 0 | 15 | 15 | 0 |
| 700 | 800 | 1 | 0 | 0 | 4 | 0 | 0 | 2 | 0 | 0 | 6,300 | 6,400 | 8 | 0 | 0 | 32 | 0 | 0 | 16 | 0 | 0 |
| 800 | 900 | 1 | 2 | 6 | 4 | 10 | 0 | 2 | 5 | 0 | 6,400 | 6,500 | 8 | 2 | 6 | 32 | 10 | 0 | 16 | 5 | 0 |
| 900 | 1,000 | 1 | 5 | 0 | 5 | 0 | 0 | 2 | 10 | 0 | 6,500 | 6,600 | 8 | 5 | 0 | 33 | 0 | 0 | 16 | 10 | 0 |
| 1,000 | 1,100 | 1 | 7 | 6 | 5 | 10 | 0 | 2 | 15 | 0 | 6,600 | 6,700 | 8 | 7 | 6 | 33 | 10 | 0 | 16 | 15 | 0 |
| 1,100 | 1,200 | 1 | 10 | 0 | 6 | 0 | 0 | 3 | 0 | 0 | 6,700 | 6,800 | 8 | 10 | 0 | 34 | 0 | 0 | 17 | 0 | 0 |
| 1,200 | 1,300 | 1 | 12 | 6 | 6 | 10 | 0 | 3 | 5 | 0 | 6,800 | 6,900 | 8 | 12 | 6 | 34 | 10 | 0 | 17 | 5 | 0 |
| 1,300 | 1,400 | 1 | 15 | 0 | 7 | 0 | 0 | 3 | 10 | 0 | 6,900 | 7,000 | 8 | 15 | 0 | 35 | 0 | 0 | 17 | 10 | 0 |
| 1,400 | 1,500 | 1 | 17 | 6 | 7 | 10 | 0 | 3 | 15 | 0 | 7,000 | 7,100 | 8 | 17 | 6 | 35 | 10 | 0 | 17 | 15 | 0 |
| 1,500 | 1,600 | 2 | 0 | 0 | 8 | 0 | 0 | 4 | 0 | 0 | 7,100 | 7,200 | 9 | 0 | 0 | 36 | 0 | 0 | 18 | 0 | 0 |
| 1,600 | 1,700 | 2 | 2 | 6 | 8 | 10 | 0 | 4 | 5 | 0 | 7,200 | 7,300 | 9 | 2 | 6 | 36 | 10 | 0 | 18 | 5 | 0 |
| 1,700 | 1,800 | 2 | 5 | 0 | 9 | 0 | 0 | 4 | 10 | 0 | 7,300 | 7,400 | 9 | 5 | 0 | 37 | 0 | 0 | 18 | 10 | 0 |
| 1,800 | 1,900 | 2 | 7 | 6 | 9 | 10 | 0 | 4 | 15 | 0 | 7,400 | 7,500 | 9 | 7 | 6 | 37 | 10 | 0 | 18 | 15 | 0 |
| 1,900 | 2,000 | 2 | 10 | 0 | 10 | 0 | 0 | 5 | 0 | 0 | 7,500 | 7,600 | 9 | 10 | 0 | 38 | 0 | 0 | 19 | 0 | 0 |
| 2,000 | 2,100 | 2 | 12 | 6 | 10 | 10 | 0 | 5 | 5 | 0 | 7,600 | 7,700 | 9 | 12 | 6 | 38 | 10 | 0 | 19 | 5 | 0 |
| 2,100 | 2,200 | 2 | 15 | 0 | 11 | 0 | 0 | 5 | 10 | 0 | 7,700 | 7,800 | 9 | 15 | 0 | 39 | 0 | 0 | 19 | 10 | 0 |
| 2,200 | 2,300 | 2 | 17 | 6 | 11 | 10 | 0 | 5 | 15 | 0 | 7,800 | 7,900 | 9 | 17 | 6 | 39 | 10 | 0 | 19 | 15 | 0 |
| 2,300 | 2,400 | 3 | 0 | 0 | 12 | 0 | 0 | 6 | 0 | 0 | 7,900 | 8,000 | 10 | 0 | 0 | 40 | 0 | 0 | 20 | 0 | 0 |
| 2,400 | 2,500 | 3 | 2 | 6 | 12 | 10 | 0 | 6 | 5 | 0 | 8,000 | 8,100 | 10 | 2 | 6 | 40 | 10 | 0 | 20 | 5 | 0 |
| 2,500 | 2,600 | 3 | 5 | 0 | 13 | 0 | 0 | 6 | 10 | 0 | 8,100 | 8,200 | 10 | 5 | 0 | 41 | 0 | 0 | 20 | 10 | 0 |
| 2,600 | 2,700 | 3 | 7 | 6 | 13 | 10 | 0 | 6 | 15 | 0 | 8,200 | 8,300 | 10 | 7 | 6 | 41 | 10 | 0 | 20 | 15 | 0 |
| 2,700 | 2,800 | 3 | 10 | 0 | 14 | 0 | 0 | 7 | 0 | 0 | 8,300 | 8,400 | 10 | 10 | 0 | 42 | 0 | 0 | 21 | 0 | 0 |
| 2,800 | 2,900 | 3 | 12 | 6 | 14 | 10 | 0 | 7 | 5 | 0 | 8,400 | 8,500 | 10 | 12 | 6 | 42 | 10 | 0 | 21 | 5 | 0 |
| 2,900 | 3,000 | 3 | 15 | 0 | 15 | 0 | 0 | 7 | 10 | 0 | 8,500 | 8,600 | 10 | 15 | 0 | 43 | 0 | 0 | 21 | 10 | 0 |
| 3,000 | 3,100 | 3 | 17 | 6 | 15 | 10 | 0 | 7 | 15 | 0 | 8,600 | 8,700 | 10 | 17 | 6 | 43 | 10 | 0 | 21 | 15 | 0 |
| 3,100 | 3,200 | 4 | 0 | 0 | 16 | 0 | 0 | 8 | 0 | 0 | 8,700 | 8,800 | 11 | 0 | 0 | 44 | 0 | 0 | 22 | 0 | 0 |
| 3,200 | 3,300 | 4 | 2 | 6 | 16 | 10 | 0 | 8 | 5 | 0 | 8,800 | 8,900 | 11 | 2 | 6 | 44 | 10 | 0 | 22 | 5 | 0 |
| 3,300 | 3,400 | 4 | 5 | 0 | 17 | 0 | 0 | 8 | 10 | 0 | 8,900 | 9,000 | 11 | 5 | 0 | 45 | 0 | 0 | 22 | 10 | 0 |
| 3,400 | 3,500 | 4 | 7 | 6 | 17 | 10 | 0 | 8 | 15 | 0 | 9,000 | 9,100 | 11 | 7 | 6 | 45 | 10 | 0 | 22 | 15 | 0 |
| 3,500 | 3,600 | 4 | 10 | 0 | 18 | 0 | 0 | 9 | 0 | 0 | 9,100 | 9,200 | 11 | 10 | 0 | 46 | 0 | 0 | 23 | 0 | 0 |
| 3,600 | 3,700 | 4 | 12 | 6 | 18 | 10 | 0 | 9 | 5 | 0 | 9,200 | 9,300 | 11 | 12 | 6 | 46 | 10 | 0 | 23 | 5 | 0 |
| 3,700 | 3,800 | 4 | 15 | 0 | 19 | 0 | 0 | 9 | 10 | 0 | 9,300 | 9,400 | 11 | 15 | 0 | 47 | 0 | 0 | 23 | 10 | 0 |
| 3,800 | 3,900 | 4 | 17 | 6 | 19 | 10 | 0 | 9 | 15 | 0 | 9,400 | 9,500 | 11 | 17 | 6 | 47 | 10 | 0 | 23 | 15 | 0 |
| 3,900 | 4,000 | 5 | 0 | 0 | 20 | 0 | 0 | 10 | 0 | 0 | 9,500 | 9,600 | 12 | 0 | 0 | 48 | 0 | 0 | 24 | 0 | 0 |
| 4,000 | 4,100 | 5 | 2 | 6 | 20 | 10 | 0 | 10 | 5 | 0 | 9,600 | 9,700 | 12 | 2 | 6 | 48 | 10 | 0 | 24 | 5 | 0 |
| 4,100 | 4,200 | 5 | 5 | 0 | 21 | 0 | 0 | 10 | 10 | 0 | 9,700 | 9,800 | 12 | 5 | 0 | 49 | 0 | 0 | 24 | 10 | 0 |
| 4,200 | 4,300 | 5 | 7 | 6 | 21 | 10 | 0 | 10 | 15 | 0 | 9,800 | 9,900 | 12 | 7 | 6 | 49 | 10 | 0 | 24 | 15 | 0 |
| 4,300 | 4,400 | 5 | 10 | 0 | 22 | 0 | 0 | 11 | 0 | 0 | 9,900 | 10,000 | 12 | 10 | 0 | 50 | 0 | 0 | 25 | 0 | 0 |

## 3. TABLE OF AD VALOREM DUTIES IN RESPECT OF RENTS RESERVED ON LEASES,

PAYABLE UNDER THE STATUTE 13 & 14 VICT. c. 97.

| Exceeding | Not Exceeding | Stamp Duty. | Exceeding | Not Exceeding | Stamp Duty. |
|---|---|---|---|---|---|
| £ | £ | £ s. d. | £ | £ | £ s. d. |
| ... | 5 | 0 0 6 | 1,100 | 1,150 | 5 15 0 |
| 5 | 10 | 0 1 0 | 1,150 | 1,200 | 6 0 0 |
| 10 | 15 | 0 1 6 | 1,200 | 1,250 | 6 5 0 |
| 15 | 20 | 0 2 0 | 1,250 | 1,300 | 6 10 0 |
| 20 | 25 | 0 2 6 | 1,300 | 1,350 | 6 15 0 |
| 25 | 50 | 0 5 0 | 1,350 | 1,400 | 7 0 0 |
| 50 | 75 | 0 7 6 | 1,400 | 1,450 | 7 5 0 |
| 75 | 100 | 0 10 0 | 1,450 | 1,500 | 7 10 0 |
| 100 | 150 | 0 15 0 | 1,500 | 1,550 | 7 15 0 |
| 150 | 200 | 1 0 0 | 1,550 | 1,600 | 8 0 0 |
| 200 | 250 | 1 5 0 | 1,600 | 1,650 | 8 5 0 |
| 250 | 300 | 1 10 0 | 1,650 | 1,700 | 8 10 0 |
| 300 | 350 | 1 15 0 | 1,700 | 1,750 | 8 15 0 |
| 350 | 400 | 2 0 0 | 1,750 | 1,800 | 9 0 0 |
| 400 | 450 | 2 5 0 | 1,800 | 1,850 | 9 5 0 |
| 450 | 500 | 2 10 0 | 1,850 | 1,900 | 9 10 0 |
| 500 | 550 | 2 15 0 | 1,900 | 1,950 | 9 15 0 |
| 550 | 600 | 3 0 0 | 1,950 | 2,000 | 10 0 0 |
| 600 | 650 | 3 5 0 | 2,000 | 2,050 | 10 5 0 |
| 650 | 700 | 3 10 0 | 2,050 | 2,100 | 10 10 0 |
| 700 | 750 | 3 15 0 | 2,100 | 2,150 | 10 15 0 |
| 750 | 800 | 4 0 0 | 2,150 | 2,200 | 11 0 0 |
| 800 | 850 | 4 5 0 | 2,200 | 2,250 | 11 5 0 |
| 850 | 900 | 4 10 0 | 2,250 | 2,300 | 11 10 0 |
| 900 | 950 | 4 15 0 | 2,300 | 2,350 | 11 15 0 |
| 950 | 1,000 | 5 0 0 | 2,350 | 2,400 | 12 0 0 |
| 1,000 | 1,050 | 5 5 0 | 2,400 | 2,450 | 12 5 0 |
| 1,050 | 1,100 | 5 10 0 | 2,450 | 2,500 | 12 10 0 |

NOTE.—Where the lease was granted in consideration of a fine and also of a yearly rent of *less* than 20*l*., ad valorem duty was chargeable only in respect of the fine, as on a conveyance on sale: see *ante*, p. 143.

## 4. TABLE OF AD VALOREM DUTIES ON BILLS OF EXCHANGE AND PROMISSORY NOTES, CONVEYANCES ON SALE, MORTGAGES, AND SETTLEMENTS,

PAYABLE FROM THE 6TH OF JULY, 1865, UP TO THE PRESENT TIME UNDER THE STATUTES NOW IN FORCE.

| Exceeding | Not Exceeding | Bills or Notes. | | | Convey-ances. | | | Mort-gages, &c. | | | Settle-ments. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| £ | £ | £ | s. | d. | £ | s. | d. | £ | s. | d. | £ | s. | d. |
| ... | 5 | 0 | 0 | 1 | 0 | 0 | 6 | ... | | | ... | | |
| 5 | 10 | 0 | 0 | 2 | 0 | 1 | 0 | 0 | 0 | 3 | ... | | |
| 10 | 15 | 0 | 0 | 3 | 0 | 1 | 6 | 0 | 0 | 8 | ... | | |
| 15 | 20 | 0 | 0 | 3 | 0 | 2 | 0 | 0 | 0 | 8 | ... | | |
| 20 | 25 | 0 | 0 | 3 | 0 | 2 | 6 | 0 | 0 | 8 | ... | | |
| 25 | 50 | 0 | 0 | 6 | 0 | 5 | 0 | 0 | 1 | 3 | ... | | |
| 50 | 75 | 0 | 0 | 9 | 0 | 7 | 6 | 0 | 2 | 6 | ... | | |
| 75 | 100 | 0 | 1 | 0 | 0 | 10 | 0 | 0 | 2 | 6 | 0 | 5 | 0 |
| 100 | 125 | 0 | 2 | 0 | 0 | 12 | 6 | 0 | 3 | 9 | 0 | 10 | 0 |
| 125 | 150 | 0 | 2 | 0 | 0 | 15 | 0 | 0 | 3 | 9 | 0 | 10 | 0 |
| 150 | 175 | 0 | 2 | 0 | 0 | 17 | 6 | 0 | 5 | 0 | 0 | 10 | 0 |
| 175 | 200 | 0 | 2 | 0 | 1 | 0 | 0 | 0 | 5 | 0 | 0 | 10 | 0 |
| 200 | 225 | 0 | 3 | 0 | 1 | 2 | 6 | 0 | 6 | 3 | 0 | 15 | 0 |
| 225 | 250 | 0 | 3 | 0 | 1 | 5 | 0 | 0 | 6 | 3 | 0 | 15 | 0 |
| 250 | 275 | 0 | 3 | 0 | 1 | 7 | 6 | 0 | 7 | 6 | 0 | 15 | 0 |
| 275 | 300 | 0 | 3 | 0 | 1 | 10 | 0 | 0 | 7 | 6 | 0 | 15 | 0 |
| 300 | 350 | 0 | 4 | 0 | 1 | 15 | 0 | 0 | 10 | 0 | 1 | 0 | 0 |
| 350 | 400 | 0 | 4 | 0 | 2 | 0 | 0 | 0 | 10 | 0 | 1 | 0 | 0 |
| 400 | 450 | 0 | 5 | 0 | 2 | 5 | 0 | 0 | 12 | 6 | 1 | 5 | 0 |
| 450 | 500 | 0 | 5 | 0 | 2 | 10 | 0 | 0 | 12 | 6 | 1 | 5 | 0 |
| 500 | 550 | 0 | 6 | 0 | 2 | 15 | 0 | 0 | 15 | 0 | 1 | 10 | 0 |
| 550 | 600 | 0 | 6 | 0 | 3 | 0 | 0 | 0 | 15 | 0 | 1 | 10 | 0 |
| 600 | 650 | 0 | 7 | 0 | 3 | 5 | 0 | 0 | 17 | 6 | 1 | 15 | 0 |
| 650 | 700 | 0 | 7 | 0 | 3 | 10 | 0 | 0 | 17 | 6 | 1 | 15 | 0 |
| 700 | 750 | 0 | 8 | 0 | 3 | 15 | 0 | 1 | 0 | 0 | 2 | 0 | 0 |
| 750 | 800 | 0 | 8 | 0 | 4 | 0 | 0 | 1 | 0 | 0 | 2 | 0 | 0 |
| 800 | 850 | 0 | 9 | 0 | 4 | 5 | 0 | 1 | 2 | 6 | 2 | 5 | 0 |
| 850 | 900 | 0 | 9 | 0 | 4 | 10 | 0 | 1 | 2 | 6 | 2 | 5 | 0 |
| 900 | 950 | 0 | 10 | 0 | 4 | 15 | 0 | 1 | 5 | 0 | 2 | 10 | 0 |
| 950 | 1000 | 0 | 10 | 0 | 5 | 0 | 0 | 1 | 5 | 0 | 2 | 10 | 0 |
| 1000 | 1050 | 0 | 11 | 0 | 5 | 5 | 0 | 1 | 7 | 6 | 2 | 15 | 0 |
| 1050 | 1100 | 0 | 11 | 0 | 5 | 10 | 0 | 1 | 7 | 6 | 2 | 15 | 0 |
| 1100 | 1150 | 0 | 12 | 0 | 5 | 15 | 0 | 1 | 10 | 0 | 3 | 0 | 0 |
| 1150 | 1200 | 0 | 12 | 0 | 6 | 0 | 0 | 1 | 10 | 0 | 3 | 0 | 0 |
| 1200 | 1250 | 0 | 13 | 0 | 6 | 5 | 0 | 1 | 12 | 6 | 3 | 5 | 0 |
| 1250 | 1300 | 0 | 13 | 0 | 6 | 10 | 0 | 1 | 12 | 6 | 3 | 5 | 0 |
| 1300 | 1350 | 0 | 14 | 0 | 6 | 15 | 0 | 1 | 15 | 0 | 3 | 10 | 0 |
| 1350 | 1400 | 0 | 14 | 0 | 7 | 0 | 0 | 1 | 15 | 0 | 3 | 10 | 0 |
| 1400 | 1450 | 0 | 15 | 0 | 7 | 5 | 0 | 1 | 17 | 6 | 3 | 15 | 0 |
| 1450 | 1500 | 0 | 15 | 0 | 7 | 10 | 0 | 1 | 17 | 6 | 3 | 15 | 0 |
| 1500 | 1550 | 0 | 16 | 0 | 7 | 15 | 0 | 2 | 0 | 0 | 4 | 0 | 0 |
| 1550 | 1600 | 0 | 16 | 0 | 8 | 0 | 0 | 2 | 0 | 0 | 4 | 0 | 0 |
| 1600 | 1650 | 0 | 17 | 0 | 8 | 5 | 0 | 2 | 2 | 6 | 4 | 5 | 0 |
| 1650 | 1700 | 0 | 17 | 0 | 8 | 10 | 0 | 2 | 2 | 6 | 4 | 5 | 0 |
| 1700 | 1750 | 0 | 18 | 0 | 8 | 15 | 0 | 2 | 5 | 0 | 4 | 10 | 0 |
| 1750 | 1800 | 0 | 18 | 0 | 9 | 0 | 0 | 2 | 5 | 0 | 4 | 10 | 0 |
| 1800 | 1850 | 0 | 19 | 0 | 9 | 5 | 0 | 2 | 7 | 6 | 4 | 15 | 0 |
| 1850 | 1900 | 0 | 19 | 0 | 9 | 10 | 0 | 2 | 7 | 6 | 4 | 15 | 0 |
| 1900 | 1950 | 1 | 0 | 0 | 9 | 15 | 0 | 2 | 10 | 0 | 5 | 0 | 0 |
| 1950 | 2000 | 1 | 0 | 0 | 10 | 0 | 0 | 2 | 10 | 0 | 5 | 0 | 0 |
| 2000 | 2050 | 1 | 1 | 0 | 10 | 5 | 0 | 2 | 12 | 6 | 5 | 5 | 0 |
| 2050 | 2100 | 1 | 1 | 0 | 10 | 10 | 0 | 2 | 12 | 6 | 5 | 5 | 0 |
| 2100 | 2150 | 1 | 2 | 0 | 10 | 15 | 0 | 2 | 15 | 0 | 5 | 10 | 0 |
| 2150 | 2200 | 1 | 2 | 0 | 11 | 0 | 0 | 2 | 15 | 0 | 5 | 10 | 0 |
| 2200 | 2250 | 1 | 3 | 0 | 11 | 5 | 0 | 2 | 17 | 6 | 5 | 15 | 0 |
| 2250 | 2300 | 1 | 3 | 0 | 11 | 10 | 0 | 2 | 17 | 6 | 5 | 15 | 0 |
| 2300 | 2350 | 1 | 4 | 0 | 11 | 15 | 0 | 3 | 0 | 0 | 6 | 0 | 0 |
| 2350 | 2400 | 1 | 4 | 0 | 12 | 0 | 0 | 3 | 0 | 0 | 6 | 0 | 0 |
| 2400 | 2450 | 1 | 5 | 0 | 12 | 5 | 0 | 3 | 2 | 6 | 6 | 5 | 0 |
| 2450 | 2500 | 1 | 5 | 0 | 12 | 10 | 0 | 3 | 2 | 6 | 6 | 5 | 0 |
| 2500 | 2550 | 1 | 6 | 0 | 12 | 15 | 0 | 3 | 5 | 0 | 6 | 10 | 0 |
| 2550 | 2600 | 1 | 6 | 0 | 13 | 0 | 0 | 3 | 5 | 0 | 6 | 10 | 0 |
| 2600 | 2650 | 1 | 7 | 0 | 13 | 5 | 0 | 3 | 7 | 6 | 6 | 15 | 0 |
| 2650 | 2700 | 1 | 7 | 0 | 13 | 10 | 0 | 3 | 7 | 6 | 6 | 15 | 0 |
| 2700 | 2750 | 1 | 8 | 0 | 13 | 15 | 0 | 3 | 10 | 0 | 7 | 0 | 0 |
| 2750 | 2800 | 1 | 8 | 0 | 14 | 0 | 0 | 3 | 10 | 0 | 7 | 0 | 0 |
| 2800 | 2850 | 1 | 9 | 0 | 14 | 5 | 0 | 3 | 12 | 6 | 7 | 5 | 0 |
| 2850 | 2900 | 1 | 9 | 0 | 14 | 10 | 0 | 3 | 12 | 6 | 7 | 5 | 0 |
| 2900 | 2950 | 1 | 10 | 0 | 14 | 15 | 0 | 3 | 15 | 0 | 7 | 10 | 0 |
| 2950 | 3000 | 1 | 10 | 0 | 15 | 0 | 0 | 3 | 15 | 0 | 7 | 10 | 0 |
| 3000 | 3050 | 1 | 11 | 0 | 15 | 5 | 0 | 3 | 17 | 6 | 7 | 15 | 0 |
| 3050 | 3100 | 1 | 11 | 0 | 15 | 10 | 0 | 3 | 17 | 6 | 7 | 15 | 0 |
| 3100 | 3150 | 1 | 12 | 0 | 15 | 15 | 0 | 4 | 0 | 0 | 8 | 0 | 0 |
| 3150 | 3200 | 1 | 12 | 0 | 16 | 0 | 0 | 4 | 0 | 0 | 8 | 0 | 0 |
| 3200 | 3250 | 1 | 13 | 0 | 16 | 5 | 0 | 4 | 2 | 6 | 8 | 10 | 0 |
| 3250 | 3300 | 1 | 13 | 0 | 16 | 10 | 0 | 4 | 2 | 6 | 8 | 10 | 0 |
| 3300 | 3350 | 1 | 14 | 0 | 16 | 15 | 0 | 4 | 5 | 0 | 8 | 15 | 0 |
| 3350 | 3400 | 1 | 14 | 0 | 17 | 0 | 0 | 4 | 5 | 0 | 8 | 15 | 0 |
| 3400 | 3450 | 1 | 15 | 0 | 17 | 5 | 0 | 4 | 7 | 6 | 9 | 0 | 0 |
| 3450 | 3500 | 1 | 15 | 0 | 17 | 10 | 0 | 4 | 7 | 6 | 9 | 0 | 0 |
| 3500 | 3550 | 1 | 16 | 0 | 17 | 15 | 0 | 4 | 10 | 0 | 9 | 5 | 0 |
| 3550 | 3600 | 1 | 16 | 0 | 18 | 0 | 0 | 4 | 10 | 0 | 9 | 5 | 0 |
| 3600 | 3650 | 1 | 17 | 0 | 18 | 5 | 0 | 4 | 12 | 6 | 9 | 10 | 0 |
| 3650 | 3700 | 1 | 17 | 0 | 18 | 10 | 0 | 4 | 12 | 6 | 9 | 10 | 0 |
| 3700 | 3750 | 1 | 18 | 0 | 18 | 15 | 0 | 4 | 15 | 0 | 9 | 15 | 0 |
| 3750 | 3800 | 1 | 18 | 0 | 19 | 0 | 0 | 4 | 15 | 0 | 9 | 15 | 0 |
| 3800 | 3850 | 1 | 19 | 0 | 19 | 5 | 0 | 4 | 17 | 6 | 10 | 0 | 0 |
| 3850 | 3900 | 1 | 19 | 0 | 19 | 10 | 0 | 4 | 17 | 6 | 10 | 0 | 0 |
| 3900 | 3950 | 2 | 0 | 0 | 19 | 15 | 0 | 5 | 0 | 0 | 10 | 5 | 0 |
| 3950 | 4000 | 2 | 0 | 0 | 20 | 0 | 0 | 5 | 0 | 0 | 10 | 5 | 0 |
| 4000 | 4050 | 2 | 1 | 0 | 20 | 5 | 0 | 5 | 2 | 6 | 10 | 10 | 0 |
| 4050 | 4100 | 2 | 1 | 0 | 20 | 10 | 0 | 5 | 2 | 6 | 10 | 10 | 0 |
| 4100 | 4150 | 2 | 2 | 0 | 20 | 15 | 0 | 5 | 5 | 0 | 10 | 15 | 0 |
| 4150 | 4200 | 2 | 2 | 0 | 21 | 0 | 0 | 5 | 5 | 0 | 10 | 15 | 0 |
| 4200 | 4250 | 2 | 3 | 0 | 21 | 5 | 0 | 5 | 7 | 6 | 11 | 0 | 0 |
| 4250 | 4300 | 2 | 3 | 0 | 21 | 10 | 0 | 5 | 7 | 6 | 11 | 0 | 0 |
| 4300 | 4350 | 2 | 4 | 0 | 21 | 15 | 0 | 5 | 10 | 0 | 11 | 5 | 0 |
| 4350 | 4400 | 2 | 4 | 0 | 22 | 0 | 0 | 5 | 10 | 0 | 11 | 5 | 0 |
| 4400 | 4450 | 2 | 5 | 0 | 22 | 5 | 0 | 5 | 12 | 6 | 11 | 10 | 0 |
| 4450 | 4500 | 2 | 5 | 0 | 22 | 10 | 0 | 5 | 12 | 6 | 11 | 10 | 0 |
| 4500 | 4550 | 2 | 6 | 0 | 22 | 15 | 0 | 5 | 15 | 0 | 11 | 15 | 0 |
| 4550 | 4600 | 2 | 6 | 0 | 23 | 0 | 0 | 5 | 15 | 0 | 11 | 15 | 0 |

TABLE 4—*continued.*

| Exceeding | Not Exceeding | Bills or Notes. | Conveyances. | Mortgages, &c. | Settlement. | Exceeding | Not Exceeding | Bills or Notes. | Conveyances. | Mortgages, &c. | Settlement. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| £ | £ | £ s. d. | £ s. d. | £ s. d. | £ s. d. | £ | £ | £ s. d. | £ s. d. | £ s. d. | £ s. d. |
| 4600 | 4650 | 2 7 0 | 23 5 0 | 5 17 6 | 12 0 0 | 7300 | 7350 | 3 14 0 | 36 15 0 | 9 5 0 | 19 5 0 |
| 4650 | 4700 | 2 7 0 | 23 10 0 | 5 17 6 | 12 5 0 | 7350 | 7400 | 3 15 0 | 37 0 0 | 9 5 0 | 19 5 0 |
| 4700 | 4750 | 2 8 0 | 23 15 0 | 6 0 0 | 12 10 0 | 7400 | 7450 | 3 15 0 | 37 5 0 | 9 7 6 | 19 10 0 |
| 4750 | 4800 | 2 8 0 | 24 0 0 | 6 0 0 | 12 15 0 | 7450 | 7500 | 3 16 0 | 37 10 0 | 9 7 6 | 19 10 0 |
| 4800 | 4850 | 2 9 0 | 24 5 0 | 6 2 6 | 13 0 0 | 7500 | 7550 | 3 16 0 | 37 15 0 | 9 10 0 | 19 15 0 |
| 4850 | 4900 | 2 9 0 | 24 10 0 | 6 2 6 | 13 0 0 | 7550 | 7600 | 3 17 0 | 38 0 0 | 9 10 0 | 19 15 0 |
| 4900 | 4950 | 2 10 0 | 24 15 0 | 6 5 0 | 13 5 0 | 7600 | 7650 | 3 17 0 | 38 5 0 | 9 12 6 | 20 0 0 |
| 4950 | 5000 | 2 10 0 | 25 0 0 | 6 5 0 | 13 5 0 | 7650 | 7700 | 3 18 0 | 38 10 0 | 9 12 6 | 20 0 0 |
| 5000 | 5050 | 2 11 0 | 25 5 0 | 6 7 6 | 13 10 0 | 7700 | 7750 | 3 18 0 | 38 15 0 | 9 15 0 | 20 5 0 |
| 5050 | 5100 | 2 11 0 | 25 10 0 | 6 7 6 | 13 10 0 | 7750 | 7800 | 3 19 0 | 39 0 0 | 9 15 0 | 20 5 0 |
| 5100 | 5150 | 2 12 0 | 25 15 0 | 6 10 0 | 13 15 0 | 7800 | 7850 | 3 19 0 | 39 5 0 | 9 17 6 | 20 10 0 |
| 5150 | 5200 | 2 12 0 | 26 0 0 | 6 10 0 | 13 15 0 | 7850 | 7900 | 4 0 0 | 39 10 0 | 9 17 6 | 20 10 0 |
| 5200 | 5250 | 2 13 0 | 26 5 0 | 6 12 6 | 14 0 0 | 7900 | 7950 | 4 0 0 | 39 15 0 | 10 0 0 | 20 15 0 |
| 5250 | 5300 | 2 13 0 | 26 10 0 | 6 12 6 | 14 0 0 | 7950 | 8000 | 4 1 0 | 40 0 0 | 10 0 0 | 20 15 0 |
| 5300 | 5350 | 2 14 0 | 26 15 0 | 6 15 0 | 14 5 0 | 8000 | 8050 | 4 1 0 | 40 5 0 | 10 2 6 | 21 0 0 |
| 5350 | 5400 | 2 14 0 | 27 0 0 | 6 15 0 | 14 5 0 | 8050 | 8100 | 4 2 0 | 40 10 0 | 10 2 6 | 21 0 0 |
| 5400 | 5450 | 2 15 0 | 27 5 0 | 6 17 6 | 14 10 0 | 8100 | 8150 | 4 2 0 | 40 15 0 | 10 5 0 | 21 5 0 |
| 5450 | 5500 | 2 15 0 | 27 10 0 | 6 17 6 | 14 10 0 | 8150 | 8200 | 4 3 0 | 41 0 0 | 10 5 0 | 21 5 0 |
| 5500 | 5550 | 2 16 0 | 27 15 0 | 7 0 0 | 14 15 0 | 8200 | 8250 | 4 3 0 | 41 5 0 | 10 10 0 | 21 10 0 |
| 5550 | 5600 | 2 16 0 | 28 0 0 | 7 0 0 | 14 15 0 | 8250 | 8300 | 4 4 0 | 41 10 0 | 10 10 0 | 21 10 0 |
| 5600 | 5650 | 2 17 0 | 28 5 0 | 7 2 6 | 15 0 0 | 8300 | 8350 | 4 4 0 | 41 15 0 | 10 12 6 | 21 15 0 |
| 5650 | 5700 | 2 18 0 | 28 10 0 | 7 2 6 | 15 0 0 | 8350 | 8400 | 4 5 0 | 42 0 0 | 10 12 6 | 21 15 0 |
| 5700 | 5750 | 2 18 0 | 28 15 0 | 7 5 0 | 15 5 0 | 8400 | 8450 | 4 5 0 | 42 5 0 | 10 15 0 | 22 0 0 |
| 5750 | 5800 | 2 19 0 | 29 0 0 | 7 5 0 | 15 5 0 | 8450 | 8500 | 4 6 0 | 42 10 0 | 10 15 0 | 22 0 0 |
| 5800 | 5850 | 2 19 0 | 29 5 0 | 7 7 6 | 15 10 0 | 8500 | 8550 | 4 6 0 | 42 15 0 | 10 17 6 | 22 5 0 |
| 5850 | 5900 | 3 0 0 | 29 10 0 | 7 7 6 | 15 10 0 | 8550 | 8600 | 4 7 0 | 43 0 0 | 10 17 6 | 22 5 0 |
| 5900 | 5950 | 3 0 0 | 29 15 0 | 7 10 0 | 15 15 0 | 8600 | 8650 | 4 7 0 | 43 5 0 | 11 0 0 | 22 10 0 |
| 5950 | 6000 | 3 1 0 | 30 0 0 | 7 10 0 | 15 15 0 | 8650 | 8700 | 4 8 0 | 43 10 0 | 11 0 0 | 22 10 0 |
| 6000 | 6050 | 3 1 0 | 30 5 0 | 7 12 6 | 16 0 0 | 8700 | 8750 | 4 8 0 | 43 15 0 | 11 2 6 | 22 15 0 |
| 6050 | 6100 | 3 2 0 | 30 10 0 | 7 12 6 | 16 0 0 | 8750 | 8800 | 4 9 0 | 44 0 0 | 11 2 6 | 22 15 0 |
| 6100 | 6150 | 3 2 0 | 30 15 0 | 7 15 0 | 16 5 0 | 8800 | 8850 | 4 9 0 | 44 5 0 | 11 5 0 | 23 0 0 |
| 6150 | 6200 | 3 3 0 | 31 0 0 | 7 15 0 | 16 5 0 | 8850 | 8900 | 4 10 0 | 44 10 0 | 11 5 0 | 23 0 0 |
| 6200 | 6250 | 3 3 0 | 31 5 0 | 7 17 6 | 16 10 0 | 8900 | 8950 | 4 10 0 | 44 15 0 | 11 7 6 | 23 5 0 |
| 6250 | 6300 | 3 4 0 | 31 10 0 | 7 17 6 | 16 10 0 | 8950 | 9000 | 4 11 0 | 45 0 0 | 11 7 6 | 23 5 0 |
| 6300 | 6350 | 3 4 0 | 31 15 0 | 8 0 0 | 16 15 0 | 9000 | 9050 | 4 11 0 | 45 5 0 | 11 10 0 | 23 10 0 |
| 6350 | 6400 | 3 5 0 | 32 0 0 | 8 0 0 | 16 15 0 | 9050 | 9100 | 4 12 0 | 45 10 0 | 11 10 0 | 23 10 0 |
| 6400 | 6450 | 3 5 0 | 32 5 0 | 8 2 6 | 17 0 0 | 9100 | 9150 | 4 12 0 | 45 15 0 | 11 12 6 | 23 15 0 |
| 6450 | 6500 | 3 6 0 | 32 10 0 | 8 2 6 | 17 0 0 | 9150 | 9200 | 4 13 0 | 46 0 0 | 11 12 6 | 23 15 0 |
| 6500 | 6550 | 3 6 0 | 32 15 0 | 8 5 0 | 17 5 0 | 9200 | 9250 | 4 13 0 | 46 5 0 | 11 15 0 | 24 0 0 |
| 6550 | 6600 | 3 7 0 | 33 0 0 | 8 5 0 | 17 5 0 | 9250 | 9300 | 4 14 0 | 46 10 0 | 11 15 0 | 24 0 0 |
| 6600 | 6650 | 3 7 0 | 33 5 0 | 8 7 6 | 17 10 0 | 9300 | 9350 | 4 14 0 | 46 15 0 | 11 17 6 | 24 5 0 |
| 6650 | 6700 | 3 8 0 | 33 10 0 | 8 7 6 | 17 10 0 | 9350 | 9400 | 4 15 0 | 47 0 0 | 11 17 6 | 24 5 0 |
| 6700 | 6750 | 3 8 0 | 33 15 0 | 8 10 0 | 17 15 0 | 9400 | 9450 | 4 15 0 | 47 5 0 | 12 0 0 | 24 10 0 |
| 6750 | 6800 | 3 9 0 | 34 0 0 | 8 10 0 | 17 15 0 | 9450 | 9500 | 4 16 0 | 47 10 0 | 12 0 0 | 24 10 0 |
| 6800 | 6850 | 3 9 0 | 34 5 0 | 8 12 6 | 18 0 0 | 9500 | 9550 | 4 16 0 | 47 15 0 | 12 2 6 | 24 15 0 |
| 6850 | 6900 | 3 10 0 | 34 10 0 | 8 12 6 | 18 0 0 | 9550 | 9600 | 4 17 0 | 48 0 0 | 12 2 6 | 24 15 0 |
| 6900 | 6950 | 3 10 0 | 34 15 0 | 8 15 0 | 18 5 0 | 9600 | 9650 | 4 17 0 | 48 5 0 | 12 5 0 | 25 0 0 |
| 6950 | 7000 | 3 11 0 | 35 0 0 | 8 15 0 | 18 5 0 | 9650 | 9700 | 4 18 0 | 48 10 0 | 12 5 0 | 25 0 0 |
| 7000 | 7050 | 3 11 0 | 35 5 0 | 8 17 6 | 18 10 0 | 9700 | 9750 | 4 18 0 | 48 15 0 | 12 7 6 | 25 5 0 |
| 7050 | 7100 | 3 12 0 | 35 10 0 | 8 17 6 | 18 10 0 | 9750 | 9800 | 4 19 0 | 49 0 0 | 12 7 6 | 25 5 0 |
| 7100 | 7150 | 3 12 0 | 35 15 0 | 9 0 0 | 18 15 0 | 9800 | 9850 | 4 19 0 | 49 5 0 | 12 10 0 | 25 10 0 |
| 7150 | 7200 | 3 13 0 | 36 0 0 | 9 0 0 | 18 15 0 | 9850 | 9900 | 5 0 0 | 49 10 0 | 12 10 0 | 25 10 0 |
| 7200 | 7250 | 3 13 0 | 36 5 0 | 9 2 6 | 19 0 0 | 9900 | 9950 | 5 0 0 | 49 15 0 | 12 12 6 | 25 15 0 |
| 7250 | 7300 | 3 14 0 | 36 10 0 | 9 2 6 | 19 0 0 | 9950 | 10000 | 5 1 0 | 50 0 0 | 12 12 6 | 25 15 0 |

# TABLE OF AD VALOREM DUTIES IN RESPECT OF RENTS RESERVED ON LEASES,

PAYABLE FROM 11TH OCTOBER, 1854, TO THE PRESENT TIME, UNDER THE STATUTES 17 & 18 VICT. C. 83 AND 33 & 34 VICT. C. 97.

| Rent exceeding | Rent not exceeding | Term not exceeding 35 years, or indefinite. | | | Term exceeding 35 years, but not 100 years. | | | Term exceeding 100 years. | | | Rent exceeding | Rent not exceeding | Term not exceeding 35 years, or indefinite. | | | Term exceeding 35 years, but not 100 years. | | | Term exceeding 100 years. | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| £ | £ | £ | s. | d. | £ | s. | d. | £ | s. | d. | £ | £ | £ | s. | d. | £ | s. | d. | £ | s. | d. |
| ... | 5 | 0 | 0 | 6 | 0 | 3 | 0 | 0 | 6 | 0 | 1,100 | 1,150 | 5 | 15 | 0 | 34 | 10 | 0 | 69 | 0 | 0 |
| 5 | 10 | 0 | 1 | 0 | 0 | 6 | 0 | 0 | 12 | 0 | 1,150 | 1,200 | 6 | 0 | 0 | 36 | 0 | 0 | 72 | 0 | 0 |
| 10 | 15 | 0 | 1 | 6 | 0 | 9 | 0 | 0 | 18 | 0 | 1,200 | 1,250 | 6 | 5 | 0 | 37 | 10 | 0 | 75 | 0 | 0 |
| 15 | 20 | 0 | 2 | 0 | 0 | 12 | 0 | 1 | 4 | 0 | 1,250 | 1,300 | 6 | 10 | 0 | 39 | 0 | 0 | 78 | 0 | 0 |
| 20 | 25 | 0 | 2 | 6 | 0 | 15 | 0 | 1 | 10 | 0 | 1,300 | 1,350 | 6 | 15 | 0 | 40 | 10 | 0 | 81 | 0 | 0 |
| 25 | 50 | 0 | 5 | 0 | 1 | 10 | 0 | 3 | 0 | 0 | 1,350 | 1,400 | 7 | 0 | 0 | 42 | 0 | 0 | 84 | 0 | 0 |
| 50 | 75 | 0 | 7 | 6 | 2 | 5 | 0 | 4 | 10 | 0 | 1,400 | 1,450 | 7 | 5 | 0 | 43 | 10 | 0 | 87 | 0 | 0 |
| 75 | 100 | 0 | 10 | 0 | 3 | 0 | 0 | 6 | 0 | 0 | 1,450 | 1,500 | 7 | 10 | 0 | 45 | 0 | 0 | 90 | 0 | 0 |
| 100 | 150 | 0 | 15 | 0 | 4 | 10 | 0 | 9 | 0 | 0 | 1,500 | 1,550 | 7 | 15 | 0 | 46 | 10 | 0 | 93 | 0 | 0 |
| 150 | 200 | 1 | 0 | 0 | 6 | 0 | 0 | 12 | 0 | 0 | 1,550 | 1,600 | 8 | 0 | 0 | 48 | 0 | 0 | 96 | 0 | 0 |
| 200 | 250 | 1 | 5 | 0 | 7 | 10 | 0 | 15 | 0 | 0 | 1,600 | 1,650 | 8 | 5 | 0 | 49 | 10 | 0 | 99 | 0 | 0 |
| 250 | 300 | 1 | 10 | 0 | 9 | 0 | 0 | 18 | 0 | 0 | 1,650 | 1,700 | 8 | 10 | 0 | 51 | 0 | 0 | 102 | 0 | 0 |
| 300 | 350 | 1 | 15 | 0 | 10 | 10 | 0 | 21 | 0 | 0 | 1,700 | 1,750 | 8 | 15 | 0 | 52 | 10 | 0 | 105 | 0 | 0 |
| 350 | 400 | 2 | 0 | 0 | 12 | 0 | 0 | 24 | 0 | 0 | 1,750 | 1,800 | 9 | 0 | 0 | 54 | 0 | 0 | 108 | 0 | 0 |
| 400 | 450 | 2 | 5 | 0 | 13 | 10 | 0 | 27 | 0 | 0 | 1,800 | 1,850 | 9 | 5 | 0 | 55 | 10 | 0 | 111 | 0 | 0 |
| 450 | 500 | 2 | 10 | 0 | 15 | 0 | 0 | 30 | 0 | 0 | 1,850 | 1,900 | 9 | 10 | 0 | 57 | 0 | 0 | 114 | 0 | 0 |
| 500 | 550 | 2 | 15 | 0 | 16 | 10 | 0 | 33 | 0 | 0 | 1,900 | 1,950 | 9 | 15 | 0 | 58 | 10 | 0 | 117 | 0 | 0 |
| 550 | 600 | 3 | 0 | 0 | 18 | 0 | 0 | 36 | 0 | 0 | 1,950 | 2,000 | 10 | 0 | 0 | 60 | 0 | 0 | 120 | 0 | 0 |
| 600 | 650 | 3 | 5 | 0 | 19 | 10 | 0 | 39 | 0 | 0 | 2,000 | 2,050 | 10 | 5 | 0 | 61 | 10 | 0 | 123 | 0 | 0 |
| 650 | 700 | 3 | 10 | 0 | 21 | 0 | 0 | 42 | 0 | 0 | 2,050 | 2,100 | 10 | 10 | 0 | 63 | 0 | 0 | 126 | 0 | 0 |
| 700 | 750 | 3 | 15 | 0 | 22 | 10 | 0 | 45 | 0 | 0 | 2,100 | 2,150 | 10 | 15 | 0 | 64 | 10 | 0 | 129 | 0 | 0 |
| 750 | 800 | 4 | 0 | 0 | 24 | 0 | 0 | 48 | 0 | 0 | 2,150 | 2,200 | 11 | 0 | 0 | 66 | 0 | 0 | 132 | 0 | 0 |
| 800 | 850 | 4 | 5 | 0 | 25 | 10 | 0 | 51 | 0 | 0 | 2,200 | 2,250 | 11 | 5 | 0 | 67 | 10 | 0 | 135 | 0 | 0 |
| 850 | 900 | 4 | 10 | 0 | 27 | 0 | 0 | 54 | 0 | 0 | 2,250 | 2,300 | 11 | 10 | 0 | 69 | 0 | 0 | 138 | 0 | 0 |
| 900 | 950 | 4 | 15 | 0 | 28 | 10 | 0 | 57 | 0 | 0 | 2,300 | 2,350 | 11 | 15 | 0 | 70 | 10 | 0 | 141 | 0 | 0 |
| 950 | 1,000 | 5 | 0 | 0 | 30 | 0 | 0 | 60 | 0 | 0 | 2,350 | 2,400 | 12 | 0 | 0 | 72 | 0 | 0 | 144 | 0 | 0 |
| 1,000 | 1,050 | 5 | 5 | 0 | 31 | 10 | 0 | 63 | 0 | 0 | 2,400 | 2,450 | 12 | 5 | 0 | 73 | 10 | 0 | 147 | 0 | 0 |
| 1,050 | 1,100 | 5 | 10 | 0 | 33 | 0 | 0 | 66 | 0 | 0 | 2,450 | 2,500 | 12 | 10 | 0 | 75 | 0 | 0 | 150 | 0 | 0 |

# CHAPTER II.

## PROBATE DUTY.


| | PAGE |
|---|---|
| *Statutory Enactments as to Rates of Duties* | 164 |
| *Stat.* 55 *Geo.* 3, *c.* 184 | 164 |
| *Stat.* 22 & 23 *Vict. c.* 36 | 169 |
| *Stat.* 43 *Vict. c.* 14 | 169 |
| *Stat.* 44 *Vict. c.* 12 | 171 |
| *On what Property the Probate Duty is Payable* | 174 |
| *Deductions of Debts and Funeral Expenses* | 185 |
| *The Affidavit of Value* | 190 |
| *Rectification of Errors* | 192 |
| *Exemptions from Probate Duty* | 193 |
| *Estates not Exceeding* 300*l. in Value* | 195 |
| *Stamp Duty on Accounts* | 197 |
| *Penalties* | 201 |


**Probate Duty.**

*Rates of Duties.*

*Statutory Enactments as to Rates of Duties.*]—The 55 Geo. 3, c. 184, sect. 37, imposed a penalty on persons administering the effects of any deceased person without obtaining probate or letters of administration within six months after the death, or two months after the termination of any suit or dispute respecting the will or the right to letters of administration.

Penalty for administering and not taking out probate.

Affidavit of values. No deduction for debts.

Sects. 38, 39. Affidavit of the value of the property to be delivered to the Court granting the probate or letters of administration, and to be transmitted to the Stamp Office. No deduction was to be made for debts owing by deceased. The value of the property is to be exclusive of property held by the deceased as trustee and not beneficially, but is to include leases for years, whether absolute or determinable on lives.

Return of excess of duty (*a*).

Sect. 40. If too much duty had been paid, the excess was to be returned and the stamp altered within six months after the true value had been

(*a*) Power is now given to deduct debts, &c., from the value of the estate as specified in the affidavit, and the provisions of sects. 40 and 41 are accordingly superseded: see *post*, p. 173, and pp. 185, *et seq.*

Probate Duty.

*Rates of Duties.*

ascertained, on producing the probate or letters, and a particular inventory, account, and valuation of the estate verified by declaration.

Rectifying deficient stamp. Penalty.

Sect. 41. If too little had been paid, the stamp might be rectified on affidavit of the value, and payment of the full duty and the penalty payable by law for stamping deeds, without allowing for what had been previously paid. Provided, that if application was made within six months after discovery of the true value of the estate, and the commissioners were satisfied by affidavit that the value was under-estimated in mistake or ignorance, and without fraudulent intention, the penalty might be remitted, and the stamp corrected, on payment of the deficiency only.

Administrator paying further duty to give security.

Sect. 42. Before stamping letters of administration for increased duty, the administrator is to give sufficient security for the amount of the valuation.

Penalty for not paying additional duty.

Sect. 43. Penalty for not paying further duty within six months after discovery of value.

Probate, &c., not to be revoked on account of wrong stamp.

Sect. 44. Court not to call in or revoke or accept surrender of probate, &c., on the ground of the wrong duty having been paid, and if done, no allowance of duty to be made thereon.

Credit for duty where assets not available.

Sects. 45, 46, 47, 48. Credit may be given on security for duty and interest at 10 per cent., where there are not available funds for payment of duty, the probate being deposited.

Sect. 49. Letters of administration *de bonis non* may be stamped with denoting stamp before payment of duty so left on credit, the letters being also deposited. (This authority extends to cases where the original letters of administration have been *insufficiently* stamped: *Doe* v. *Wood*, 2 B. & Al. 724).

Sect. 50. Affidavits as to trust property by persons out of England.

Stat. 5 & 6 Vict. c. 79.

By the 5 & 6 Vict. c. 79, s. 23, on proof of payment of debts so as to reduce the value of the estate to the amount on which a less duty than has been paid would have been payable, the commissioners are to return the excess, if claimed within three years, with power to allow further time in case of delay by reason of suit.

**Probate Duty.**

*Rates of Duties.*

Duties under 55 Geo. 3, c. 184.

Under the stat. 55 Geo. 3, c. 184, different duties were imposed on probates and letters of administration, but both duties were subject to the same rules, and are usually referred to under the denomination of probate duty.

The following statement shows the duties on probates of wills and letters of administration payable in England prior to the 1st April, 1880 (*b*); see 55 Geo. 3, c. 184, Sched., part iii. :—

Probate and letters of administration with will annexed.

PROBATE of a will, and letters of administration with a will annexed.

Exemption of trust property.

Where the estate and effects for or in respect of which such probate or letters of administration respectively shall be granted or expeded, exclusive of what the deceased shall have been possessed of, or entitled to, as a trustee for any other person or persons, and not beneficially, shall be

| £ | | £ | £ | s. | d. |
|---|---|---|---|---|---|
| Above the value of 20 | and under the value of | 100 | 0 | 10 | 0 |
| Of the value of 100 | „ | 200 | 2 | 0 | 0 |
| „ 200 | „ | 300 | 5 | 0 | 0 |
| „ 300 | „ | 450 | 8 | 0 | 0 |
| „ 450 | „ | 600 | 11 | 0 | 0 |
| „ 600 | „ | 800 | 15 | 0 | 0 |
| „ 800 | „ | 1,000 | 22 | 0 | 0 |
| „ 1,000 | „ | 1,500 | 30 | 0 | 0 |
| „ 1,500 | „ | 2,000 | 40 | 0 | 0 |
| „ 2,000 | „ | 3,000 | 50 | 0 | 0 |
| „ 3,000 | „ | 4,000 | 60 | 0 | 0 |
| „ 4,000 | „ | 5,000 | 80 | 0 | 0 |
| „ 5,000 | „ | 6,000 | 100 | 0 | 0 |
| „ 6,000 | „ | 7,000 | 120 | 0 | 0 |
| „ 7,000 | „ | 8,000 | 140 | 0 | 0 |
| „ 8,000 | „ | 9,000 | 160 | 0 | 0 |
| „ 9,000 | „ | 10,000 | 180 | 0 | 0 |
| „ 10,000 | „ | 12,000 | 200 | 0 | 0 |
| „ 12,000 | „ | 14,000 | 220 | 0 | 0 |
| „ 14,000 | „ | 16,000 | 250 | 0 | 0 |
| „ 16,000 | „ | 18,000 | 280 | 0 | 0 |
| „ 18,000 | „ | 20,000 | 310 | 0 | 0 |

(*b*) Although these duties are superseded, they are not repealed by the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), *infra*; reference must therefore be made to these duties in rectifying any grant of probate or administration made before the 1st April, 1880.

Probate Duty.

*Rates of Duties.*

| £ | | £ | £ | s. | d. |
|---|---|---|---|---|---|
| Of the value of 20,000 | and under the value of | 25,000 | 350 | 0 | 0 |
| „ 25,000 | „ | 30,000 | 400 | 0 | 0 |
| „ 30,000 | „ | 35,000 | 450 | 0 | 0 |
| „ 35,000 | „ | 40,000 | 525 | 0 | 0 |
| „ 40,000 | „ | 45,000 | 600 | 0 | 0 |
| „ 45,000 | „ | 50,000 | 675 | 0 | 0 |
| „ 50,000 | „ | 60,000 | 750 | 0 | 0 |
| „ 60,000 | „ | 70,000 | 900 | 0 | 0 |
| „ 70,000 | „ | 80,000 | 1,050 | 0 | 0 |
| „ 80,000 | „ | 90,000 | 1,200 | 0 | 0 |
| „ 90,000 | „ | 100,000 | 1,350 | 0 | 0 |
| „ 100,000 | „ | 120,000 | 1,500 | 0 | 0 |
| „ 120,000 | „ | 140,000 | 1,800 | 0 | 0 |
| „ 140,000 | „ | 160,000 | 2,100 | 0 | 0 |
| „ 160,000 | „ | 180,000 | 2,400 | 0 | 0 |
| „ 180,000 | „ | 200,000 | 2,700 | 0 | 0 |
| „ 200,000 | „ | 250,000 | 3,000 | 0 | 0 |
| „ 250,000 | „ | 300,000 | 3,750 | 0 | 0 |
| „ 300,000 | „ | 350,000 | 4,500 | 0 | 0 |
| „ 350,000 | „ | 400,000 | 5,250 | 0 | 0 |
| „ 400,000 | „ | 500,000 | 6,000 | 0 | 0 |
| „ 500,000 | „ | 600,000 | 7,500 | 0 | 0 |
| „ 600,000 | „ | 700,000 | 9,000 | 0 | 0 |
| „ 700,000 | „ | 800,000 | 10,500 | 0 | 0 |
| „ 800,000 | „ | 900,000 | 12,000 | 0 | 0 |
| „ 900,000 | „ | 1,000,000 | 13,500 | 0 | 0 |
| „ 1,000,000 | and upwards (*c*) . . . | | 15,000 | 0 | 0 |

LETTERS of ADMINISTRATION without a will annexed.

Letters of Administration without will.

Where the estate and effects for or in respect of which such letters of administration or confirmation respectively shall be granted or expeded or whereof such inventory shall be exhibited and recorded, exclusive of what the deceased shall have been possessed of, or entitled to, as a trustee for any other person or persons, and not beneficially, shall be

Exemption of trust property.

| £ | | £ | £ | s. | d. |
|---|---|---|---|---|---|
| Above the value of 20 | and under the value of | 50 | 0 | 10 | 0 |
| Of the value of 50 | „ | 100 | 1 | 0 | 0 |
| „ 100 | „ | 200 | 3 | 0 | 0 |
| „ 200 | „ | 300 | 8 | 0 | 0 |
| „ 300 | „ | 450 | 11 | 0 | 0 |
| „ 450 | „ | 600 | 15 | 0 | 0 |
| „ 600 | „ | 800 | 22 | 0 | 0 |

(*c*) But as to the duty where the value of the estate amounts to 1,000,000*l.* or upwards, see *post*, p. 169.

**Probate Duty.**

| *Rates of Duties.* | £ | | £ | Duty. £ | *s.* | *d.* |
|---|---|---|---|---|---|---|
| Of the value of | 800 | and under the value of | 1,000 | 30 | 0 | 0 |
| „ | 1,000 | „ | 1,500 | 45 | 0 | 0 |
| „ | 1,500 | „ | 2,000 | 60 | 0 | 0 |
| „ | 2,000 | „ | 3,000 | 75 | 0 | 0 |
| „ | 3,000 | „ | 4,000 | 90 | 0 | 0 |
| „ | 4,000 | „ | 5,000 | 120 | 0 | 0 |
| „ | 5,000 | „ | 6,000 | 150 | 0 | 0 |
| „ | 6,000 | „ | 7,000 | 180 | 0 | 0 |
| „ | 7,000 | „ | 8,000 | 210 | 0 | 0 |
| „ | 8,000 | „ | 9,000 | 240 | 0 | 0 |
| „ | 9,000 | „ | 10,000 | 270 | 0 | 0 |
| „ | 10,000 | „ | 12,000 | 300 | 0 | 0 |
| „ | 12,000 | „ | 14,000 | 330 | 0 | 0 |
| „ | 14,000 | „ | 16,000 | 375 | 0 | 0 |
| „ | 16,000 | „ | 18,000 | 420 | 0 | 0 |
| „ | 18,000 | „ | 20,000 | 465 | 0 | 0 |
| „ | 20,000 | „ | 25,000 | 525 | 0 | 0 |
| „ | 25,000 | „ | 30,000 | 600 | 0 | 0 |
| „ | 30,000 | „ | 35,000 | 675 | 0 | 0 |
| „ | 35,000 | „ | 40,000 | 785 | 0 | 0 |
| „ | 40,000 | „ | 45,000 | 900 | 0 | 0 |
| „ | 45,000 | „ | 50,000 | 1,010 | 0 | 0 |
| „ | 50,000 | „ | 60,000 | 1,125 | 0 | 0 |
| „ | 60,000 | „ | 70,000 | 1,350 | 0 | 0 |
| „ | 70,000 | „ | 80,000 | 1,575 | 0 | 0 |
| „ | 80,000 | „ | 90,000 | 1,800 | 0 | 0 |
| „ | 90,000 | „ | 100,000 | 2,025 | 0 | 0 |
| „ | 100,000 | „ | 120,000 | 2,250 | 0 | 0 |
| „ | 120,000 | „ | 140,000 | 2,700 | 0 | 0 |
| „ | 140,000 | „ | 160,000 | 3,150 | 0 | 0 |
| „ | 160,000 | „ | 180,000 | 3,600 | 0 | 0 |
| „ | 180,000 | „ | 200,000 | 4,050 | 0 | 0 |
| „ | 200,000 | „ | 250,000 | 4,500 | 0 | 0 |
| „ | 250,000 | „ | 300,000 | 5,625 | 0 | 0 |
| „ | 300,000 | „ | 350,000 | 6,750 | 0 | 0 |
| „ | 350,000 | „ | 400,000 | 7,875 | 0 | 0 |
| „ | 400,000 | „ | 500,000 | 9,000 | 0 | 0 |
| „ | 500,000 | „ | 600,000 | 11,250 | 0 | 0 |
| „ | 600,000 | „ | 700,000 | 13,500 | 0 | 0 |
| „ | 700,000 | „ | 800,000 | 15,750 | 0 | 0 |
| „ | 800,000 | „ | 900,000 | 18,000 | 0 | 0 |
| „ | 900,000 | „ | 1,000,000 | 20,250 | 0 | 0 |
| „ | 1,000,000 and upwards | | . . . | 22,500 | 0 | 0 |

*Exemptions from all Stamp Duties (d).*

Probate of will or letters of administration, of the effects of any common seaman, marine, or soldier who shall be slain or die in the service of his Majesty, his heirs or successors.

**Probate Duty.**

*Rates of Duties.*

22 & 23 Vict. c. 36.

Duties on probates, &c., where value of property is above 1,000,000*l.*

By the stat. 22 & 23 Vict. c. 36, which came into operation on the 13th August, 1859, the following duties were charged in lieu of the stamp duties contained in the schedule to the stat. 55 Geo. 3, c. 184, upon probates and letters of administration respectively where the value of the estate and effects of a deceased person amounted to 1,000,000*l.* or upwards, that is to say :—

For every 100,000*l.* of the whole value of such estate and effects, and any fractional part of 100,000*l.* :

Where the deceased left any will or testament or testamentary disposition of his personal or moveable estate and effects the stamp duty of 1,500*l.*

And where the deceased did not leave any will or testament or testamentary disposition, the stamp duty of 2,250*l.*

Stat. 43 Vict. c. 14.

The difference of duties on probates of wills and letters of administration in cases of intestacy was abolished by the Customs and Inland Revenue Act, 1880, sect. 9, which provided that in lieu of the duties payable on probates and letters of administration respectively under the Act of Geo. 3, there should from and after the 1st of April, 1880, be payable the duties specified in the Schedule to the Act, which is as follows (*e*) :—

Stamp Duties on Probates and Letters of Administration,

Where the estate and effects for or in respect of which a Probate or Letters of Administration shall be granted exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person and not beneficially, shall be—

| | £ | | £ | Duty. £ |
|---|---|---|---|---|
| Above the value of | 100 | and under | 200 | 2 |
| Of the value of | 200 | „ | 300 | 4 |
| „ | 300 | „ | 400 | 6 |
| „ | 400 | „ | 500 | 9 |

(*d*) For further exemptions from probate duty, see *post*, p. 193.

(*e*) These duties though superseded are not repealed, and reference must be made to them in rectifying grants of probate or administration made before the 1st June, 1881.

**Probate Duty.**

| *Rates of Duties.* | | £ | | £ | Duty. £ |
|---|---|---|---|---|---|
| | Of the value of | 500 | and under | 600 | 11 |
| | „ | 600 | „ | 800 | 15 |
| | „ | 800 | „ | 1,000 | 22 |
| | „ | 1,000 | „ | 1,500 | 30 |
| | „ | 1,500 | „ | 2,000 | 40 |
| | „ | 2,000 | „ | 3,000 | 62 |
| | „ | 3,000 | „ | 4,000 | 88 |
| | „ | 4,000 | „ | 5,000 | 113 |
| | „ | 5,000 | „ | 6,000 | 140 |
| | „ | 6,000 | „ | 7,000 | 165 |
| | „ | 7,000 | „ | 8,000 | 190 |
| | „ | 8,000 | „ | 9,000 | 215 |
| | „ | 9,000 | „ | 10,000 | 240 |
| | „ | 10,000 | „ | 12,000 | 275 |
| | „ | 12,000 | „ | 14,000 | 325 |
| | „ | 14,000 | „ | 16,000 | 375 |
| | „ | 16,000 | „ | 18,000 | 425 |
| | „ | 18,000 | „ | 20,000 | 475 |
| | „ | 20,000 | „ | 25,000 | 565 |
| | „ | 25,000 | „ | 30,000 | 690 |
| | „ | 30,000 | „ | 35,000 | 815 |
| | „ | 35,000 | „ | 40,000 | 940 |
| | „ | 40,000 | „ | 45,000 | 1,065 |
| | „ | 45,000 | „ | 50,000 | 1,190 |
| | „ | 50,000 | „ | 60,000 | 1,375 |
| | „ | 60,000 | „ | 70,000 | 1,625 |
| | „ | 70,000 | „ | 80,000 | 1,875 |
| | „ | 80,000 | „ | 90,000 | 2,125 |
| | „ | 90,000 | „ | 100,000 | 2,375 |
| | „ | 100,000 | „ | 120,000 | 2,750 |
| | „ | 120,000 | „ | 140,000 | 3,250 |
| | „ | 140,000 | „ | 160,000 | 3,750 |
| | „ | 160,000 | „ | 180,000 | 4,250 |
| | „ | 180,000 | „ | 200,000 | 4,750 |
| | „ | 200,000 | „ | 250,000 | 5,625 |
| | „ | 250,000 | „ | 300,000 | 6,875 |
| | „ | 300,000 | „ | 350,000 | 8,125 |
| | „ | 350,000 | „ | 400,000 | 9,375 |
| | „ | 400,000 | „ | 500,000 | 11,250 |
| | „ | 500,000 and upwards. | | | |
| | Then in addition to the said duty of 11,250*l.* for every full sum of 100,000*l.* in excess of 500,000*l.*, and also for any fractional part of 100,000*l.* so in excess | | | | 2,500 |

**Probate Duty.**

*Rates of Duties.*

By Part III. of the Customs and Inland Revenue Act, 1881, which deals with Probate and Legacy Duties and duties on accounts, several further changes are introduced in the mode of charging probate duty. A graduated percentage duty is substituted for the former system of levying different rates of duty on different groups of estates, according as such estates exceeded or fell below certain limits of value; small estates are subjected to lower rates of duty; and the stamp is no longer payable on the grant of probate or letters of administration, but is charged and made payable upon the affidavit as to the value of the property, which is required from every person applying for such grant; and a deduction is allowed to be made from the value of the estate as specified in the affidavit in respect of the debts of the deceased, and funeral expenses.

Stat. 44 Vict. c. 12.

By sects. 26, 27 and 28 of this Act it is enacted as follows:—

Stamp duties to be under the care and management of the Commissioners of Inland Revenue.

Sect. 26. "(1.) The stamp duties hereinafter imposed shall be under the care and management of the Commissioners of Inland Revenue, who by themselves and their officers shall have the same powers and authorities for the collection, recovery, and management thereof, as are by law vested in them for the collection, recovery, and management of any stamp duties, and shall have all other powers and authorities requisite for carrying into effect the provisions of this Act in relation to such stamp duties.

"(2.) Such stamp duties may be denoted by impressed or adhesive stamps, or partly by impressed stamps and partly by adhesive stamps, as the said Commissioners may think proper (*f*).

"(3.) As respects the duties imposed on affidavits in substitution for the duties on probates or letters of administration, the

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(*f*) Adhesive stamps may be used in the following cases—

(1.) For the stamp of 15*s.* for fees of Court and expenses required by sect. 33 in all cases where the gross value of the estate does not exceed 300*l.*

(2.) For the probate duty of 30*s.* payable under sect. 33 where such gross value exceeds 100*l.*, but does not exceed 300*l.*

(3.) To denote the *ad valorem* duties in all cases where the value of the estate does not exceed 1,000*l.*

(4.) To denote the *ad valorem* duties, where the value of the estate exceeds 1,000*l.*, payable in respect of every 100*l.*, or part of 100*l.*, in addition to the impressed stamps denoting the duty in respect of every complete 1,000*l.*

**Probate Duty.**

*Rates of Duties.*

several provisions now in force in relation to the last-mentioned duties shall, so far as the same are consistent with the provisions of this Act, be deemed to be applicable to the said duties hereby imposed, and in the application thereof a probate or letters of administration having thereon such a certificate as is hereinafter mentioned shall for all purposes be deemed to have been duly stamped in respect of the value stated in the certificate."

Grant of duties in respect of probate and letters of administration, and on inventories.

Sect. 27. "The duties imposed by the Customs and Inland Revenue Act, 1880, upon probates of wills and letters of administration in England and Ireland shall not be payable upon probates or letters of administration granted on and after the first day of June, 1881; and on and after that day in substitution for such duties, and in lieu of the duties imposed by the said Act upon inventories in Scotland, there shall, save as is hereinafter expressly provided, be charged and paid on the affidavit to be required and received from the person applying for the probate or letters of administration in England or Ireland, or on the inventory to be exhibited and recorded in Scotland, the stamp duties hereinafter specified; (that is to say):—

| | Duty. |
|---|---|
| "Where the estate and effects for or in respect of which the probate or letters of administration is or are to be granted, or whereof the inventory is to be exhibited and recorded, exclusive of what the deceased shall have been possessed of or entitled to as trustee, and not beneficially, shall be above the value of 100*l.* and not above the value of 500*l.* . . . . . | At the rate of one pound for every full sum of 50*l.*, and for any fractional part of 50*l.* over any multiple of 50*l.* |
| "Where such estate and effects shall be above the value of 500*l.* and not above the value of 1,000*l.* | At the rate of one pound five shillings for every full sum of 50*l.* and for any fractional part of 50*l.* over any multiple of 50*l.* |
| "Where such estate and effects shall be above the value of 1,000*l.* . . . . . | At the rate of three pounds for every full sum of 100*l.* and for any fractional part of 100*l.* over any multiple of 100*l.* |

"Provided that an additional inventory to be exhibited or recorded in Scotland, of any effects of a deceased person, where a former inventory of the estate and effects of the same person has been exhibited and recorded prior to the first day of June, 1881, shall be chargeable with the amount of stamp duty with which it would have been chargeable if this Act had not been passed."

**Probate Duty.**

*Rates of Duties.*

Power to deduct debts, &c., where deceased died domiciled in the United Kingdom.

Sect. 28. "On and after the first day of June, 1881, in the case of a person dying domiciled in any part of the United Kingdom, it shall be lawful for any person applying for the probate or letters of administration in England or Ireland, or exhibiting the inventory in Scotland, to state in his affidavit the fact of such domicile, and to deliver therewith or annex thereto a schedule of the debts due from the deceased to persons resident in the United Kingdom, and the funeral expenses, and in that case, for the purpose of the charge of duty on the affidavit or inventory, the aggregate amount of the debts and funeral expenses appearing in the schedule shall be deducted from the value of the estate and effects as specified in the account delivered with or annexed to the affidavit, or whereof the inventory shall be exhibited."

Tabular statement of present rates of duty.

The following statement shows in a convenient manner the duties payable under the stat. 44 & 45 Vict. c. 12, sect. 27, on affidavits of value required and received on and after the 1st June, 1881 :—

| Where the value (see *ante*, p. 169) shall be, | | | | Duty. | | |
|---|---|---|---|---|---|---|
| | £ | | £ | £ | *s.* | *d.* |
| Above | 100 | and not above | 150 | 3 | 0 | 0 |
| „ | 150 | „ | 200 | 4 | 0 | 0 |
| „ | 200 | „ | 250 | 5 | 0 | 0 |
| „ | 250 | „ | 300 | 6 | 0 | 0 |
| „ | 300 | „ | 350 | 7 | 0 | 0 |
| „ | 350 | „ | 400 | 8 | 0 | 0 |
| „ | 400 | „ | 450 | 9 | 0 | 0 |
| „ | 450 | „ | 500 | 10 | 0 | 0 |
| „ | 500 | „ | 550 | 13 | 15 | 0 |
| „ | 550 | „ | 600 | 15 | 0 | 0 |
| „ | 600 | „ | 650 | 16 | 5 | 0 |
| „ | 650 | „ | 700 | 17 | 10 | 0 |
| „ | 700 | „ | 750 | 18 | 15 | 0 |
| „ | 750 | „ | 800 | 20 | 0 | 0 |
| „ | 800 | „ | 850 | 21 | 5 | 0 |
| „ | 850 | „ | 900 | 22 | 10 | 0 |
| „ | 900 | „ | 950 | 23 | 15 | 0 |
| „ | 950 | „ | 1,000 | 25 | 0 | 0 |
| „ | 1,000 | „ | 1,100 | 33 | 0 | 0 |
| „ | 1,100 | „ | 1,200 | 36 | 0 | 0 |
| „ | 1,200 | „ | 1,300 | 39 | 0 | 0 |
| „ | 1,300 | „ | 1,400 | 42 | 0 | 0 |
| „ | 1,400 | „ | 1,500 | 45 | 0 | 0 |

**Probate Duty.**

*Rates of Duties.*

| £ | | £ | Duty. £ | s. | d. |
|---|---|---|---|---|---|
| Above 1,500 | and not above | 1,600 | 48 | 0 | 0 |
| „ 1,600 | „ | 1,700 | 51 | 0 | 0 |
| „ 1,700 | „ | 1,800 | 54 | 0 | 0 |
| „ 1,800 | „ | 1,900 | 57 | 0 | 0 |
| „ 1,900 | „ | 2,000 | 60 | 0 | 0 |

And so on at the rate of 3*l.* for every 100*l.* or fractional part of 100*l.*, to any amount.

Duty is only payable on assets within the jurisdiction.

*On what Property the Probate Duty is payable.*]—Probate duty is charged on the value of the estate and effects "for or in respect of which such probate, letters of administration, or confirmation respectively shall be granted or expeded." It is payable in respect only of property belonging to the testator and locally situate within the jurisdiction of the Court at the time of the decease, whatever may be the country or domicil or place of abode of the testator at his decease: see *Re Ewin*, 1 Cr. & J. 153. Therefore, probate duty is not payable on French *Rentes* belonging to a testator who died in England: *Att.-Gen.* v. *Dimond*, 1 Cr. & J. 356. So, no duty is payable on moneys in the public stock or funds of the United States, or debts owing from persons abroad: *Att.-Gen.* v. *Hope*, 1 C. M. & R. 530; 2 Cl. & F. 84. So, also, a foreign debt agreed to be but not actually converted into an English security is not liable to probate duty. This was decided as to securities of the East India Company in the hands of agents there, the principal and interest being payable there, which the testator had agreed with the company to have converted into stock of the company, to be registered and transferable in England, such conversion not having been completed until after the testator's death: *Pearse* v. *Pearse*, 9 Sim. 430. But the duty is payable on Russian, Danish, and Dutch bonds, or rather certificates, saleable here and transferable by delivery only, and being within the jurisdiction at the decease of the testator: *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171. In *Att.-Gen.* v. *Pratt*, L. R. 9 Ex. 140, certain securities were realized in India by P., a person resident there, and the proceeds were remitted by him in bills of ex-

No duty on foreign funds.

Duty payable on securities transferable by delivery and within the jurisdiction.

change drawn upon a bank in London in favour of his London bankers; while the bills were on their way to England, P. died in India. The bills were received by his London bankers, and were accepted and paid at maturity, and the proceeds were received by P.'s executor in England, who had taken out probate here: it was held that the amount of the bills was chargeable with probate duty.

**Probate Duty.**

*Property Subject to Duty.*

Simple contract debts not owing on securities transferable by delivery without indorsement (*Att.-Gen.* v. *Bouwens*), are *bona notabilia* where the debtor resided at the time of the death: *Northampton* v. *St. John*, 2 Leon. 56; *Nicholl* v. *Thomas*, 14 Jur. 227. Judgments and statutes are *bona notabilia* where they are recorded: *Daniel* v. *Luker*, Dyer, 305 a; 1 Saund. 275; leaseholds and rent-charges for years where the land lies: Dyer, 305 a; shares in railway, &c., companies generally are assets in the country in which the holders must be registered: *Att.-Gen.* v. *Higgins*, 2 H. & N. 339; *Att.-Gen.* v. *Bunning*, 8 H. L. C. 243.

*Bona notabilia.*

By the stat. 25 & 26 Vict. c. 22, it is enacted that—

"For the purpose of the stamp duties on probates of wills and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death or obligation on specialty, shall be estates and effects of the deceased within the jurisdiction of her Majesty's Court of Probate in England or Ireland, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased."

For probate duty bond debts to be assets, as if they were simple contract debts.

Upon the same principle by the stat. 27 & 28 Vict. c. 56, s. 4, the duty is payable on all ships and shares of ships belonging to any deceased person and registered at any port in the United Kingdom, though such ships may at the time of the death have been at sea or in a foreign port.

Ships.

By the stat. 23 & 24 Vict. c. 5, sect. 1, Indian Government promissory notes on which interest is payable in London, or with coupons attached, and

Indian Government notes.

**Probate Duty.**

*Property Subject to Duty.*

registered, and certificates and stock issued in lieu of such promissory notes, are to be deemed *bona notabilia* in England.

Shares in colonial companies.

And by the stat. 46 & 47 Vict. c. 30, sect. 3, upon the death of a member of a company transacting business in a colony, who has been registered in a colonial register under this Act, his interest in the company is to be deemed part of his estate and effects situated in the United Kingdom for the purposes of probate duty.

English probate necessary in respect of property not within the jurisdiction at the death.

Although probate duty is only payable on property situate within the jurisdiction of the Court at the time of the decease, English Courts, in administering the personal property of a deceased person, wherever it may have been situate at the death, will not take notice of any will of personalty, or of the title of any personal representative that has not been recognised or constituted here: *Price* v. *Dewhurst*, 4 M. & Cr. 80 (where the property was abroad and the testator had died in an English domicil): *Att.-Gen.* v. *Cockerell*, 1 Price, 179 (as to a debt due to a foreign executor). In *Tyer* v. *Bell*, 2 M. & Cr. 89, the testator had died in India, domiciled there, and leaving no assets in England, and it was held, that a personal representative constituted in this country was a necessary party to a bill for an account of assets filed against a person who happened to be in England. Lord *Cottenham*, C., said, "The cases of *Tourton* v. *Flower*, 3 P. W. 369; *Atkins* v. *Smith*, 2 Atk. 63; *Swift* v. *Swift*, 1 Ba. & B. 326; *Att.-Gen.* v. *Cockerill*, 1 Price, 165, 179; *Lowe* v. *Fairlie*, 2 Mad. 101; *Logan* v. *Fairlie*, 2 S. & St. 289 (*g*); all proceed upon this, that the Courts in this country, for the security of property, will not administer the property of a person deceased in the absence of a person authorised to represent the estate, and that they look only to the judgment of the Ecclesiastical Courts in this country in granting probate or letters

(*g*) In these cases the question was also raised as to liability to legacy duty, and on that point they may be regarded as overruled by the decision in *Att.-Gen.* v. *Jackson*, 8 Bli. N. S. 15; see *post*, p. 217.

Probate Duty.

*Property Subject to Duty.*

of administration to ascertain who are so authorised; and it is immaterial what Ecclesiastical Court in this country has granted probate or letters of administration, provided the state of the property was such as to give it jurisdiction" (*h*).

Foreign probate not necessary in an English suit.

In *Whyte* v. *Rose*, 3 Q. B. 493, it was held by the Court of Exchequer Chamber to be no answer to an action of debt on a deed by an administrator under a prerogative administration from the Archbishop of Canterbury, that the intestate died in Nova Scotia, and that at the time of his death the deed was in Ireland and *bona notabilia* there. *Tindal*, C.J., said, "It is well established that, in order to sue in any Court of this country in respect of the personal rights or property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper spiritual Courts of this country." *M'Mahon* v. *Rawlings*, 16 Sim. 429, where a plaintiff was allowed to sue as personal representative under colonial letters of administration, no administration having been taken out in this country, is clearly wrong. The case of *Jauncy* v. *Sealey*, 1 Vern. 397, where, to a bill by an English administrator for an account of the assets, it was held to be a good plea that the deceased died domiciled in Naples, and appointed the defendant his executor, who had proved his will in Naples, and that there were no assets but in Naples; and the case of *Currie* v. *Bircham*, 1 D. & Ry. 35, where an administrator constituted in England was held not to be entitled to sue the agent of an administrator constituted in India for assets of the deceased transmitted to the defendant by the Indian administrator, have been supposed to be distinguishable on the principle of *respondeat superior*, as in case of a client suing an attorney's clerk (3 Q. B. at p. 498). But that principle seems inapplicable, the rule in our Courts being, that no one can be recognised as the personal representative whom the Court has not declared to be so. In *Currie* v. *Bircham*, the deceased had an English domicil at his death. In *Bond* v. *Graham*, 1 Hare,

Cases in which the title of a foreign executor has been regarded.

(*h*) See further as to grant of probate of wills made abroad, *post*, sub tit. WILLS, p. 320.

**Probate Duty.**

*Property Subject to Duty.*

482, it was held, that an administrator constituted in England was a necessary party to a suit against an executor who had proved in India only, in respect of Indian assets in his hands. See also *Lasseur* v. *Tyrconnel*, 10 Beav. 28; *Mashan* v. *Dawson*, 27 Beav. 21; *Enohin* v. *Wyllie*, 10 H. L. C. 19; *Re Commercial Bank, Fernandes' Executors Case*, L. R. 5 Ch. 314.

Payment of duty on property in different parts of United Kingdom.

Formerly it was necessary where the personal estate of a deceased person was situate in different parts of England or Ireland for separate grants of representation to be taken out in the several provinces in which the property was situate. But by sects. 94 and 95 of the Irish Probate Act, 1857 (20 & 21 Vict. c. 77), which came into operation on the 1st January, 1858, it was enacted that probates and letters of administration granted in England should be of like force as if originally granted in Ireland on being resealed in that country, and, conversely, that probates, &c., granted in Ireland should be of like force as if originally granted in England. And by the stat. 21 & 22 Vict. c. 56, sect. 9, it is enacted that an inventory of the estate and effects of any person domiciled in Scotland may include personal estate in any part of the United Kingdom; by sects. 12, 13, and 14 of the same Act, confirmations of the executors of such persons produced in Court in England or Ireland and duly sealed, are to have the effect of probates or letters of administration; and by sect. 15, probates and letters of administration are to be deemed to be granted for all property in the United Kingdom, and inventories are to include all such property. And the stamp duty is now payable upon the affidavit or inventory delivered upon the application for a grant of representation, in respect of the aggregate amount or value of all the personal property of the deceased situate in any part of the United Kingdom. If the deceased leaves only English and Irish assets, the grant of representation may be obtained and the duty paid in either England or Ireland, irrespective of the domicil of the deceased. But the Court will not reseal in this country an Irish grant of representation without

Probate Duty.

*Property Subject to Duty.*

production of a certificate of the Commissioners that the grant bears the proper stamp denoting that the full duty payable has been duly paid. If the English assets were not included in the affidavit of value delivered in Ireland, a further affidavit of value must be delivered in this country duly stamped for the amount of the additional duty (see sect. 32 of the Act of 1881, *post*, p. 193), and therefore the Commissioners will transmit to the Court a certificate to that effect. The law as to the devolution of personalty or intestacy being in Scotland different from that in force in other parts of the United Kingdom, it is provided by the stat. 21 & 22 Vict. c. 56, that where there are Scotch assets the grant of representation shall be obtained in the country of domicil of the deceased: and the affidavit must state such domicil, and must include the whole of the personalty of the deceased in the United Kingdom and the value thereof, and also separately specify the value of the estate and effects in Scotland. A note of the domicil of a testator signed by the proper officer may be written on an English probate, in order that effect may be given to it in Scotland: *Re Allison*, 3 Sw. & Tr. 574. In Scotland the stamp is impressed on the inventory, which must be exhibited on oath before confirmation; and accordingly the Court in this country will reseal it without requiring a certificate of the Commissioners as to the stamp. See further as to the mode of proceeding in applications for grants of representation where the assets are situate in different parts of the United Kingdom, Hanson on Probate, &c., Acts, pp. 168 *et seq.*, and Tristram and Coote, Probate Practice, ch. x., pp. 191 *et seq.* As to deductions, see *post*, p. 187.

Duty not payable on real estate constructively converted into personalty.

Probate duty is, as a general rule, only payable on that which is actually and not merely constructively personal property, and is within the jurisdiction at the time of the death. So in the case of *Forbes* v. *Steven*, L. R. 10 Eq. 185, *James*, V.-C., said, "Probate duty is payable or not payable according to the character of the property at the time, whereas legacy duty is payable according to what the legatee gets." But this rule is subject to

Probate Duty.

*Property Subject to Duty.*

exceptions, the test being whether or not the property passes to the executor or administrator of the deceased owner *virtute officii*. It was held by Lord *Longdale*, M. R., that the duty was not payable in respect of real estate which the deceased had in his lifetime by revocable deed subjected to a discretionary trust for sale for payment of debts, but which remained unsold at his decease: *Matson* v. *Swift*, 8 Beav. 368 (*i*). And in *Custance* v. *Bradshaw*, 4 Hare, 315, it was held, that probate duty was not payable in respect of the deceased's share in freehold and copyhold estates purchased with partnership money for partnership purposes, but conveyed to the use of the partners as tenants in common. These cases are, however, not altogether satisfactory, and the decisions therein, so far as now binding, must be regarded as founded on the particular circumstances in each case. Indeed, in the case of *Att.-Gen.* v. *Brunning*, 4 H. & N. 94, the Court of Exchequer considered that the cases above referred to established a general principle, that real estate not actually converted is exempt from probate duty, notwithstanding that it is in equity impressed with the character of personalty for the purposes of distribution, and accordingly sought to extend that principle to the case of purchase-money of real estate which had been contracted to be sold by a deceased owner, but not actually conveyed by him in his lifetime to the purchaser. But the House of Lords (*S. C.* on appeal, 8 H. L. C. 243), unanimously reversed this decision, and held that all moneys or other property which an executor is entitled to recover and receive *virtute officii* is liable to probate duty. The land in this case, by the doctrine in equity, was gone and a claim against the purchaser for money was substituted, and such claim could not be enforced by the executor except in his character as such, and by means of the probate. In *Forbes* v. *Steven*, L. R. 10 Eq. 178, it was held by *James*, V.-C., that the

Land contracted to be sold, but not conveyed by deceased owner.

Partnership property in land.

(*i*) Proceeds of real estate devised on trust for sale were expressly made liable to legacy duty by the stat. 55 Geo. 3, c. 184, see *post*, p. 202. But they are now made liable to succession duty: see 51 Vict. c. 8, sect. 21, sub-sect. (2).

Probate Duty.

*Property Subject to Duty.*

share of a deceased partner in realty, proving part of the partnership property, was liable to legacy duty, but the reasoning on which his Lordship based his judgment is equally applicable to show that such an interest, if within the jurisdiction of the Court, is liable to probate duty. And in *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275, it was held by the Court of Appeal (affirming the decision of the Queen's Bench Division), that inasmuch as the shares of partners in realty forming part of the partnership property, in the absence of a binding agreement between the partners to the contrary, are personal estate, and pass to their personal representatives, probate duty is payable in respect of such shares accordingly, irrespective of any question as to whether there has been any actual conversion into personalty. *Brett*, M.R., said (at p. 289), "I am of opinion that *Custance* v. *Bradshaw* ought never to be cited again as an authority."

Heir taking undisposed of interest in land directed to be sold.

Where a will contains an absolute trust for the conversion of real estate, and by reason of the failure of some of the limitations of the will with respect to the proceeds of sale, the heir of the testator becomes entitled to the undisposed of interest, he takes it as money, and on his death his interest becomes liable to probate duty, though the real estate still remains unsold: *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29.

Reconversion into realty.

In *Greisbach* v. *Freemantle*, 17 Beav. 314, a testatrix devised real estate to trustees upon trust for sale, and to pay her debts and legacies, and she gave the residue to her son. The son, who was one of the trustees, by consent of his co-trustees, paid the debts and legacies, except one annuity, and remained in possession of the real estate for 16 years, until he died intestate: it was held that the son took the residue of the realty in the character of personalty, but that by his acts he had reconverted it into realty. See as to conversion, *Fletcher* v. *Ashburner*, 1 Wh. & Tud. L. C. 826.

Investment of lunatic's personalty in purchase of real estate.

In *Att.-Gen.* v. *Marquis of Aylesbury*, 12 App. Ca. 672, the accumulations of a lunatic's estate had been invested by his committees by order of the Lords Justices in Lunacy in the purchase of land, which

Probate Duty.

*Property Subject to Duty.*

were, pursuant to the order, conveyed to the committees, their heirs and assigns, upon trust for the lunatic, his executors, administrators, and assigns, with a declaration that the land purchased should "to all intents and purposes be considered as part of the personal estate" of the lunatic, but there was no trust for sale: it was held, reversing the decision of the Court of Appeal (16 Q. B. D. 408), and restoring the decision of *Mathew* and *Smith*, JJ. (14 Q. B. D. 895), that, on the death of the lunatic who never recovered, the value of the land purchased was personal estate of the lunatic and liable to probate duty. The question was treated as being not whether the land had been reconverted into personalty, but whether there had originally ever been any effectual conversion into realty of the lunatic's moneys invested in the purchase. Lord *Selborne* said, "It is to be observed that in this case the lunatic, to whom the money laid out in these purchases belonged, never himself did, or assented to, any act by which it was or could be converted into realty; he was incapable of doing any such act, or of giving any such consent. And although I do not think it open to dispute that the Lords Justices, in the due course of administration of his estate in lunacy, might have done any act which they judged to be for his benefit, it is to me clear that, in this case, they did not judge it necessary, or for his benefit, to do anything which would have the effect of converting his personal right to the money thus invested into a real right to land, with the incidents belonging to realty; but that, on the contrary, they intended to prevent the investment which they authorised from having any such consequence, and introduced both into their own order, and into the conveyance which followed thereon, declarations which they considered proper and sufficient to effectuate that intention" (*j*).

Result of the cases.

The result of the cases appears to be that, where

(*j*) This decision, being to a great extent based on considerations applicable only to a lunacy, is perhaps not to be strongly relied on as an authority on the general question of the liability to probate duty.

Probate Duty.

*Property Subject to Duty.*

a person dies possessed of property in land which he has up to the time of his death enjoyed and treated as realty, then, if he by his own will directs it to be sold and converted into money, the liability to probate duty will not attach to the property; but if, at the time of his death, his title to the property is derived under an *antecedent* instrument, being either a deed (see *Clarke* v. *Franklin*, 4 K. & J. 257) or the will of a former owner, whereby the land is subject to a direction or trust for sale, the property will be liable to the duty, although it has not actually been converted into money. And it is believed that this view of the law on the subject is adopted and acted on by the advisers of the Crown.

Death of legatee, leaving issue, in testator's lifetime.

In *Percy's Executors* v. *The Queen*, L. R. 4 Ex. 27, where a testator bequeathed personalty to his son who died leaving issue who took under sect. 33 of the Wills Act (1 Vict. c. 26), whereby the bequest was prevented from lapsing, it was held that the executors of the son were chargeable with probate duty on the bequest, as if the son had survived the testator.

Property passing under appointments by will.

Before the passing of the stat. 23 & 24 Vict. c. 15 (which applies to the wills of persons dying after the 3rd April, 1860), probate duty was not payable on personalty over which a testator had merely a general power of appointment, inasmuch as his executors would not be entitled to administer: see *Vandiest* v. *Fynmore*, 6 Sim. 570; *Platt* v. *Routh*, 6 M. & W. 756, *S. C.*, 3 Beav. 257, affirmed by the House of Lords sub nom. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257. The contrary had been decided in *Palmer* v. *Whitmore*, 3 Sim. 178, and *Att.-Gen.* v. *Staff*, 2 Cr. & M. 124; and by sect. 4 of the Act above referred to, it is enacted that personal estate appointed by will under general powers shall be chargeable with probate and inventory duties.

Reversionary interests.

A sum of money was bequeathed in trust for several persons for life in succession, with remainder as one of them, who was a married woman, should by will appoint, and in default of such appointment, to her executors or administrators; the lady died without making any appointment: it was held that

**Probate Duty.**

*Property Subject to Duty.*

her reversionary interest was part of her personal estate, and liable to probate duty: *Att.-Gen.* v. *Malkin* 2 Phil. 64; 10 Jur. 955.

Contingent interests.

The duty must be paid on the whole personal estate of a testator or intestate, including contingent interests; if paid at the time of the grant of representation, the duty will be chargeable only on the fair and reasonable value of the contingent interest at that time: see *Talbot* v. *Stainforth*, 1 J. & H. 484; but if not so paid, it must be paid on the value of the property when it falls into possession: *Lord* v. *Colvin*, L. R. 3 Eq. 737.

Lighthouse tolls.

Profits arising from the tolls of a lighthouse are realty, not personalty, and are therefore not liable to probate or legacy duty: *Att.-Gen.* v. *Jones*, 1 Mac. & G. 574.

Duty payable on each successive devolution of title.

The duty (like legacy duty, see *post*, p. 206) is payable in respect of every successive devolution of the property under the will or intestacy of every person through whom the ultimate taker derives his beneficial interest. And therefore where a married woman became entitled to personal property under an intestacy, and died, and her husband also subsequently died, without having taken any steps to reduce the property into possession, it was held that, in order to enable his next of kin to recover, it was necessary to take out two representations, one to the husband, and the other to the wife, on each of which, as a distinct devolution, duty was payable: *Partington* v. *Att.-Gen.*, L. R. 4 H. L. 100. See also *Att.-Gen.* v. *Malkin*, 2 Phil. 64; 10 Jur. 955.

Duty payable on value at the time of the grant.

The duty must be paid on the value of the estate at the date of the grant, including all assets previously realised and disposed of, and also assets expected to be realised or received: *Butler* v. *Butler*, 2 Phil. 39. Where the next of kin did not administer until after a lapse of thirteen years, and in the meantime an intruder had built a house on leasehold land of the deceased, letters of administration not stamped according to the value at the time of the grant were rejected: *Doe* v. *Evans*, 10 Q. B. 476. The duty is payable not only on the principal amount or value of the property of the deceased at the time of his death,

Probate Duty.

*Property Subject to Duty.*

but also upon any interest which may have accrued thereon up to the date of the grant of representation: *Partington* v. *Att.-Gen.*, L. R. 4 H. L. 100.

Executor, &c., cannot recover beyond the value on which duty has been paid;

If the executor or administrator in suing shows by his case that the estate, including that which he seeks to recover, is of greater value than the amount on which duty has been paid, the probate or letters of administration must be rejected, even though he is suing on a doubtful claim: *Hunt* v. *Stevens*, 3 Taunt. 113; *Carr* v. *Roberts*, 2 B. & Ad. 905; *Jones* v. *Howells*, 2 Hare, 342; *Christian* v. *Devereux*, 12 Sim. 264; *Howard* v. *Prince*, 10 Beav. 312. But as to desperate debts, see *Moses* v. *Crafter*, 4 C. & P. 524. But the defendant will not be allowed to enter into evidence as to the value of property not in question in the action: see *Whyte* v. *Rose*, 3 Q. B. at p. 499. And if the title of the plaintiff is admitted on the pleadings, no objection can be made to the stamp on the probate or grant: *Thynne* v. *Protheroe*, 2 M. & S. 553.

unless his title is admitted.

Stamping at any time sufficient.

Of course, the stamping of the probate or grant at any time is sufficient to render it admissible as evidence of the title of the executor or administrator *ab initio*: *Rogers* v. *James*, 2 Marsh. 425. And in equity, time will be given to an executor or administrator to obtain a proper stamp, the proceedings being in the mean time suspended: *Jones* v. *Howells*, 12 L. J. Ch. 365; *Christian* v. *Devereux*, 12 Sim. 264; *Howard* v. *Prince*, 10 Beav. 312.

Stamp evidence of assets.

It seems that the amount of probate duty paid is admissible, as being some slender evidence against the executor of the amount of assets. See *Mann* v. *Lang*, 3 A. & E. 699; *Stearn* v. *Mills*, 4 B. & Ad. 657.

Deduction of debts, &c., is optional.

*Deduction of Debts and Funeral Expenses.*]—The power given by sect. 28 of the Act of 1881 (set out *ante*, p. 173) to deduct debts and funeral expenses from the value of the estate and effects as specified in the accounts delivered with or annexed to the affidavit, may be exercised or not at the option of the person applying for probate or letters of administration. If this course is not adopted, a return of duty may be

**Probate Duty.**

*Deduction of Debts, &c.*

applied for at any time within three years after the grant, or within such further period as the Commissioners may allow on the ground that no amount, or an insufficient amount, was deducted on the ground of debts and funeral expenses: see sect. 31. If a deduction for debts, &c., is made erroneously, the person acting in the administration must within six months of the discovery of the error, deliver an amended affidavit and pay further duty amounting to the true value of the estate and effects with interest: see sect. 32. These sections are set out in full, *post*, pp. 192, 193.

Deduction of debts, where deceased is domiciled abroad.

The power to deduct debts and funeral expenses is confined in its application to cases where the deceased dies domiciled in this country, and as to debts, to such debts as are *personally* due from the deceased (see *infra*) to creditors who are resident here; and accordingly no deduction under this Act can be made from assets in this country belonging to a person who died domiciled abroad, or in respect of debts owing by a person who died domiciled in this country to creditors resident abroad. A statement as to domicil must in all cases be inserted in the affidavit if it is intended to make a deduction for debts, &c., under this Act.

Deduction and return of duty under earlier statutes.

In cases where the provisions of this section do not apply, deductions may, nevertheless, be made from the value of leaseholds in respect of mortgage debts secured thereon, and probate duty will be payable accordingly, under the stat. 31 & 32 Vict. c. 124, sect. 7; as also from the amounts due on policies of life assurance in respect of debts secured thereon, under the stat. 30 & 31 Vict. c. 144. And as regards debts, with regard to which there is no statutory power of making any deduction, it is still open to apply under the stat. 5 & 6 Vict. c. 79, sect. 23 (see *ante*, p. 165), at any time within three years after the date of the probate or letters of administration, for a return of duty in respect of debts of the deceased properly payable and actually paid out of his estate (*k*). None of these last men-

(*k*) The consent of the Crown is necessary to an application to the Court to direct a return of duty by the Commissioners under this Act: *In the goods of Webster*, 35 L. T. 47.

tioned provisions are subject to any limitations as to domicil or residence of either debtor or creditor.

Deduction for debts where representation is granted in different countries within the United Kingdom.

Formerly, under the practice which prevailed prior to the passing of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), where it was necessary to take out probate in both Provinces, and the executors sought a return of duty in respect of debts subsequently paid, it was considered that they were not entitled to treat the assets in the two Provinces as one amount, and the total duty as one amount, but that debts must be apportioned according to the relative values of the assets in the two Provinces, and that the right to a return of duty must be determined by the effect in each Province taken separately: see *Reg.* v. *Commissioners of Stamps, Wallace's Case,* 9 Q. B. 637; in that case the result was that the deduction of the apportioned share of the debts in each Province was insufficient to reduce the amount in either to a lower place in the scale of duties. The same principle seems to apply to cases where the deceased was possessed of personal property in different countries within the United Kingdom, and left debts owing to persons resident in such different countries. If all the assets of the deceased are capable of being included, and are expressly included in one affidavit or inventory so that representation in one country only is necessary, then under sect. 28 all his debts owing to creditors resident in any part of the United Kingdom may be deducted; but by the second clause of the section only such debts may be deducted as are "payable by law out of any part of the estate and effects comprised in *the affidavit.*" If, therefore, it is necessary to deliver separate affidavits for the purpose of obtaining probate on confirmation in more than one country, the rule appears to be that the debts in each country must be paid out of the assets in that country, and the deduction must be made out of such assets, and confined to such debts as are due to creditors resident in that country: see *Cook* v. *Gregson,* 2 Drew. 286.

Deduction for debts where

But where the personal property of the deceased

**Probate Duty.**

*Deduction of Debts, &c.*

there is foreign property.

is situate partly in this country and partly abroad, the assets abroad are not necessarily applicable to the payment of debts owing in this country, and consequently the value of such property is not to be taken into account in making a deduction under sect. 28 of the Act of 1881 in respect of such debts: see *Reg.* v. *Commissioners of Stamps, Ostell's Case*, 13 Jur. 624.

Debts must be owing from deceased personally.

Only such debts may be deducted under this section as are "owing from the deceased and payable by law," and it seems to be settled that the meaning of these words is that the debts must be debts for which the deceased is personally liable, and not merely debts for which he was liable to be sued in a representative character. Where the owner of real estate mortgaged it, covenanting by the mortgage deed to pay the principal and interest, and died devising the property subject to the mortgage, and not leaving personalty sufficient to pay off the debt; and subsequently the devisee died, and his executors paid the debt out of his personal estate, it was held that they were not entitled to a return of duty paid in respect of his estate: *Re Taylor's Estate*, 8 Exch. 384. The same principle will apparently apply where a person purchases an equity of redemption: "the purchaser of an estate subject to a mortgage who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage money his personal debt; his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage money to be deducted from the price:" per *Leech*, M. R., in *Barham* v. *Earl of Thanet*, 3 My. & K., at p. 624. So, also, if a claim is such that its payment out of the estate of the deceased cannot be legally enforced, it seems clear that no direction in his will that such claim shall be satisfied out of his estate will entitle his representatives to make any deduction in respect of money applied pursuant to the direction. And inasmuch as the debts must be owing from the deceased personally, no deduction may be made in respect of debts in-

curred by his representatives after his death, however unavoidable and properly chargeable against his estate, as for instance, in keeping up his establishment, or carrying on his business.

Probate Duty.
*Deduction of Debts, &c.*

No deduction can be made in respect of "voluntary debts," by which term is meant any debt not contracted for a valuable consideration, *i.e.*, money, or money's worth, or marriage. The stat. 24 & 25 Vict. c. 92, sect. 3, expressly provided that no return of probate duty should be allowed in respect of voluntary debts, &c.

Voluntary debts.

In a recent Irish case, A., by a settlement executed on his marriage, covenanted to bequeath out of his real and personal estate to the trustees the sum of 20,000*l.* with interest from his death, to be held by them upon certain trusts declared by the settlement, and also to devise, bequeath, or appoint to them by his will the whole of the residue of his real and personal estate (subject to the payment of the sum of 20,000*l.* and interest, and of his debts and funeral expenses), to be held by them upon the trusts declared by the settlement; A., by a codicil to his will, accordingly bequeathed to the trustees the sum of 20,000*l.* to be held by them upon the trusts of the settlement, and also gave to them the whole residue of his real and personal estate to be held by them upon the trust declared by the settlement as to such residue: it was held by the Court of Appeal that the residue did not constitute a debt due by A. at his death within the meaning of the stat. 44 Vict. c. 12, but formed part of the testator's estate passing by his will and codicil, and was accordingly subject to probate duty: *Att.-Gen.* v. *Murray*, 20 L. R. Ir. 124.

Gift by will of residue pursuant to covenant in marriage settlement.

And no deduction may be made in respect of debts "in respect whereof any real estate may be primarily liable," &c. As for instance in respect of a mortgage debt on real estate not contracted by the deceased, but subject to which he purchased the property: see *Barham* v. *Earl of Thanet*, 3 My. & K. 607.

Debts secured on real estate.

The deduction may, however, be made in respect of all debts of the deceased, otherwise capable of

Debts directed to be paid out of real estate.

Probate Duty.

*Deduction of Debts, &c.*

being deducted which are payable "out of any part of the estate and effects comprised in the affidavit." Where a testator devised and bequeathed his real and personal estate to his executors upon trust for sale and for payment out of the proceeds of his debts and funeral and testamentary expenses, and to invest the residue, and the executors did not sell the realty but paid the debts, &c., out of the personalty exclusively and thus reduced the net value of the personalty below the amount on which probate duty had been paid, it was held that they were entitled to a full return of duty in respect of all the payments as "debts payable by law out of the personal or moveable estate," and not merely to a return apportioned according to the respective values of the real and personal estate: *Percival's Executors* v. *The Queen*, 3 H. & C. 317.

Funeral expenses.

The provision of mourning for the widow and family of the deceased are not funeral expenses which an executor can charge against the estate: *Johnson* v. *Baker*, 2 C. & P. 207. The reasonableness of the funeral expenses depends upon the position in life and financial circumstances of the deceased; such expenses will be more strictly scrutinised where the estate proves to be insolvent, than if it is sufficient for payment of debts; but unusual and unnecessary expenses will not be allowed even as against a residuary legatee or next of kin. See further as to funeral expenses, Wms. Exors., 871 *et seq.*

Form and contents of affidavit of value.

*The Affidavit of Value.*]—The Act of 1881 introduces a material change as regards the form and contents of the affidavit of value. Under the stat. 55 Geo. 3, c. 184, the affidavit was merely required to state generally, and without going into details, that the personal estate and effects of the deceased were "under the value of a certain sum to be therein specified," no deduction being made for debts owing by the deceased. But by sect. 10 of the Act of 1880 (43 & 44 Vict. c. 14) it was provided that, together with the affidavit of value, there should be delivered "an account of the particulars of the personal estate for or in respect of which the probate

or letters of administration is or are to be granted, and of the estimated value of such particulars." And by sect. 29 of the Act of 1881, it is enacted that,— Probate Duty. *The Affidavit.*

"The affidavit to be required or received from any person applying for probate or letters of administration in England or Ireland, shall extend to the verification of the account of the estate and effects, or to the verification of such account and the schedule of debts and funeral expenses, as the case may be, and shall be in accordance with such form as may be prescribed by the Commissioners of her Majesty's Treasury; and the Commissioners of Inland Revenue shall provide forms of affidavit, stamped, to denote the duties payable under this Act."

Proofs in support of affidavit.

By sect. 37 the Commissioners are empowered at any time within three years after the grant of probate or letters of administration, to require from the executor or administrator such explanations and documentary and other evidence in support of the affidavit as the case may seem to them to require. This power is rendered necessary by reason of the provisions in sect. 28 as to deduction of debts, &c. (*ante*, p. 173); and also by reason of the abolition by sect. 41 of the legacy and succession duties at the rate of one per cent. in respect of estates for which stamp duty has been paid under this Act, thus no longer rendering necessary the rendering of a residuary account in all cases. The Commissioners may of course obtain evidence *aliunde*, irrespective of this section, as to any fraud on the Crown or error which would entitle them to claim additional duty.

Duties payable on affidavit instead of on grant of representation.

The duties imposed by this Act are payable on all affidavits of value received on and after the 1st June, 1881, irrespective of the date of the death of the testator or intestate person. The stamps denoting the duty are now impressed on or affixed to the affidavit instead of the grant of probate or letters of administration as was formerly the case. The affidavit (as to which see 55 Geo. 3, c. 184, sects. 38, 39, *ante*, p. 164), is filed in the Stamp Office, and may at any future time be referred to for the purpose of ascertaining the amount of duty denoted by the stamps, and the items of property covered by

Probate Duty.
*The Affidavit.*

the duty actually paid. The probate or letters of administration granted and issued to the applicant is to bear, in lieu of a stamp denoting the duty paid, a certificate given by the Court stating that the affidavit of value has been duly delivered, and, if liable to duty, duly stamped, and stating the amount of the gross value of the estate and effects shown by the account : see sect. 30 of the Act of 1881.

Amounts to be delivered with the affidavit of value.

By sect. 10 of the stat. 43 Vict. c. 14, it is enacted that, together with the affidavit required by sect. 38 of the stat. 55 Geo. 3, c. 184, "there shall be delivered an account of the particulars of the personal estate for or in respect of which the probate or letters of administration is or are to be granted, and of the estimated value of such particulars." The amount so delivered is to be transmitted to the Commissioners, together with the prescribed documents (*l*).

The affidavits must now extend to the verification of the account : 44 Vict. c. 12, sect. 29, *ante*, p. 191.

As to what property must be included in the affidavit of value, see *ante*, pp. 174 *et seq.*

Rectification of errors in estimate of value.

*Rectification of Errors.*]—The Act contains the following provisions for rectifying any errors which may occur in the estimate of the value of the estate and effects on which probate duty is payable, and for the return of duty overpaid, or payment of further duty accordingly, as the case may require.

Provision for return of duty overpaid.

Sect. 31. "If at any time after the grant of probate or letters of administration, and during the administration of the estate, the value mentioned in the certificate of the officer of the Court shall be found to exceed the true value of the personal estate and effects of the deceased, or if at any time within three years after the grant, or within such further period as the Commissioners of Inland Revenue may allow, it shall appear that no amount or an insufficient amount was deducted on account of debts and funeral

(*l*) The documents are "in the case of a probate or letters of administration with the will annexed, a copy of the will and the original affidavit; and in the case of letters of administration without the will annexed such original affidavit, and in every case of letters of administration a copy or extract thereof": stat. 20 & 21 Vict. c. 79, sect. 93.

expenses, it shall be lawful for the Commissioners, upon proof of the facts to their satisfaction, to return the amount of stamp duty which shall have been overpaid, and to cause a certificate to be written by an authorised officer on the probate or letters of administration setting forth such true value, or as the case may be, the amount, or corrected amount of deduction, and such certificate shall be substituted for, and have the same force and effect as, the certificate of the officer of the Court."

**Probate Duty.**

*Rectification of Errors.*

Sect. 32. "If at any time it shall be discovered that the personal estate and effects of the deceased were at the time of the grant of probate or letters of administration of greater value than the value mentioned in the certificate, or that any deduction for debts or funeral expenses was made erroneously, the person acting in the administration of such estate and effects shall, within six months after the discovery, deliver a further affidavit with an account to the Commissioners of Inland Revenue, duly stamped for the amount which, with the duty (if any) previously paid on an affidavit in respect of such estate and effects, shall be sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the said Commissioners interest upon such amount at the rate of 5*l.* per centum per annum from the date of the grant, or from such subsequent date as the said Commissioners may in the circumstances think proper.

Provision for payment of further duty.

"The Commissioners of Inland Revenue, upon the receipt of such affidavit duly stamped as aforesaid, shall cause a certificate to be written by an authorised officer on the probate or letters of administration, setting forth the true value of the estate and effects as then ascertained, or, as the case may be, the corrected amount of the deduction, and such certificate shall be substituted for, and have the same force and effect as the certificate of the officer of the Court."

*Exemptions from Probate Duty.*]—The 48 Geo. 3, c. 149, s. 35, exempts trust property from probate duty. Sects. 36 and 37 authorise the Bank or other company, or any debtor or holder of property, to require an affidavit that the stock, shares, debt, or property required to be transferred to an executor or administrator, is trust property, or as to the amount of the beneficial interest, and the amount of probate duty paid.

Trust property.

Duty is not payable on trust property. In *Carr* v. *Roberts*, 2 B. & Ad. 905, the deceased had granted an annuity, and charged it on property which he

Trust property. Right of

Probate Duty.

*Exemptions.*

action under covenant of indemnity.

afterwards sold to the defendant, who covenanted to indemnify him against the claims of the annuitant. The annuitant having recovered against the administratrix for arrears due in the lifetime of the intestate, it was held, in an action on the covenant for indemnity, that the right to recover the amount was part of the intestate's estate, and could not be regarded as trust property, but was liable to duty.

Probates, &c., of sailors and soldiers dying on service.

Probates of wills and letters of administration of common seamen, marines, or soldiers dying on service, are exempt from probate duty: see 55 Geo. 3, c. 184, Sched. part iii., *ante*, p. 169.

Probates, &c., where value of estate does not exceed 100*l.*

By the stat. 27 & 28 Vict. c. 56, sect. 5, probates and letters of administration where the value of the estate and effects of the deceased (exclusive of what he held as trustee) does not exceed 100*l.*, are expressly exempted from stamp duty. As all duties previously in force were superseded by the stat. 43 Vict. c. 14 (*ante*, p. 169), and as no duty is expressly charged in respect of such small estates (except the fee stamp of 15*s.*) either by that Act, or by the stat. 44 Vict. c. 12, all estates under the value of 100*l.* are now exempt from probate duty, irrespective of the date of the death of the testator or intestate. This exemption may be claimed where the value of the estate is reduced below 100*l.* by deduction of debts, &c., under sect. 28 of the later Act.

Cases where no representation need be taken out.

In the following cases the taking out of probate or letters of administration may be dispensed with, and accordingly in such cases no probate duty will be payable in respect of the amount paid out to the persons entitled as next of kin, or otherwise :—

(i.) Where a sum not exceeding 50*l.* is paid out by a Friendly Society to the next of kin of a deceased member; but probate of the member's will, if any, will nevertheless be necessary: 18 & 19 Vict. c. 63, sect. 31.

(ii.) Where deposits in a Savings Bank of a deceased person do not exceed 50*l.*, exclusive of interest if within one month, no will is proved, and no notice of the existence of a will or of intention to take out administration is given to the trustees or managers: 26 & 27 Vict. c. 87, sect. 43.

Probate Duty.

*Exemptions.*

(iii.) Where the personal property of a deceased military officer, or soldier dying on service, after payment of certain charges mentioned in the Act, does not exceed 100*l.* : 26 & 27 Vict. c. 57, sects. 14, 15, 16.

(iv.) Where the amount to the credit of a deceased officer, seaman, or marine in Her Majesty's service in the books of the Admiralty in respect of the sale of effects, arrears of pay, wages, prize-money, bounty-money, grants, or allowances, does not exceed 100*l.* : 28 & 29 Vict. c. 111, sect. 6.

(v.) Where the share of prize-money or arrears of civil or military allowances chargeable to army votes to which a deceased military officer or soldier was entitled, does not exceed 100*l.* : 27 & 28 Vict. c. 36, sect. 3 ; 31 & 32 Vict. c. 90, sect. 2.

(vi.) Where the amount of pay, allowances, or pension to which a deceased civil servant was entitled, does not exceed 100*l.* : 31 & 32 Vict. c. 90, sect. 1.

With regard to estates of a value not exceeding 300*l.*, sect. 33 of the Act of 1881 enacts as follows (*m*) :—

Provisions as to obtaining probate, &c., where gross value of the estate does not exceed 300*l.*

"(1.) Where the whole personal estate and effects of any person dying on or after the 1st day of June, 1881 (inclusive of property by law made such personal estate and effects for the purpose of the charge or duty, and any personal estate and effects situate out of the United Kingdom), without any deduction for debts or funeral expenses, shall not exceed the value of 300*l.*, it shall be lawful for the person intending to apply for probate or letters of administration in England or Ireland, to deliver to the proper officer of the Court or to any officer of Inland Revenue duly appointed for the purpose, a notice in writing in the prescribed form, setting forth the particulars of such estate and effects, and such further particulars as may be required to be stated therein, and to deposit with

(*m*) The omitted sub-sections provide (2) that the officer may refuse to accept the notice and deposit until satisfied as to the true value of the estate ; (3) that the principal registrars of the Probate Division in communication with the Commissioners of Inland Revenue shall prescribe forms of notices, and make regulations with reference to necessary matters ; (4) that officers of inland revenue may administer oaths, &c., and attest and accept administration bonds.

Probate Duty — *Exemptions.*

aim the sum of fifteen shillings for fees of Court and expenses, and also, in case the estate and effects shall exceed the value of 100*l.*, the further sum of thirty shillings for stamp duty.

"(5.) Where the estate and effects shall exceed the value of 100*l.*, the stamp duty payable on the affidavit for the Commissioners of Inland Revenue shall be the fixed duty of thirty shillings and no more."

Remarks on sect. 33.

With reference to the provisions of this section it may be remarked that the term "the whole personal estate" is very sweeping, and embraces all personalty whatsoever and wherever situate which passes under a will or intestacy. It expressly or impliedly includes the following items: (1) all personalty subject to a general power of appointment by will (see stat. 23 & 24 Vict. c. 15, sect. 4, *ante*, p. 183); (2) all personalty situate out of the United Kingdom which is not generally liable to probate duty, see *ante*, p. 174; and (3) the surplus property of naval and military officers, sailors, soldiers, and marines, and civil servants, though not in itself exceeding 100*l.* in value: *vide supra.* Moreover, no deduction is allowed for debts or funeral expenses, and it seems doubtful whether any deduction can be made in respect of mortgage debts secured exclusively on leaseholds or policies of assurance, which may, for other purposes than a claim to come under this section, be deducted independently of the provisions of this Act: see *ante*, p. 186. It will also be observed that this section applies only to cases of death on or after the 1st June, 1881, but is not limited as regards the nationality or domicile of the deceased; and that it is optional for the persons seeking representation either to avail themselves of the provisions of the section, or to come under the ordinary law. See further as to the provisions in question, Hanson, Rev. Acts, 1880 and 1881, pp. 36 *et seq.*

Duty on administration bond where estate exceeds 100*l.*

Although the fixed duty is "thirty shillings and no more," where the estate exceeds the value of 100*l.*, but does not exceed the value of 300*l.*, a further sum of five shillings is in such cases payable on the administration bond. As to widows and children of poor intestates, where the value of the

estate does not exceed 100*l.*, see stats. 36 & 37 Vict. c. 52, and 38 & 39 Vict. c. 27. **Probate Duty.** *Exemptions.*

The Act contains the following further provisions with regard to estates alleged not to exceed the value of 300*l.* :—

Provision in case of subsequent discovery that the value of estate exceeded 300*l.*

Sect. 35. "Where representation has been obtained in conformity with either of the two preceding sections, and it shall be at any time afterwards discovered that the whole personal estate and effects of the deceased were of a value exceeding 300*l.*, then a sum equal to the stamp duty payable on an affidavit or inventory in respect of the true value of such estate and effects shall be a debt due to her Majesty from the person acting in the administration of such estate and effects, and no allowance shall be made in respect of the sums deposited or paid by him, nor shall the relief afforded by the next succeeding section be claimed or allowed by reason of the deposit or payment of any sum."

By sect. 36 the payment of the fixed duty of thirty shillings is to be in full satisfaction of legacy duty or succession duty.

Stamp duty on accounts relating to voluntary gifts and settlements.

*Stamp Duty on Accounts.*]—In order to prevent evasion of probate duty it is provided by the Act of 1881, that accounts shall be delivered in certain cases in which it might not be necessary to take out representation, and where consequently no affidavit of value would need to be delivered, and such accounts are to be impressed with stamp duty on the value of the property specified therein at similar rates as are charged on affidavits. The accounts so to be delivered and chargeable with duty are in respect of personal property passing under any voluntary disposition made by any person dying after the 1st June, 1881, and which takes effect either as a *donatio mortis causâ*, or as an immediate gift *inter vivos* made within three months before the donor's death, or as a gift by survivorship to some person to or in whom the donor has transferred or vested the property jointly with himself, or as a settlement whereby a life interest in or a power of revocation over the property is reserved to the settlor. The accounts so delivered are to be verified by oath.

**Probate Duty.**

*Accounts.*

Grant of duties on accounts of certain property.

Sect. 38. "(1.) Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

"(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz. :—

"(*a.*) Any property taken as a *donatio mortis causâ* made by any person dying on or after the 1st day of June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased.

"(*b.*) Any property which a person dying on or after such day having been absolutely entitled thereto has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

"(*c.*) Any property passing under any past or future voluntary settlement, made by any person dying on or after such day by deed, or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

"(3.) Where an account delivered duly stamped comprises property passing under a voluntary settlement, and upon the production of the settlement it shall appear that the stamp duty of five shillings per centum has been paid thereon according to the amount or value of the property so passing, or any part thereof, the amount of such stamp duty shall be returned to the person delivering the account."

Remarks on sects. 38 and 39.

With regard to these sections the following points are to be observed :—

Where the value of the estate does not exceed 100*l.* no stamp duty or any affidavit is imposed by this Act (see sect. 33, *ante*, p. 195), if therefore an

account is delivered under sect. 38, showing a value not exceeding 100*l.*, no stamp duty will be payable thereon. Probate Duty. *Accounts.*

If the value exceeds 100*l.*, but not 300*l.*, the practice appears to be to hold the account exempt from duty (see Hanson, Rev. Acts, 1880 and 1881, p. 44); but it seems open to some doubt whether the account in such cases would not be strictly chargeable with duty at the fixed "rate" of 30*s.*, such as is imposed on the affidavit in like cases by sect. 33 (5).

The duty on these accounts is apparently payable only in respect of any particular gift exceeding 100*l.* (or perhaps 300*l.*) in value. In the case therefore of several voluntary gifts by the same person exceeding to any extent in the aggregate the amount exempt from stamp duty, no duty would seem to be payable except in respect of such of the gifts (if any) as of themselves exceed that amount.

A *donatio mortis causâ* is the delivery of property by a person who is, or believes himself to be, at the point of death by way of gift to another person conditioned to take effect only in the event of the death of the donor by the particular illness affecting him at the time of the gift: see Wms. Exors. 771. If the donor dies this operates as a legacy, if he recovers the property reverts to him: per Lord *Cowper* in *Hedges* v. *Hedges,* Prec. Ch. 269; see also *Duffield* v. *Elwes,* 1 Bli. N. S. 530; *Tate* v. *Hilbert,* 2 Ves. Jun. 290; *Miller* v. *Miller,* 3 P. Wms. 357. *Donatio mortis causâ.*

A voluntary disposition means a disposition not made in consideration of money or money's worth, or marriage. Voluntary dispositions.

A post-nuptial settlement unless made pursuant to ante-nuptial articles is a voluntary disposition, and is evidently liable to duty under this Act. A settlement of leasehold property has been held not to be a voluntary conveyance under the stat. 27 Eliz. c. 4, on the ground that the liabilities which the assignee incurs in respect of the lessee's covenants and conditions in the lease are, in themselves, a valuable consideration: *Price* v. *Jenkins,* 5 Ch. D.

Probate Duty. *Accounts.*

619. Assuming the lease to be beneficial it seems to be open to doubt whether the settlement thereof, except on marriage, would not be liable to duty as a voluntary disposition within the meaning of sect. 38.

Joint investments.

Clause *b* of sect. 38 (2) is aimed at attempts to evade probate duty by means of gifts by way of transfer into, or investment in the joint names of the donor and another person, as where money is deposited in a bank, or stocks, shares, or securities are purchased in the names of a man and his wife or child, in which cases the presumption in law is that the surviving wife or child should take the property beneficially (*n*). But similar transfers of investments in the joint names of the donor and a stranger would equally be within the mischief of this enactment, though no such presumption arises in such cases, if it appears that the transaction was in intention a gift conferring a contingent benefit of survivorship. Of course, however, the enactment does not apply to a transfer of property into the joint names of the original holder and another person for valuable consideration, nor to a purchase of stock, &c., in the joint names of several persons who contribute to make up the purchase-money, with the intention that the survivor shall take the whole property beneficially; and it would seem that the enactment does not apply to policies of assurance effected by a husband on his own life for the benefit of his wife if she should survive him, nor to other survivorship policies, nor to policies within the Married Women's Property Act, 1870.

Voluntary settlements.

Clause *c* applies only to property which continues subject to the trusts of the settlement up to the testator's death, and not to property which though originally included in the settlement has been taken out of it by the exercise of any power of appoint-

(*n*) Where a father purchases property in the name of a child there is a *primâ facie* presumption that it was intended as an advancement, but this presumption may be rebutted by declarations or acts of the father, and particularly if he retains possession of the property: *Damper* v. *Damper*, 3 Giff. 583; *Sidmouth* v. *Sidmouth*, 2 Beav. 447.

Probate Duty.

*Accounts.*

ment or otherwise; see, however, as to the liability of property so taken out to succession duty *post*, Chap. IV. of this Dissertation.

What will amount to a reservation of a life interest.

R. C., in exercise of a power contained in articles of partnership, appointed and transferred to his sons his shares in the partnership business, as from a future date specified or as from his own death, whichever should first happen, upon condition that the sons should on the specified date execute a deed of covenant for payment to R. C. thenceforth during his life interest at the rate of 4 per cent. on the value of the shares appointed: it was held that the transfer of the shares was a voluntary settlement within the meaning of sect. 38 (2) of this Act, and that a life interest in the property transferred was reserved to the settlor, and accordingly that upon his death the stamp duty was payable upon the value of the shares transferred: *Crossman* v. *The Queen*, 18 Q. B. D. 256.

Where a settlor by a voluntary settlement assigned a sum of money to trustees upon trusts therein mentioned, and it was thereby declared that the trustees should during the life of the settlor apply the income for the benefit of the settlor and his wife and children, or at their discretion for the benefit of such one or more exclusively of the others or other of such objects of the trust, and after the decease of the settlor should hold the property upon certain trusts for the benefit of the wife and children: it was held a life interest was by the settlement reserved to the settlor, and that upon his death the trust fund was liable to duty under this section: *Att.-Gen.* v. *Heywood*, 19 Q. B. D. 326.

Double duty.

*Penalty for Default in taking out Representation, &c.*]—By sect. 40 of the Act of 1881 any person who ought to obtain probate or letters of administration, or to deliver an affidavit, or account, and who neglects to do so within the prescribed time, is made personally liable to pay to the Crown double the amount of the duty chargeable.

# CHAPTER III.

## LEGACY DUTY.


| | PAGE |
|---|---|
| *Rates of Legacy Duty* | 202 |
| *Enactments relating to Legacy Duty* | 205 |
| *Stat.* 36 *Geo.* 3, *c.* 52 | 205 |
| *Stat.* 39 *Geo.* 3, *c.* 73 | 210 |
| *Stat.* 42 *Geo.* 3, *c.* 99, *sect.* 2 | 210 |
| *Stat.* 45 *Geo.* 3, *c.* 28, *sect.* 4 | 211 |
| *Stat.* 8 *& 9 Vict. c.* 76, *sect.* 4 | 211 |
| *Stats.* 43 *Vict. c.* 14, *and* 44 *Vict. c.* 12 | 212 |
| *What Dispositions are Chargeable with Duty* | 213 |
| *Domicil* | 215 |
| *Appointments by Will under General and Limited Powers* | 221 |
| *Rentcharges, &c.* | 224 |
| *Proceeds of Sale of Real Estate* | 224 |
| *Release of Debt* | 228 |
| *Accretions to Capital* | 229 |
| *Retainer and Payment of Legacies* | 231 |
| *Liability of Executors, &c., as to Payment of Duty* | 236 |
| *Gifts Free of Legacy Duty* | 240 |
| *Statutory Exemptions from Legacy Duty* | 246 |


**Legacy Duty.**

*Rates of Duty.*

*Rates of Legacy Duty.*]—The legacy duty was first imposed by stat. 20 Geo. 3, c. 28, and was increased and subjected to various regulations by several succeeding Acts. (23 Geo. 3, c. 58; 29 Geo. 3, c. 51; 36 Geo. 3, c. 52; 44 Geo. 3, c. 98; 45 Geo. 3, c. 28; 48 Geo. 3, c. 149). The present rate of duty was fixed by the stat. 55 Geo. 3, c. 184, the third part of the schedule to which (as amended by the stats. 8 & 9 Vict. c. 76, s. 4, and 44 & 45 Vict. c. 12, s. 42), imposes on "Legacies and Successions to personal or moveable estate upon intestacy where the testator, testatrix, or intestate shall have died after the 5th April, 1805," the duties following, that is to say:—

Stat. 55 Geo. 3, c. 184; sched. pt. 3.

Amount of duty where testator died after 5th of April, 1805.

Legacy out of personal or real estate.

For every legacy (*a*), specific or pecuniary, of any other description, given by any will or testamentary instrument, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof (*a*).

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(*a*) The word legacy in this Act is to be interpreted by the definitions contained in the prior Acts of 36 Geo. 3, c. 52, and 45 Geo. 3, c. 28, and the stat. 8 & 9 Vict. c. 76, stated *infra*, p. 211.

**Legacy Duty.**

*Rates of Duty.*

Also, for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate of any person (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy.

Residue under will or intestacy.

And also, for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons), of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any).

Residue of money directed by will to be raised out of real estate.

Where any such legacy, &c., shall have been given, or have devolved to or for the benefit of a child of the deceased, or any descendant of any child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased, a duty at and after the rate of 1*l.* per centum on the amount or value thereof.

Child or ancestor, or issue of child, 1 per cent.

Where any such legacy, &c., shall have been given, or have devolved, to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, at duty at and after the rate of 3*l.* per cent. on the amount or value thereof.

Brother or sister, or issue of brother or sister, 3 per cent.

Where any such legacy, &c., shall have been given, or have devolved, to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased, a duty at and after the rate of 5*l.* per centum on the amount or value thereof.

Uncle or aunt, or issue of uncle or aunt, 5 per cent.

Where any such legacy, &c., shall have been given, or have devolved, to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, a duty

Grand uncle or grand aunt, or issue, 6 per cent.

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It therefore includes donations *mortis causâ*, and appointments of personal estate under a general power: *Re Cholmondeley*, 1 Cr. & M. 149; and it is immaterial that the power is contained in a will, and relates to personal estate, so as to be subject to legacy duty also under that will. And a power to appoint by will only "to any person or persons, except A. and his relations, B. and his relations, and the relations of C., deceased," has been held to be a general power to dispose of the property as the donee shall think fit (and also a general and absolute power within the 36 Geo. 3, c. 52, s. 18), so as to make any interest appointed by will liable to the claims of creditors, and to legacy duty: *Platt* v. *Routh*, 6 M. & W. 756; 3 Beav. 257.

**Legacy Duty.**

*Rates of Duty.*

at and after the rate of 6*l.* per centum on the amount or value thereof.

Other collateral relation or stranger, 10 per cent.

And where any such legacy, &c., shall have been given, or have devolved, to or for the benefit of any person, in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased, a duty at and after the rate of 10*l.* per centum on the amount or value thereof.

Annuities.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

Legacies under 20*l.*

The stat. 55 Geo. 3, c. 184, contained an exemption in favour of all legacies, specific and pecuniary, of a less amount or value than 20*l.*; but such exemption is now restricted to specific legacies by the stat. 44 & 45 Vict. c. 12, sect. 42, and is subject to the following qualification contained in the former Act:—

"And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary disposition, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, although each or either may be separately under that amount or value."

See further as to exemptions from legacy duty, *post*, p. 246.

Illegitimate children.

A child born out of wedlock is according to the laws of this country deemed to be *filius nullius*, and accordingly a legacy to an illegitimate child will be liable to legacy duty at the rate of 10*l.* per cent. as being given or having devolved to or for the benefit of a stranger in blood of the deceased. But where land in England was devised to trustees by a British subject domiciled in France upon trust to sell and to pay the proceeds of sale to his daughters born of a French mother before marriage, but legitimated on the occasion of the marriage, according to the law of France, by a declaration of the father and mother, it was held that the gift was liable to legacy duty at the rate of 1 per cent. only: *Skottowe* v. *Young*, L. R. 11 Eq. 474. See also *Re Goodman's Trusts*, 17 Ch. D. 266. But it may be doubted whether this excep-

tion to the general rule would hold good in the case of natural children recognized, and as such allowed to inherit or take property in a foreign country, but not fully *legitimated* by marriage of the parents or otherwise: see *Atkinson* v. *Anderson,* 21 Ch. D. 100, stated *post,* p. 252.

Legacy to a married woman.

The duty on a legacy to a husband or wife of a person who is related to the testator, is calculated in respect of that relationship although the husband or wife is a stranger or related in a more remote degree: see stat. 18 & 19 Vict. c. 51, sect. 11 (*b*).

Legacy to husband and wife.

And where a legacy is given to a husband and wife, either absolutely or for their lives, the duty is payable as if one moiety had been given to the husband and the other to the wife: *Att.-Gen.* v. *Bauhns,* 9 Price, 30; 11 Price, 546; *Att.-Gen.* v. *Burnie,* 3 Y. & J. 531.

*Enactments relating to Legacy Duty.*]—The following is a summary of the principal enactments now in force relating to legacy duty. Other statutory provisions will be noticed in the course of this Dissertation.

36 Geo. 3, c. 52.

Duty to be paid by executors, &c., on retainer or payment of legacy.

The stat. 36 Geo. 3, c. 52 (*c*), enacts, in sect. 6, that the duties shall, in all cases not otherwise provided for, be paid by the executors or administrators, on retainer or payment of the legacies, residue, or shares of residue charged. If not paid, the duty is to be a debt to the Crown from them; and if the legacies are paid without deducting the duty, to be a debt to the Crown from the legatee also (*d*).

Gifts of personalty under general powers to be deemed legacies.

Sect. 7. Every testamentary gift, having by virtue of the will effect, or to be satisfied out of the testator's personal estate, or personal estate which he has power to dispose of as he thinks fit, to be deemed

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(*b*) The case of a legacy *given by* the husband or wife of a person who is related in a nearer degree to the legatee than the testator or testatrix is not provided for.

(*c*) The corresponding Act with regard to legacy duty in Ireland is the stat. 54 Geo. 3, c. 92.

(*d*) But not a charge on the residuary estate, if the legacy is paid without paying the duty: *Wright* v. *Barnewall,* 13 Jur. 1041.

Legacy Duty.

*Enactments relating to Duty.*

a legacy, whether given by way of annuity or not, and whether charged only on the personalty, or on the personalty and also on real estate, except so far as the same shall be satisfied out of the realty, and every donation *mortis causâ*. (But see now, 45 Geo. 3, c. 28, and 8 & 9 Vict. c. 76, s. 4, *infra*.)

Annuities.

Sect. 8. The value of any legacy by way of annuity, whether payable annually or otherwise, for life or years determinable, or for years or other period of time, shall be calculated according to the tables in the schedule to the Act, without regard to any contingency (besides death) by which the annuity may be determined. And the duty is to be paid by four equal payments during the first four years. But if actually determined by any contingency besides death, any excess of duty actually paid beyond the amount which would have been payable on an annuity of the same amount for a fixed term equal to the actual duration of the annuity, shall be returned. (See now, 16 & 17 Vict. c. 51, sect. 31, *post*, p. 260).

Legacy charged with annuity.

Sect. 9. The duty on a legacy charged with an annuity is to be calculated on the amount or value of the legacy after deducting the value of the annuity according to the tables ; but the duty on the annuity is to be paid by the legatee by four yearly payments, and deducted from the annuity.

Legacy to purchase annuity.

Sect. 10. The duty on a legacy given by a direction to purchase an annuity is to be reckoned on the value, according to the tables, and paid at once. The annuity to be purchased is to be reduced proportionably.

Value of benefit not ascertainable beforehand.

Sect. 11. If a benefit is given in such terms that the amount or value cannot be ascertained beforehand under any of the directions in the Act, the duty is to be charged on the several sums of money or effects which shall be applied from time to time for the purposes directed, as separate and distinct legacies, and be paid out of the fund applicable for the purpose.

Legacy to be enjoyed by several in succession.

Sects. 12, 13, 14, 15. In the case of a legacy to be enjoyed in succession, life interests are to be

treated as annuities, and the duties on the successive interests are to be paid as they fall into possession, unless all are chargeable at the same rate; in which case they are to be paid by the executor at once, out of the capital, upon payment to any trustee. But no duty is to be paid on plate or other things not yielding income, given to be enjoyed in specie by persons successively, until the property vests in possession or is actually sold; in which case, the person taking the absolute interest is to pay the duty, and the executor, having previously assented to the bequest, is not to be liable.

Plate, &c., not to be sold.

Sect. 16. The duty on a joint legacy to persons, some being chargeable and others not, is to be paid in proportion to their respective interests, originally or by survivorship.

Joint legacy.

Sect. 17. A legacy defeasible on a contingency (not being an annuity) is charged as an absolute gift; and if by the contingency it goes over to a person liable to a higher rate of duty, the difference is to be paid (*f*).

Defeasible legacy.

Sect. 18. A power to appoint a legacy or residue to or in favour of any person or persons specially named or described, is, when exercised, to be considered as a legacy to the appointee or appointees. And a general power of appointment given to a person to whom the property would not belong in default of appointment, is, when exercised, to be deemed a legacy to such person.

Legacy subject to power of appointment.

Sect. 19. Money or personalty directed to be laid out in land is to be charged as personalty. But if given to be enjoyed by different persons in succession, no duty is to accrue after it has been actually laid out in realty (*g*).

Money, &c., to be laid out in land.

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(*f*) It will be observed that while it is here provided, reasonably enough, that upon the happening of a contingency which transfers a legacy from one person to another, the substituted legatee, if chargeable with a *higher* rate of duty than that which has already been paid by the prior or original legatee, shall pay the difference of duty, the Act does not provide that in the converse case, where the substituted legatee would be liable to a *lower* rate of duty, the difference shall be returned.

(*g*) See *De Launcey* v. *The Queen*, L. R. 7 Ex. 140.

Legacy Duty.

*Enactments relating to Duty.*

Estate *pur autre vie.*

Sect. 20. Estates *pur autre vie*, applicable by law as personalty, to be charged.

Money to pay duty.

Sect. 21. Money left to pay legacy duty not to be charged.

Value of property not reduced to money.

Sect. 22. Property not reduced into money during the admininistration to be valued by the parties, or, at the option of the Commissioners, by an appraiser appointed by the Commissioners, with an appeal to the Commissioners of Land Tax (*h*).

Legacies not paid in full.

Sect. 23. The duty on legacies not paid in full, or not satisfied in money, to be paid on the amount or value of the composition or satisfaction.

Legatees refusing to allow duty.

Staying proceedings.

Sect. 24. If legatees refuse to accept legacies duty deducted, the Court, in case of suit, may order them to pay costs ; and in a suit the defendant may have proceedings stayed on payment of bequests, deducting duty.

Administration suit.

Sect. 25. In an administration suit the Court is to provide for the payment of the duty (*i*).

Payment by executors.

Sect. 26. Executors may pay legacies, or parts of legacies, or a residue, on payment of duty accrued.

No legacy to be paid without receipt containing certain particulars.

Sect. 27. No legacy, &c., liable to duty to be paid without a receipt containing the date of the payment, the names of the testator or intestate, the person paying, and the legatee or next of kin, the amount or value of the legacy, &c., and the amount and rate of the duty ; and no written receipt for any legacy, &c., charged with duty shall be received in evidence or be available in any manner unless stamped as required by the Act ; and no evidence shall be given of the payment of any legacy, &c., without producing such receipt duly stamped, unless

Receipt to be stamped.

No evidence of payment of legacy available without proof of payment of duty.

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(*h*) A residuary account was brought in shortly after the death of a testatrix, and accepted, setting a value upon certain pictures, &c. ; subsequently the executor in the course of administration sold the articles for a sum largely in excess of the value upon which duty had been paid : it was held that the Crown was entitled to duty on the actual proceeds of sale : *Att.-Gen.* v. *Dardier*, 11 Q. B. D. 16.

(*i*) The pendency of a suit does not excuse the executor from his present liability for duty on a legacy which he has actually paid : *Re Sammon*, 3 M. & W. 381. See *Foster* v. *Ley*, 2 Sc. 438 ; *Hicks* v. *Keat*, 3 Beav. 141.

the actual payment of the duty be first given in evidence (*k*). Provided, that a copy of the entry of payment in the books of the Commissioners shall be evidence (*l*); and no payment of an annuity, &c., shall be within this section, except the payments completing the payments for each of the first four years.

Penalty.

Sect. 28. Penalty of 10 per cent. for paying or receiving legacies without stamped receipts.

Time for stamping.

Sect. 29. Receipts to be stamped within twenty-one days after date, on which an acknowledgment of payment of duty shall be written : may be stamped within three months after date, on payment of duty and 10 per cent. penalty. (By 48 Geo. 3, c. 149, s. 44, receipts may be stamped after the three months, on payment of the penalty ; and if a receipt signed out of Great Britain is brought to be stamped within twenty-one days after its being received in Great Britain, the penalty may be remitted).

Rectifying mistakes.

Sect. 30. Mistakes in paying duty may be rectified before suit, on payment of the difference within three months, and 10 per cent.

Indemnity.

Sect. 31. Indemnity to approvers.

Payment of legacies belonging to persons under age or beyond seas.

Sect. 32. If from the infancy or absence beyond seas of a legatee, the legacy cannot be paid, it may be paid into the Bank to the account of the legatee, to be invested in Consols (*m*). If improperly paid

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(*k*) If the fact of payment of duty is first proved by any means, a release for the legacy stamped like a release of any other demand will be admissible ; and if the legatee release the legacy without receiving it, or release particular property, retaining his demand against other property, such release is not within the above enactment. See sect. 23.

(*l*) This copy must be proved, like any other copy. A copy signed by the comptroller of the stamp duties is not admissible, though his signature be proved : *Harrison* v. *Borwell*, 10 Sim. 380.

(*m*) See *Whopham* v. *Wingfield*, 4 Ves. 630 ; *Wilson* v. *Brownsmith*, 9 Ves. 180. In *Rimell* v. *Simpson*, 18 L. J. Ch. 55, a decree was made against executors, with costs, for payment of a legacy with 4 per cent. interest, which they had invested in Consols instead of paying into the Bank, although, by so doing, the expenses of getting the fund out of Court was saved. In the case of an adult legatee of weak intellect, the executors were held justifiable in investing the legacy and accumulating the dividends: *Pothecary* v. *Pothecary*, 18 L. J. Ch. 48.

Legacy Duty. *Enactments relating to Duty.*

in, the Court of Chancery may dispose of it. If duty overpaid, excess may be returned; if less, the Court may order the deficiency to be paid. (The 37 Geo. 3, c. 135, provides for the filing of the accountant-general's certificates and drafts, and authorises the Court to make orders respecting the monies paid in).

Compounding for duty.

Sect. 33. Power to compound for duty, if it appear at the end of two years from death that it will require time to ascertain the residue. Receipts not then to be required. Duty to be paid on any part of estate not included in the composition.

Legacy refunded.

Sect. 34. If legacy be refunded, duty to be repaid on proof.

Retainer by executor.

Sect. 35. Executors, before retaining their own legacies, to transmit the particulars with the duty to the commissioners (*n*). Penalty of treble the duty.

Payments under void authority.

Sect. 37. Improper payments under void authority to be refunded. Proper payments under void authority to be allowed (*o*).

Receipts.

Sect. 41. Receipts duly stamped under the Act to be free from other duties on receipts.

39 Geo. 3, c. 73. Gifts of specific articles to certain societies, schools, &c.

By the 39 Geo. 3, c. 73, (passed on occasion of the Cracherode gift to the British Museum) legacies of books, prints, pictures, statues, gems, &c., or other specific articles bequeathed to or in trust for any body corporate, aggregate, or sole, the Society of Serjeants' Inn, or any of the Inns of Court or Chancery, or any endowed school, in order to be kept by such body corporate, society, or school, and not for sale, are exempt from duty.

42 Geo. 3, c. 99, s. 2.

By the 42 Geo. 3, c. 99, s. 2, where executors, &c., have not paid the duty, the Court may grant

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(*n*) See as to Ireland, stats. 54 Geo. 3, c. 92, s. 37, and 56 Geo. 3, c. 56, s. 128.

(*o*) Thus, where probate of a will was revoked on the ground of the insanity of the deceased, the supposed residuary legatee and executor, who had previously paid duty at 10*l.* per cent. on the whole residue, recovered back the excess of duty on the whole amount, including upwards of a moiety of the residue, which he was allowed by the next of kin to retain by way of compromise: *Reg.* v. *Commissioners of Stamps*, 6 Q. B. 657.

a rule against them to deliver in an account on oath of legacies paid. See *Re Pigott*, 1 Cr. & M. 827; *Re Sammon*, 3 M. & W. 381.

Enforcing payment of duty.

Under the 36 Geo. 3, c. 52, legacies were only liable to duty so far as they were paid out of the personal estate. But the 45 Geo. 3, c. 28, s. 4, charged the duty on every testamentary gift taking effect out of personal estate which the deceased had power to dispose of as he thought fit, or charged upon or made payable out of any real estate or the proceeds of the sale of any real estate which the deceased had power to dispose of, whether given by way of annuity or in any other form, except appointments of specific sums or shares thereof under a power in any marriage settlement or deed or deeds.

45 Geo. 3, c. 28, s. 4.

Legacies and annuities charged on land.

Sect. 5. The duties on legacies out of real estates to be paid by the trustees or devisees thereof.

By whom to be paid.

The exception in the last mentioned enactment extended to appointments under a power contained in deeds which were not marriage settlements: *Att.-Gen.* v. *Hertford*, 14 M. & W. 285; and the enactment has been superseded and greatly extended by the 8 & 9 Vict. c. 76, s. 4, which enacts:—

8 & 9 Vict. c. 76, s. 4.

"That from and after the passing of this Act every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of, or which gifts is or shall be payable or shall have effect or be satisfied out of or is or shall be charged or rendered a burden upon the real or heritable estate of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath had or shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any monies to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate, or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causâ*, shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and shall be subject and liable to the said duties accordingly: Provided always, that no

Legacy duty to be paid on donations *mortis causâ*, and on all monies charged by will under any power, except appointments under powers in marriage settlements in favour of persons designated.

**Legacy Duty.**

*Enactments relating to Duty.*

sum of money which by any marriage settlement is or shall be subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties on legacies under the will in which such sum is or shall be appointed or apportioned in exercise of such limited power."

By sect. 11 of the stat. 43 Vict. c. 14, sect. 11, it is enacted as follows :—

Power to commute legacy or succession duty presumptively payable in certain cases.

"Where any legacy duty or succession duty shall be presumptively payable in respect of any interest in expectancy upon the determination of a life or other temporary interest in possession in a legacy, or residue, or in personal property comprised in a succession, and the duty (if any) payable upon the life or other temporary interest shall have been fully paid and satisfied, it shall be lawful for the Commissioners of Inland Revenue, in their discretion, upon the application of the executor or trustee or other person who would be accountable for the duty in respect of such interest in expectancy if it were then in possession, to commute the duty presumptively payable, for a certain sum to be presently paid.

"For assessing the amount which shall be so payable, the Commissioners shall cause a present value to be set upon the presumptive duty, regard being had to any contingencies affecting the liability to such duty, and the interest of money involved in the calculation being reckoned at the rate for the time being, allowed by the Commissioners in respect of duties paid in advance, under the Succession Duty Act, 1853.

"Upon receipt of the certain sum the Commissioners shall give a discharge for the duty accordingly."

It will be observed that this enactment applies only to commutations of future claims after all present claims have been satisfied; but by sect. 43 of the stat. 44 Vict. c. 12, full powers to compound all claims, present as well as future, are now vested in the Commissioners. This enactment is as follows :—

Power to Commissioners to accept composition for legacy duty under a will.

"It shall be lawful for the Commissioners of Inland Revenue, upon the application of the person acting in the execution of the will of any deceased person, and upon the delivery to them of an account showing the amount of the estate and effects in respect whereof legacy duty is payable, together with the names or description of class of the persons entitled thereto and every part

thereof, in possession or expectancy, and their degrees of consanguinity to the testator, to assess the duty upon the amount shown by the said account at such a sum by way of composition as, having regard to the circumstances, shall appear to be proper, and to accept payment of the duty so assessed in full discharge of all claims for legacy duty under such will.

"If the Commissioners are of opinion that an application should receive the assent of any person, they shall refuse to entertain the application until such assent shall have been given."

And the stat. 43 Vict. c. 14, sect. 12, enacts as follows:—

Discharge of executor, &c., from claim to duty on distribution of fund.

"When an executor, administrator, or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to legacy duty or succession duty in respect of any funds in his hands which he intends to distribute, and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund.

"Such certificate shall not in any way affect the liability of any persons other than the person in whose favour it is expressed to be given."

Legacy duty chargeable on testamentary dispositions.

*What Dispositions are chargeable with Duty.*]—Legacy duty is only chargeable on such dispositions as are testamentary. "A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place, as passing that interest to be conveyed, at the execution. But a will is quite the reverse: it can only operate after death . . . The cases have established, that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will:" per *Buller*, J., in *Habergham* v. *Vincent*, 2 Ves. jun. 231.

The definition given by Carth. 38 is perhaps more exact, in that "a will is a declaration of the mind, either by words or writing, in disposing of an estate, and to take place after the death of the testator."

Legacy Duty.

*Dispositions Chargeable with Duty.*

Will, with other matter *inter vivos.*

That is to say, the disposition must be wholly inoperative during the testator's life, in respect of the estate or interest which is to be enjoyed after his death. It may be operative in other respects during his life, without destroying its testamentary character, as in *Doe* v. *Cross*, 8 Q. B. 714, where a soldier in service in the East Indies executed a paper, attested by two witnesses, in the form of a power of attorney appointing his mother to receive the rent of a house, &c., and, in the event of his death before his return to England, disposing of the property. This was held to be a will, with a power of attorney on the same paper. If the estate had passed immediately with a power of revocation, it would have been different. The distinction between a will which has no present operation, and a conveyance or assignment operating at once, though only to pass a future interest which may be contingent or revocable, is illustrated by *Audley's Case*, Dy. 166, 4 Leon. 166.

Revocable settlement in lieu of will.

In *Att.-Gen.* v. *Jones*, 3 Price, 368, an assignment of personal property upon trust for the assignor himself for life, and after his decease for a daughter, with a power of revocation, was held, on an information for legacy duty, to be testamentary. The decision has been generally disapproved of, and seems to have been overruled in *Thompson* v. *Browne*, 3 My. & K. 32, where it was held, that a reservation of a life interest to the assignor, with a power of revocation, would not make an assignment of personal property testamentary. At the present time, however, although the property would escape duty under the Legacy Duty Acts, it would be clearly liable to succession duty under the stat. 16 & 17 Vict. c. 51, including the additional duties imposed by the stat. 51 Vict. c. 8, sect. 21.

In the Ecclesiastical Court, probate has been granted of an assignment of a bond by indorsement, receipts for stock and bills indorsed, letters, marriage articles, promissory notes, and notes made payable by executors in order to avoid the legacy duty. See the cases cited in *Masterman* v. *Maberley*, 2 Hagg. 235; all of which, however, are not to be implicitly

relied on : *Jones* v. *Nicholay*, 14 Jur. 675 ; *Re Knight*, 2 Hagg. 554.

Legacy Duty.

*Dispositions Chargeable with Duty.*

In *Fletcher* v. *Fletcher*, 4 Hare, 67, E. Fletcher executed a deed of covenant with trustees, that, in case his natural sons or either of them should survive him, his executors or administrators should pay 60,000*l.* to the trustees, on certain trusts for the benefit of the sons. He did not communicate this deed either to the trustees or to the sons, and kept it in his own possession until his death. This deed was held not to be testamentary, and, the trustees refusing to sue, to give the sons a valid claim against the assets in equity. See *Savage* v. *Lane*, 6 Hare, 32. The question of the form and characteristics of wills will be more fully considered, *post*, pp. 304 *et seq.* See also Jarman on Wills, Chap. ii.

Deed of covenant retained by covenantor.

*Domicil.*]—The operation of the Stamp Acts is confined to the United Kingdom. Contracts and deeds made abroad will be received in evidence in British Courts, although they do not bear the stamps which must have been impressed upon them if they had been executed here : *ante*, p. 33, and see Vol. I., p. 391. The probate duty, being the price paid for the assistance of the Ecclesiastical Court, is regulated by the extent of its jurisdiction, and that depends upon the local situation of the property. The legacy duty is a tax imposed upon so much of the personal property of every individual (whether a British subject or not, *Re Coales*, 7 M. & W. 395), who dies domiciled in England, as is disposed of by his will, or is distributed under the statute. The liability to legacy duty, therefore, depends, not upon the actual locality of the property, but upon its locality in the eye of the law, depending (as its name indicates) upon the domicil of the person of the owner.

Stamp laws confined to Great Britain.

Probate duty depends on local situation of the property.

Legacy duty depends on the domicil of the testator or intestate.

First. If the deceased was domiciled in the United Kingdom, and his personal representatives prove the will, or obtain a grant of administration here, they must account for legacy duty on the whole of the moveable personal estate, even though it be wholly or in part recoverable and administered abroad, and paid to legatees residing abroad.

**Legacy Duty.**

*Domicil.*

Secondly. But as the duty is only charged in this country, and on appropriations and payments by executors or administrators of the estates of deceased persons, executors deriving their authority solely from a foreign probate, are not bound to pay legacy duty on the assets which they collect abroad, even though they transmit them to legatees in this country; nor are the legatees liable. This was decided where the fund was transmitted to England, and paid into Court, and the rights of the legatees in England were decided in a suit between them and two of the executors: *Att.-Gen.* v. *Forbes* or *Jackson*, *infra*.

Thirdly. If the owner (even though a British subject dying in this country) had at the time of his death a foreign or colonial domicil, his property locally situate in this country, even though administered here, and for the benefit of legatees or next of kin domiciled in this country, is exempt from the duty (*q*).

The modern decisions appear to support these propositions in all their generality, and to overrule some earlier authorities to the contrary. The cases are as follow:—

*Re Ewin*

Legacy duty payable in respect of personal property situate abroad, of person domiciled here.

In *Re Ewin*, 1 Cr. & J. 151, it was held, that personal property situate abroad (namely, American, Austrian, French, and Russian funds, which funds were transferable and the dividends payable abroad), belonging to a testator who died domiciled in England, being dealt with by the executor in England, subjected him to payment of the duty. The same point was decided, in respect of property situate in India, in the case of *Re Coales*, 7 M. & W. 390, where the executor in England had received the property from an administrator in India. The

*Re Coales.*

(*q*) In questions of domicil with reference to a law not extending to all parts of the British Dominions, domicil in a colony or other place to which the law does not extend, is equivalent to domicil in a country subject to a different government. Thus, India is a foreign country with reference to our stamp laws, while Scotland is a foreign country as to the laws relating to the distribution of personal estate, though not as to the stamp laws.

testator was a British subject, though not so by birth, and was domiciled in England when he died.

Legacy Duty.
*Domicil.*

In *Att.-Gen.* v. *Cockerell*, 1 Price, 165, it was held, that the duty was payable on legacies bequeathed by a British subject who died domiciled in India, whose property was situate in India at the time of his death, whose executors proved the will there: such legacies having been paid in England to legatees there, out of funds transmitted from India to executors who had proved the testator's will in England. The same point was decided in *Att.-Gen.* v. *Beatson*, 7 Price, 560. See also *Logan* v. *Fairlie*, 2 S. & St. 284. These decisions have, however, been overruled by the House of Lords in *Att.-Gen.* v. *Jackson*, 8 Bligh, 15; *S. C.*, nom. *Att.-Gen.* v. *Forbes*, 2 Cl. &. F. 48; *S. C.*, nom. *Jackson* v. *Forbes*, 2 Cr. & J. 382. In that case, a native of Scotland, domiciled in India, died there, leaving personal property there, but none in England. His executors in India proved his will there, and not in England, paid his debts and pecuniary legacies, converted the residue of his estate into money, which they sent to England to be invested in their names, and two of them subsequently came to England. A suit having been instituted in England to ascertain the rights of the residuary legatees, the fund was transferred to the account of the Accountant-General. It was held by Lord *Brougham*, C., by the Court of Exchequer, on a case sent from the Court of Chancery to them, and finally by the House of Lords, that no duty was payable in respect of any of the specific or residuary legacies, some of which were given to parties domiciled in Great Britain at the time of the testator's death.

Legacy duty not payable on personalty in this country belonging to person domiciled abroad.

*Att.-Gen.* v. *Jackson.*

In that case there was no personal representative in this country; but in the subsequent case of *Arnold* v. *Arnold*, 2 M. & Cr. 256, it was held that the personal assets situate in India of a testator who was domiciled and made his will in India were not subject to legacy duty, although such assets were afterwards remitted to this country, by an executor who had proved the will in India, to executors who had

*Arnold* v. *Arnold.*

**Legacy Duty.**

*Domicil.*

proved the will in this country, to be administered here.

*Commissioners of Charitable Donations* v. *Devereux.*

In the case of *Commissioners of Charitable Donations* v. *Devereux*, 13 Sim. 14, the legacy duty was held not to be payable under the following circumstances: — A British subject in 1776 settled in France, and obtained letters of naturalization there. During the revolution he fled to England, and his property in France was confiscated. In 1802 he returned to France, and as a British subject claimed the compensation for his lands. He remained in France until his death in 1806, having, by a will made there, and confirming a will previously made in England, given part of his property, including the expected compensation, to be applied in Ireland to charitable uses. His will was proved in France and in England. In 1820, the expected compensation was awarded by the Commissioners, in the form of a sum of French rentes, and transferred in France to an agent for the executor in England, against whom the present bill was filed on behalf of the charity, for an account. The property, therefore, was not locally situate in this country; and it was principally contended, on behalf of the Crown, that an Englishman could not acquire a foreign domicil so as to avoid the legacy duty. But *Shadwell*, V.-C., said :—"The question here seems to be, not to whom the party owed allegiance, but where he was domiciled at his death, and there can be no doubt but that he was domiciled in France. His will also was French, and the property to be administered was in its essence and origin French; and though the title to it arises out of British allegiance, that does not affect the question. There is no difficulty whatever in the case; the domicil of the party being French, the will French, and the property French."

*Thompson* v. *Adv.-Gen.*

The rule that legacy duty is not, under any circumstances, payable in respect of personal property bequeathed by a testator who was not domiciled in Great Britain or Ireland at the time of his death, was finally established by the decision of the House of Lords in the case of *Thompson* v. *Att.-Gen.*, 12

Legacy Duty.
*Domicil.*

Cl. & F. 1. In that case the testator was a native of Scotland, but died domiciled in Demerara, possessed of personal property in Scotland, which by his will he bequeathed to persons in that country. The question as to the liability of those bequests to legacy duty, came in the first instance before the Scotch Court of Exchequer, who held that legacy duty was payable; but this decision was reversed by the House of Lords, who heard the case with the assistance of the judges. *Tindal*, C.J., in delivering the unanimous opinion of the judges that no legacy duty was payable under the circumstances, said:—"It is admitted in all the decided cases that the very general words of the statute, 'Every legacy given by any will or testamentary instrument by any person,' must of necessity receive some limitation to their application; for they cannot in reason extend to every person everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad; and as your Lordships' question applies only to legacies out of personal estate, strictly and properly so called, we think such necessary limitation is that the statute does not extend to the wills of persons at the time of their decease domiciled out of Great Britain, whether the assets are locally situated within England or not." And the Lords adopted this view, that the locality where the assets are situated is immaterial as regards liability to legacy duty: Lord *Lyndhust* in giving his judgment said:—"This was personal property; and following the principle laid down in the case of *Ewin*, it must be considered as property within the domicile of the testator in Demerara; and it is admitted that if it was property within the domicile of the testator in Demerara, it cannot be liable to legacy duty."

Rule as to leaseholds.

But it must be borne in mind that the rules above stated for determining the liability of property to legacy duty apply only to such personalty as is of a moveable nature. In the case of chattels real, as in the case of all immoveable property, the liability to

Legacy Duty. *Domicil.*

legacy or succession duty (*r*) will be regulated by the law of the place where the property is situated, and not by the law of the domicil. Thus, where a testator domiciled in Ireland by his will gave a leasehold house in Belgrave Square, London, to trustees upon trusts for sale and investment, and directed the investments to be held upon the trusts therein declared of his general personal estate, and the sums of the trusts of the general personal estate were for accumulation beyond the period allowed by the Thelusson Act (39 & 40 Geo. 3, c. 98), which does not apply to Ireland; it was held that the validity of the disposition as to the house must be governed by the law of England, and that such disposition was accordingly void: *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

Legacies and annuities charged on land.

Legacy duty has hitherto been payable upon legacies and annuities charged on real estate; but such legacies, &c., are now liable to succession duty: see *post*, p. 272. Whether the liability of such legacies to the duty is to be governed by the domicil of the testator or by the locality of the land charged is a question of some difficulty, and not touched by authority.

Estate *pur autre vie.*

Where a testatrix domiciled abroad bequeathed her share in a rent-charge issuing out of lands in England to which she was entitled during the lives of herself and two other persons; it was held that legacy duty was payable on the share in the rent-charge as being "an estate *pur autre vie* applicable by law in the same manner as personal estate" (see 1 Vict. c. 26, s. 6), and that the foreign domicil of the testatrix did not exempt it from liability to duty inasmuch as it was not personal estate, though applicable as such but really not following the person: *Chatfield* v. *Berchtolt*, L. R. 7 Ch. 192 (*s*).

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(*r*) Since the commencement of the Succession Duty Act (16 & 17 Vict. c. 51), *i.e.*, the 19th of May, 1850, leaseholds are included in "real property" for the purposes of the Act, and subjected to succession duty accordingly: sect. 1. And by sect. 19 leaseholds are exempted from legacy duty.

(*s*) In this case the point was raised on behalf of the Crown, that the rentcharge was independently of the question as to the

Legacy Duty.

*Domicil.*

It is a well established doctrine that land bought by partners with partnership moneys for the purposes of their trade or business is regarded as converted out and out into personalty; and the liability to legacy duty of such property will be determined accordingly: see *ante*, sub tit. PARTNERSHIP, Vol. IV., pp. 280 *et seq.* So it was held that legacy duty was payable upon the share of a partner, who died domiciled in England, in real property at Bombay which had been used for partnership purposes and formed part of the partnership assets: *Forbes* v. *Steven*, *Mackenzie* v. *Forbes*, L. R. 10 Eq. 178.

As to shares in immoveable property of partnership.

Residence or service in the East Indies or elsewhere abroad, in the British Army, does not change the domicil: *Bruce* v. *Bruce*, 2 B. & P. 229; *Craigie* v. *Lewin*, 3 Curt. 435.

Whether testamentary appointments under limited powers created by will are liable.

*Appointments by Will under General and Limited Powers.*]—The provisions of the stat. 8 & 9 Vict. c. 76, s. 4 (*ante*, p. 211), extend to all gifts taking effect out of personal estate which the testator has power to dispose of, the words "as he shall think fit" (which were in the 45 Geo. 3, c. 28, s. 4, as well as in the 36 Geo. 3, c. 52, s. 7), being omitted. This omission seems to be material; for though the enactment purports to have been made only for removing doubts, and though the Stamp Acts are strictly construed, and a power to appoint property in favour of particular persons only is not ordinarily described as a power of disposal, yet the concluding proviso with respect to appointments of money under powers in marriage settlements seems not to have reference solely to money charged on real estate, the words "on any real estate," which were in the corresponding part of the 45 Geo. 3, c. 28, s. 4, being

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estate *pur autre vie*, liable to legacy duty under the stat. 45 Geo. 3, c. 28, s. 20, but this point does not appear to have been referred to in the judgment. The consideration of it would not apparently have affected the decision, which is based on the principle "*simile non est idem.*" The decision is important as laying down the rule that estates *pur autre vie* in realty, which are applicable as personal estate, are liable to legacy duty, irrespective of the domicil of the deceased owner.

Legacy Duty.

*Appointments by Will.*

omitted; and if so, it shows that limited powers of appointment over personalty were intended to be included. See *Att.-Gen.* v. *Hertford,* 3 Exch. 670, where *Pollock,* C.B., said, (with reference, however, to a charge on real estate), "Where you have to select from certain objects of the testator's bounty, who and in what proportions they shall take, that may well be considered a gift." And see the judgment of *Parke,* B., in *Att.-Gen.* v. *Hertford,* 14 M. & W. 293.

General powers of appointment.

Under the 45 Geo. 3, c. 28, the word "legacy" includes appointments of personalty under general powers, whether given by will or deed; so that, in the case of a power created by will, legacy duty will be payable as well under the will creating the power, as also by the appointees, as legatees under the will exercising the power: *Re Cholmondeley,* 1 Cr. & M. 149; and a power to appoint by will only, to any person or persons except A. and his relations, B. and his relations, and the relations of C., deceased, was held to be a general power, so as to subject any interest appointed by will to the claims of creditors and to legacy duty: *Platt* v. *Routh,* 6 M. & W. 756, 3 Beav. 257; *S. C.,* nom. *Drake* v. *Att.-Gen.,* 10 Cl. & F. 257. It makes no difference that the whole effect of the appointment may be to make a trifling variation in the amounts of the shares which the objects would take in default of appointment. Even where the appointment is to the same effect as the limitation in default of appointment, those to whom shares are appointed cannot elect to waive the benefit of the appointment, and take as in default of appointment so as to evade the duty: *Att.-Gen.* v. *Brackenbury,* 1 H. & C. 782.

Limited power of appointment.

Property given by will or deed to the members of a class in such proportions as B. shall appoint, and appointed by the will of B., will be liable to duty under the instrument by which the power is created: *Att.-Gen.* v. *Pickard,* 3 M. & W. 552; *S. C.,* aff. in Exch. Ch., 6 M. & W. 348; *Lord Henniker* v. *Att.-Gen.,* 8 Exch. 257 (*t*). And it makes no

(*t*) The increased rates of succession duty imposed by the recent Act (51 Vict. c. 8, *post,* p. 251) render this point

Legacy Duty.

*Appointments by Will.*

difference that the exercise of the power is made to depend on a condition or contingency: *Sweeting* v. *Sweeting*, 1 Drew. 331 (*u*).

Trustee of personalty appointed under a limited power not liable for duty.

There is no obligation on the part of the trustee of personal property appointed by will under a limited power to deduct the legacy duty, but the appointee alone seems to be liable (*x*). The stat. 45 Geo. 3, c. 28, s. 5, expressly makes the trustee or owner of real estate liable for the payment of the duty on legacies charged thereon.

Appointments of leaseholds, jointures, &c., under limited powers in marriage ettlements are chargeble.

A testamentary appointment under a power contained in a marriage settlement, to appoint a "sum of money" in favour of objects designated, is exempted. There is no exception in favour of an appointment of an annuity or rent charge, or of specific chattels or leaseholds, under a limited power in a marriage settlement.

A settlement made after marriage, and not in pursuance of antenuptial articles, does not appear to be within the exception. See, however, per *Parke*, B., in *Att.-Gen.* v. *Hertford*, 14 M. & W. at p. 294.

If it could be held that appointments of personalty under limited powers were not within the enactment, a mere testamentary appointment of a sum already charged on real or or personal property, in exercise

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one of some practical importance. If the limited power is given by will, legacy duty will apparently be payable under the will creating the power, see *supra* in the text; and the Succession Duty Act (16 & 17 Vict. c. 51, s. 4) expressly enacts that persons taking a succession under an appointment in exercise of a limited power, are to be deemed to derive the succession from the person by whom the power was created, and accordingly such persons (except so far as chargeable with legacy duty, see sect. 18) are liable to succession duty at the present increased rate.

(*u*) It has been doubted whether the effect of sect. 4 of the stat. 8 & 9 Vict. c. 76, is not to make appointments in exercise of a limited power of appointment created by will, liable to legacy duty under both wills. But the language of the section does not seem necessarily to have this effect, and the practice is only to require duty under the will creating the power: see Hanson, Pr. Leg. & Succ. Duties, 70. This principle is affirmed as regards successions by the stat. 16 & 17 Vict. c. 51, s. 4.

(*x*) But see as to appointments in exercise of general powers, *post*, p. 239.

Legacy Duty. *Appointments by Will.*

of a power of selection, would not be liable to legacy duty.

Rentcharges, &c.

*Rentcharges, &c.*]—Rentcharges and annuities charged by will on real estate, whether by direct charge or in the form of a limitation of a use, are now subject to succession duty: see *post*, p. 272.

Freehold rentcharge.

Of course, a freehold rentcharge already existing and devised by the testator, is not charged by any of these enactments, but it is now liable to succession duty.

Tolls of lighthouse.

The tolls and profits derivable under a grant from the Crown of the right to maintain a lighthouse in a certain place and to take tolls, savour of the realty, and a devise of them is not subject to probate or legacy duty: *Att.-Gen.* v. *Jones*, 1 Mac. & G. 574.

Mortgage debt not merged.

Where money subject to the trusts of a marriage settlement was lent to the father on mortgage of a freehold estate belonging to him, and on his death his daughter became entitled to the money and also to the equity of redemption of the estate, and she took from the trustees a conveyance of the estate expressly subject to the equity of redemption, and did not release her father's covenant, it was of course held that the money was part of her personal estate, and subject to probate and legacy duty: *Swabey* v. *Swabey*, 15 Sim. 502.

Monies arising from sales, &c., of real estate (*y*).

Effect of direction to sell.

*Proceeds of Sale, &c., of Real Estate.*]—The duty is expressly charged on the monies to arise from the sale, mortgage, or other disposition of real estate directed by any will or testamentary instrument to be sold, mortgaged, or otherwise disposed of. If real estate is unequivocally directed to be sold (*z*),

(*y*) The above remarks have special reference to monies arising from the sale, mortgage, or other disposition of real estate of a person dying before the 1st of July, 1888; but the principles considered in the text seem also to apply in great measure to the case of a person dying after that date, the proceeds of sale, &c., of whose real estate is now subject to succession duty: see 51 Vict. c. 8, sect. 21, sub-sect (2), *post*, p. 272.

(*z*) It is not necessary that the word "direct" should be found in the will; any words which show an obvious intention of the testator that the trustees shall sell is sufficient: see *Adv.-Gen.* v. *Smith*, 1 Macq. H. L. C. 760.

Legacy Duty.

*Proceeds of Sale of Realty.*

and the legatee of the produce elects to take the estate itself, the duty will be payable on the value, (to be ascertained according to the directions in the 36 Geo. 3, c. 52, s. 22, respecting specific legacies); for the estate is in equity converted into money at the testator's death. Thus, where a testator devised to A. and B. his real estate, including a share in the New River Water Works, upon trust, as soon as possible, after his decease, to sell the same by public auction, the profits arising therefrom to be deemed part of the residue of his estate thereinafter disposed of, or go in aid, if necessary, of the rest of his property in discharge of his pecuniary legacies; the testator then bequeathed various legacies, and devised the residue of his estate and effects to A., his heirs, executors, administrators, and assigns, and appointed A., B., C., and D., executors. The personal estate being sufficient to discharge the debts and legacies, the New River share was not sold, but passed in specie to A., the residuary devisee and legatee. Duty was claimed by the Crown on this share under the clause in the stat. 48 Geo. 3, c. 149, (the Act then in force), which imposes the duty on the clear residue of "monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of" by will, &c., (and which, for this purpose, corresponds with the present Act). It was contended, for the defendant, that since he had elected to take the property as real estate, it was exempt from the duty, which was imposed, not on the value, but on the clear residue of the monies to arise from the sale, which necessarily supposed an actual conversion. But the Court held, that it was liable. *Thompson*, C.B., observed :—"This is not a bequest of the property in question, directing it to be sold with a view solely to the payment of debts, but it is directed to be sold in all events, and to be turned into money. The profits arising therefrom were, by the will, to go in aid of the rest of his property, if necessary, in discharge of his pecuniary legacies; but it is not directed to be sold for that purpose merely, but generally to be sold, and the

**Legacy Duty.**

*Proceeds of Sale of Realty.*

money to go as residue of his personal estate. Now, all the residue of the testator's estate goes to Holford, the defendant, a stranger in blood; and this property would be considered in equity as sold, although it might not be in fact sold: and, supposing him to have died before election it would have gone to his personal representatives; and shall it be said, that, by not selling it according to the directions of the will he shall be enabled to intercept the duty? He has, it is true, a right to take it in its original state, as between himself and the executors; but he must not, by so doing, be permitted to evade the duty to which, if sold, it would have been liable; and it must be considered as having been actually sold by the executors, and that the money arising from the sale had been by them paid over to the devisee": *Att.-Gen.* v. *Holford*, 1 Pri. 426; *Adv.-Gen.* v. *Ramsay's Trustees*, 2 C. M. & R. 224, n.; *Williamson* v. *Adv.-Gen.*, 10 Cl. & F. 1. In the latter case the principal debate was, whether in a Scotch testamentary deed there was a direction or a mere power to sell; and it was considered that there was an absolute direction to sell. "It was alleged," said Lord *Cottenham*, "that this case turned upon what was a common question in courts of this country,—whether this amounted to a conversion of the real property out and out into personalty, or whether it was to be considered as a direction to sell for the purpose of paying off certain charges, debts, and so on. That is the criterion by which questions of this sort are to be determined. . . . . It is not necessary that the words of the power should contain an absolute direction to the trustees to sell. The intention of the testator must be gathered from all the provisions of the deed."

Discretionary power to sell will generally make duty payable if exercised.

Even where there is a mere discretionary power enabling the trustees if they think proper to sell and divide the proceeds among the devisees in specie, the duty will be payable, if the power is exercised, but not otherwise.

In *Att.-Gen.* v. *Mangles*, 5 M. & W. 120, where there was an absolute trust for the conversion and distribution of the real and personal estate as one

Legacy Duty.

*Proceeds of Sale of Realty.*

fund, (which conversion the testator, in a subsequent part of the will, referred to as having been by him *directed*); but among the general powers given to the trustees was a power to defer any sale, and to cause any part of the real and personal estate to be valued instead of being sold, and to be allotted to any of the legatees at the value, *but to be considered as personal estate.* Part of the real estate was allotted and part sold. Duty was claimed on all. During the argument, in deference to the opinion of the Court, the counsel for the legatees admitted the liability of the part that had been sold. It was held, that the unsold land was not liable to duty. The decision was followed, with regard to a discretionary power of a converse character, in *Att.-Gen.* v. *Simcox*, 1 Exch. 749, where the testator devised real estates to trustees, in trust for the testator's brothers and sisters for their lives, with survivorship, and after the death of the survivor, to convey the estates to the testator's nephews and nieces equally, as nearly as they could make partition of them; and he declared, that, for the purposes of such partition, it should be lawful for his trustees to sell all or any part of the said estates, and be possessed of the proceeds on the trusts declared of his residuary personalty, (being similar trusts to those of the realty,) with a superadded declaration as to the time of payment. The estates having been sold, it was held that the duty was payable. See also *Att.-Gen.* v. *Metcalfe*, 6 Exch. 43.

Exception where proceeds of sale retain the character of real estate.

Where, however, there is a discretionary power to trustees to sell not for the purpose of dividing the proceeds, but for the benefit or convenience of the beneficiaries, with a direction that the proceeds shall be invested in securities to be held upon the same trusts as the land directed to be sold it would seem that no legacy duty would have been payable, the character of real estate being regarded as still attaching on the money produced by the sale: *Re Evans*, 2 C. M. & R. 206; and see the remarks of *Pollock*, C.B., on that case in *Att.-Gen.* v. *Simcox*, 1 Exch. 768. See also the observations of Lord *St. Leonards* in *Adv.-Gen.* v. *Smith*, 1 H. L. C. 760.

Legacy Duty.

*Proceeds of Sale of Realty.*

A fortiori, legacy duty would not have been payable where trustees were empowered to sell settled real estate and directed to invest the proceeds of sale in the purchase of other lands to be settled upon similar trusts, and in the meantime to invest such proceeds in securities, and apply in income as the rents and profits of the settled land: *Mules* v. *Jennings*, 8 Exch. 830.

Proceeds of sale of realty under order of Court, set apart to answer annuities.

Where a will empowered the trustees to sell the testator's real estate, and to apply the proceeds in aid of his personal estate in payment of his debts and legacies, and directed them by the ways and means aforesaid to raise a sufficient sum to pay two annuities; the rents being insufficient for payment of the annuities, the Court ordered a sale and the investment of 20,000*l.* being proceeds of sale in consols to provide for the annuities; legacy duty being claimed on this sum, it was held that inasmuch as the sale had been effected under the jurisdiction of the Court, and not under the power in the will no legacy duty was payable: *Hobson* v. *Neale*, 17 Beav. 178; 8 Exch. 375.

Release of debt by will liable to duty.

*Release of Debt.*]—The forgiving of a debt by will is a legacy upon which duty is payable: *Izon* v. *Butler*, 2 Price, 34. See *Maitland* v. *Adair*, 3 Ves. 231; *South* v. *Williams*, 6 Jur. 332; *Davis* v. *Elmes*, 1 Beav. 31. In *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114; 12 Pri. 407, after the death of the principal in a bond, the obligee by his will released the surety, who was his brother, by these words—"I forgive the bond debt entered into by W. and my brother J. H." J. H. was one of the executors. Interest had been paid on the bond up to the testator's death. It was held, that duty, as on a legacy to a brother, was payable on the debt, but not in respect of interest from the death to the time of settlement.

A direction for the payment of the debts of another person is a legacy to the creditors: *Foster* v. *Ley*, 2 Sc. 438. But a direction to apply a certain fund in payment of particular creditors of the testator himself, whose debts are specified in the

Legacy Duty.

*Release of Debt.*

will, is no legacy, though their debts would, but for the provision, have been barred by the Statute of Limitations; and the benefit of such a direction is not liable to lapse or legacy duty: *Williamson* v. *Naylor*, 3 Y. & C. 208. But it is otherwise if not only the remedy is barred, but if the debts themselves are extinguished or have been released, for in that case a direction for their payment will be equivalent to a legacy and liable to duty: *Turner* v. *Martin*, 7 De G. M. & G. 429.

Duty on profit made after testator's death.

*Accretions to Capital.*]—In a case under some early statutes, Lord *Loughborough* said, "The growing profits after a testator's death are not subject to the tax:" *Green* v. *Croft*, 2 H. Bl. 34. But in effect all interest, dividends, profits, or other accretions to capital are subject to it, whether the legacy be specific or residuary. The duty is considered to belong to the Crown from the time of the death; and if the payment is delayed, what profit is made of that part of the fund which belongs to the Crown as legacy duty, also belongs to the Crown. So that, if the assets were employed in trade, the profit made of such part as constitutes the percentage payable as duty, would, according to the general principles of equity, belong to the Crown; and in this view it is indifferent whether we calculate the duty on the aggregate fund at the time of payment, (which is the mode adopted in practice,) or calculate it on the amount payable at the testator's death, and add the profits or increase referable to that particular amount: *Att.-Gen.* v. *Cavendish*, Wightw. 82.

Crown entitled to the produce of fund, which ought to have been appropriated to the payment of duty.

In *Thomas* v. *Montgomery*, 3 Russ. 502, the same rule was contended to apply to pecuniary legacies; but the case seems not to have raised the point. The facts were, that the Duke of Queensbury (who died in 1810) by his will bequeathed legacies to an immense amount, (no less than 605,000*l.* and upwards), which he directed to be paid within three months after his decease. Shortly after the testator's death, a suit in Chancery was instituted on behalf of the legatees. The legacies remained unpaid for several years, in consequence of certain claims on the assets,

**Legacy Duty.**

*Accretions to Capital.*

and the complicated state of the accounts. In 1818 and 1824, however, two large sums were, under orders of Court, divided among the legatees rateably; on both which occasions legacy duty was paid on these sums. In 1827 there still remained 347,000*l.* due for principal and interest on the legacies; but only about 11,000*l.* of this sum was for capital, the residue being made up of interest. The Crown claimed the duty on the whole sum remaining unpaid; the legatees insisted, that it only attached on the 11,000*l.*, the amount of capital remaining unpaid. Lord *Lyndhurst*, C., said—"It is the duty of the Court to put all parties as nearly as possible in the same situation as if the legacies had been paid three months after the testator's death. A certain sum has been appropriated to the satisfaction of the legatees and the payment of the duty; for, a sum appropriated for the legacies must be considered as appropriated in part for the payment of the duty which attaches upon the legacies. It must be considered as so appropriated from the time when the legacies were payable; at that time, a certain proportion of the appropriated sum would have belonged to the legatees, and a certain proportion of it would have belonged to the Crown; and it appears to me to be the justice of the case, and not contrary to the Acts of Parliament, but rather consonant to their scope and spirit, that the legatees should have that part of the fund which they would have had if the appropriation had been made at the time fixed by will, and that the Crown should have the full benefit of that part of the fund, which it would have been incumbent on the Court, at the same time, to have set apart for the discharge of duty." If, without the executor's wilful default, no profit is made, the Crown is entitled to nothing beyond the simple duty: *Att.-Gen.* v. *Holbrook*, 3 Y. & J. 114. Where the duty is payable on a fund in Court, the practice seems to be to order the transfer of a proportionate part of the fund itself: *Kilpin* v. *Kilpin*, 4 L. J. (N. S.) Ch. 17. In *Bate* v. *Pane*, 13 Jur. 609, leaseholds were bequeathed to A. for life, and after her death to B. Five years after the death of A., the

Rent of leaseholds.

Legacy Duty.

*Accretions to Capital.*

property was sold by B. Fifteen years after the death of A. the executors paid the duty on the value of the property, and on fifteen years' rent. It was held, that he could recover the whole from B. as money paid to his use.

Sale at increased value.

As to the sale, in the course of administration, of articles, forming part of the estate, at a value in excess of that put upon them in the residuary account, see *ante*, p. 208, note (*h*).

What is retainer of a legacy by trustees and executors.

*Retainer and Payment of Legacies.*]—What is payment or retainer of a legacy, within the legacy-duty Acts, has often been the subject of controversy; the question being, to determine whether a fund bequeathed to executors in trust, and held by them as such trustees, when the accounts of their executorship are wound up, is to be considered as having been retained or satisfied at this period. If the matter were *res integra*, one should scarcely have hesitated to pronounce that it was; but a perusal of some modern decisions of the Court of Exchequer will show the insecurity of acting on any such conclusion.

*Att.-Gen.* v. *Lady Manners.*

Thus, in *Att.-Gen.* v. *Manners*, 1 Pri. 411, where Lord W. M., by his will, dated 8th of July, 1771, gave the sum of 13,000*l.* to his executor in trust to invest the same, and to pay the income to his reputed son, T. M., for life; and, after his decease, one moiety to be paid to the eldest son, and the other moiety to the younger children of T. M. The testator died shortly after the execution of his will; the executor retained the 13,000*l.* in his own hands, and paid the interest to T. M., until the year 1794, when he (T. M.) and his children applied to the executors of the executor, (who was then dead), to invest the money in the funds; which they did in their own names. T. M. died in 1812. The question was, whether the legacy to the children of T. M. was liable to the duty of 8*l.* per cent., imposed by stat. 48 Geo. 3, c. 149, on legacies given to strangers in blood by the will of any person who died before the 5th of April, 1805, and which should be paid, delivered, retained, satisfied, or discharged, after the

Legacy Duty.

*Retainer of Legacy.*

10th of October, 1808. It was contended, for the legatees, that the executors, as soon as they had assets in their hands applicable to the payment of the legacy, had "received" and "retained" it, within the meaning of the Act, or, at all events, that it was discharged in 1794, when it was invested in the funds, upon the trusts of the will; so that, if the Bank had failed, the executors, and not the legatees, must have borne the loss; but the Court decided, that the legacy was liable to the duty.

*Hill* v. *Atkinson.*

Payment into Court.

In *Hill* v. *Atkinson*, 2 Mer. 45, a testator gave to H. and T. 3000*l.*, in trust for A. Atkinson for her life, and after her decease to transfer the principal to T. Leake; and the testator directed H. and T. to invest the 3000*l.* in the funds as soon as conveniently might be after his decease, and appointed them executors of his will. The testator died in 1776, when the execution of the trusts became the subject of certain suits in Chancery; and by decree pronounced at the Rolls in 1779, it was ordered that the principal should be laid out in the purchase of Bank Annuities, in the causes in question, the interest to be paid to A. Atkinson for her life, and at her decease to T. Leake, who should be at liberty to apply for a transfer. Under this decree, the executors paid the 3000*l.* into the Bank in 1779, which was laid out by the Accountant-General as directed by the decree. T. Leake married, and the reversionary interest in the legacy was settled on her marriage. A. Atkinson died in January, 1807. In 1808, the Bank Annuities were transferred to the trustees of the marriage settlement. It was contended, that inasmuch as, in 1779, no legacy duty existed, the first Act imposing that duty (20 Geo. 3, c. 28), having passed more than a year afterwards, the legacy was free from duty; but the Crown insisted that it came within the 48 Geo. 3, c. 149, as a legacy paid, delivered, retained, satisfied, and discharged *after* the 10th October, 1805; and the case of *Att.-Gen.* v. *Manners* was much relied upon. But Lord *Eldon* decided, that the duty did not attach. His Lordship said, "The case of *Att.-Gen.* v. *Manners* is an authority, as far as it goes, against

Legacy Duty.

*Retainer of Legacy.*

the prayer in the present petition, because it would seem that, in this case, if the legacy had been clearly appropriated, the Court would have held the duty not payable. Whether there was an appropriation in that case, or not, is not now to be considered. It was the opinion of the Barons, that an executor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not appropriate the legacy ; and upon this opinion they acted. But if where a legacy has been paid into Court under a decree and the trusts are declared accordingly, it is to be said there has been no appropriation, that would be to deny what has never heretofore been called in question."

*Att-Gen.* v. *Wood.*

Appropriation of trust fund by executors themselves.

The question again arose in the case of *Att.-Gen.* v. *Wood*, 2 Y. & J. 290, where a testator bequeathed to his executors 8000*l.* Bank Annuities, upon trust for A. Buckland during her life, and after her decease to transfer the said 8000*l.* Annuities amongst the children of A. Buckland, who should be living at her decease, on their attaining twenty-one ; and he bequeathed all other his estate, after payment of debts, &c., to A. Buckland. The testator died in 1794, and the 8000*l.* Five per cent. Annuities were transferred from his name to those of A., B., and C., and were afterwards converted by Act of Parliament into 8400*l.* New Four per cents. In the same year the executors accounted for and paid over the residuary estate of the testator to Mrs. Buckland. They continued to pay to her the dividends on the 8400*l.* New Four per cents., until her decease, in 1826. She left three children surviving, who were now absolutely entitled to the legacy. The question was, whether this legacy was liable to the duty under the statute 55 Geo. 3, c. 184, as a legacy "paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815."

The Court was unanimously of opinion that the duty attached. *Alexander*, C. B., thus distinguished the case from *Hill* v. *Atkinson*. His Lordship said : "If an executor transfer into his own name as trustee the amount of a particular legacy, and acts upon that transfer, that is an appropriation as against many

Legacy Duty.

*Retainer of Legacy.*

persons, and in particular as against himself. But the question here is, whether that act so done is to be considered as a delivery of the legacy as against the revenue and this Act of Parliament: whether it is a retainer, or a satisfaction, or a discharge. Now the fact is, that it has not been delivered, it has not been retained, it has not been satisfied, and it has not been discharged; but the executor and trustee is at this moment liable in consequence of having this fund in his hands. Can any body of good sense contend that it has been delivered, retained, satisfied, or discharged, when the same money is now in his hands, and he is liable for it to the persons beneficially entitled to this legacy? The case of *Hill* v. *Atkinson* is a case in which the executor or trustee, or whatever name you give him, was actually discharged, as much as if there had been persons in being entitled to give him a legacy receipt, if a receipt were necessary at that time. The money was paid into Court, and distinguished from all the rest of the testator's effects, but above all taken out of the hands of the executor, and paid in to the name of the Accountant-General of the Court, under the directions of the Court, for the benefit of the legatees. That, therefore, was an actual payment by the executor, for the use of those persons, whoever they might be. Whether it was a vested interest, or a contingent interest, the executor was discharged, which in this case he undoubtedly is not. I think that case has no application to the present, and I am very clearly of opinion that this party is liable to the legacy duty."

*Coombe* v. *Trist.*

The authority of *Hill* v. *Atkinson* was followed in *Coombe* v. *Trist*, 1 My. & C. 77, where 10,000*l.* was bequeathed to A. for life, and after her decease to such of her children as should attain twenty-one, or being daughters should marry, and, if no such children, as she should appoint, and in default of appointment over. Under a decree made in 1798, in a suit for having the legacy secured, the executors paid the amount into Court, and before November, 1802, it was invested in stock in the name of the Accountant-General, and placed to the separate ac-

Legacy Duty.

*Retainer of Legacy.*

count of A. It was held, that this was a sufficient payment of the legacy within the 55 Geo. 3, c. 184. Lord *Lyndhurst*, C., said, "In *Hill* v. *Atkinson*, the legacy was not paid to the party beneficially entitled, nor could it have been so paid without the agreement of the person who had the prior life interest in the fund; but the payment into Court was considered to amount to precisely the same thing. That would apply in a case where contingent interests were given, for the Court in such a case would equally take possession of the capital, at the same time discharging the executor, and holding the fund upon trust for those who had contingent interests and might become eventually entitled." See also *Att.-Gen.* v. *Loscombe*, 5 H. & N. 564.

*Att.-Gen.* v. *Hancock.*

In the case of *Att.-Gen.* v. *Hancock*, 2 M. & W. 563, a testator, who died in 1791, devised his real estates to W. V. and J. M., and their heirs, to the use of W. M. for life, remainder to his issue, remainders over. He gave the residue of his personal estate to his executors W. V. and W. M., upon trust for conversion and investment in the purchase of land, to be conveyed to W. V. and J. M., to the uses declared of his real estates, with a direction for the interim investment of the money on the usual securities in the names of his executors, the income to be paid to the persons who would have been entitled to the rents of the purchased lands. Before 1796 and before the 36 Geo. 3, c. 5, the executors invested the produce of the residuary personal estate on mortgage in their own names. W. M. survived W. V. and died without issue; and in 1832 his executors paid the money so secured on mortgage to J. M., who, on the death of W. M., became tenant in fee under the original will. It was held, that this was a payment after the 31st August, 1815, within the 55 Geo. 3, c. 184. It was argued, that the 19th section of the 36 Geo. 3, c. 52, (*ante*, p. 207), providing for the mode of paying the duty on legacies directed to be laid out in the purchase of real estate, amounted to an imposition of a new duty, and could not have been meant to act retrospectively; but the Court said that the duty was always intended to be

Legacy Duty.

*Retainer of Legacy.*

levied on such legacies, although where receipts were not given the payment might have been evaded.

Result of the decisions.

The result of the decisions on this subject appears to be that a mere appropriation of a legacy by executors, who are also trustees, in order that they may thenceforth hold the fund in trust for the persons entitled is not such a payment, delivery, retainer, satisfaction, or discharge of the legacy within the meaning of the stat. 55 Geo. 3, c. 184 (see *ante*, p. 202), as to prevent the liability to legacy duty from attaching, when the remainderman becomes entitled to the fund. But that the liability will not attach where the fund has been paid into the Bank, and invested under an order of Court for the benefit of the tenant for life and remainderman; or where the testator's general assets have been paid into Court in an administration action, and a specific amount has afterwards been appropriated to provide for the trust fund. And the rule applies equally, whether the remainderman's interest is vested or contingent.

Executor and legatee both liable for duty to the Crown, and executor paying it may recover from the legatee.

*Liability of Executors, &c., as to Payment of Duty.*] —If an executor pays a legacy in full, without retaining the duty, both he and the legatee are debtors to the Crown for the amount of the duty, (see stat. 36 Geo. 3, c. 52, s. 6, *ante*, p. 205), which, if paid by the executor, may be recovered by him from the legatee. Thus, where a testatrix devised all her real estates to trustees, upon trust, and bequeathed to the defendant an annuity of 100*l.*, clear of all deductions, during her life, secured upon the testatrix's real estates; the testatrix died in June, 1808; during eight years the trustees paid the annuity to the legatee, and the persons to whom she had sold and assigned it, without deducting or demanding the duty; in 1816 they paid the duty at the Stamp Office; and it was held, that the plaintiffs were entitled to recover the amount as money paid on the defendant's account; and that the fact of her having assigned the annuity did not affect their claim against her: *Hales* v. *Freeman*, 4 Moo. 21; see *Stow* v. *Davenport*, 5 B. & Ad. 366; *Bate* v. *Pane*, 13 Q. B.

900. Where an executor by mistake retains out of a legacy a sum which afterwards proves to be insufficient for payment of the legacy duty, he is not precluded from recovering from the legatee the balance of such duty, by reason of his having executed a deed reciting that he had retained the sum "being the amount of legacy duty payable" upon the legacy: *Brooke* v. *Haymes*, L. R. 6 Eq. 25. Where the land on which the legacy was charged was devised as to one moiety to A. for life, as to the other to B. in fee; it was held, that both parties were liable to the Crown for the duty: *Att.-Gen.* v. *Jackson*, 3 M. & W. 386. So, where the entirety was devised to A. for life, subject to an annuity, A. was held liable to the Crown: *Att.-Gen.* v. *Pickard*, 3 M. & W. 552. "By the regulations with respect to the payment of the legacy duty on annuities, the value of the annuity is, in the first instance, estimated according to the tables contained in the 36 Geo. 3, c. 52. That amount is to be paid by four quarterly payments, and I think the highest charge of duty is 10*l.* per cent.; the extreme case, eighteen years' purchase. It is obvious, therefore, upon making a calculation, that the money to be paid in respect of the first instalment, must fall greatly short of the sum which the annuitant would be entitled to receive in that year. The person, therefore, paying the annuity is never required to be in advance, and he is allowed to retain that payment out of the payment made to the annuitant." Per Lord *Lyndhurst*, C.B., 2 Cr. & J. 115. These observations of the learned Judge referred to life annuities alone, but the Act contains tables of values of annuities for terms certain up to ninety years, the value of an annuity of 100*l.* for ninety years being stated at 2426*l.* This appears to be calculated on the assumption that the interest of money is four per cent., in which case the value of a perpetual annuity of that amount would be 2500*l.*, one instalment of the duty on which, at the highest rate, would be 62*l.* 10*s.*, little more than half of a single year's payment. So that his Lordship's conclusion may be extended to every case. See stat. 36 Geo. 3, c. 52, sect. 8, *ante*, p. 206.

**Legacy Duty.**

*Liability of Executors.*

Devise for life, subject to annuity, is liable for the legacy duty.

Legacy Duty.

*Liability of Executors.*

The executor is entitled to retain the duty and to deduct it accordingly from a legacy or residue as against a purchaser, no less than against the original legatee, for the subject sold is only the legacy or residue *minus* the duty: *Nisbett's Trustees* v. *Learmouth*, 8 Sco. Sess. Ca. (2nd Ser.) 69. See also *Jennings* v. *Bond*, 8 Ir. Eq. R. 755. And the purchaser is liable either to pay the duty to the revenue or to reimburse the executors in respect of any moneys paid by them in respect thereof, as the original legatee himself would be: *Bryan* v. *Mansion*, 3 Jur. N. S. 473.

When legacy duty is payable by purchaser.

Purchaser cannot recover duty from vendor.

In the absence of stipulation to the contrary a purchaser of a legacy or residue is not entitled to recover from the purchaser in respect of any amount which the vendor may be called on to pay, or which may be deducted from the legacy or residue, on account of legacy duty. And where a legatee of a life interest assigned the same representing that it was "unincumbered," it was held that the assignee was liable to legacy duty, which is a government charge on property, not an "incumbrance": *Bliss* v. *Putnam*, 7 Beav. 40.

Extent of liability of legatee or purchaser.

But the liability of a legatee, or of a purchaser from a legatee, is limited to the interest which he takes or purchases. Thus, where a residue is divisible in shares amongst several persons each share is chargeable with duty only on the amount of such share, and there is no lien thereon in respect of duty payable on the other shares: *Hicks* v. *Keat*, 7 Beav. 141. So where an executor paid over a legacy without deducting or paying the legacy duty thereon and died insolvent, as did also the legatee, it was held that there was no lien for the duty on the residuary personal estate: *Wright* v. *Barnewall*, 13 Jur. 1041. And the same principle applies to the case of a purchaser of a legacy or of an interest in residuary estate. Where two legacies were given to the same legatee, it was held that a purchaser of one of the legacies was not liable for unpaid legacy duty in respect of the legacy not purchased by him: *Att.-Gen.* v. *Giles*, 5 H. & N. 255. And a purchaser, though liable for duty in respect of the interest

purchased by him, is not liable for any duty which may be payable upon the purchase-money paid by him: *Farwell* v. *Seale*, 3 De G. & Sm. 359.

Persons administering the estate primarily liable for the duty.

The primary liability in respect of payment of the legacy duty lies upon "the person or persons having or taking the burthen of the execution of the will, or other testamentary instrument, or the administration of the personal estate": 36 Geo. 3, c. 52, sect. 6. These words include all who receive, or intermeddle with the administration of the estate and effects of the deceased either as original or derivative executors or administrators, or as executors *de son tort*, or as trustees appointed or pursuant to a will. In the case of an appointment by will, in exercise of a general power, of a settled fund, the executors of the will, and not the trustees of the fund, are the proper persons to administer the fund, and consequently primarily liable for the payment of the legacy duty thereon: *Re Philbrick's Trusts*, 13 W. R. 570; see *Re Hoskin's Trusts*, 6 Ch. D. 281.

Persons receiving money for payment of duty accountable.

By the stat. 13 & 14 Vict. c. 97, sect. 8, it is enacted that any person who receives or gets into his possession money for payment of the duty upon any legacy or residue is to be accountable for the same, and the same is to be recoverable as a debt from such person to the Crown. If a legatee pays the duty to the authorised agent of the executor, who fails to account for it, the executor cannot recover the amount from the legatee: *Horn* v. *Coleman*, 26 L. J. Ch. 213.

Lapse on disclaimer of legacy.

If a legacy lapses or fails through remoteness or is disclaimed before acceptance no duty will be chargeable in respect of it. But if a person entitled to a legacy bequeaths it, his executors cannot escape the liability to duty by disclaiming the original legacy. A testator bequeathed his residuary estate to his daughter for life, with remainder to her husband absolutely; on the testator's death duty was paid on the life interest according to sect. 13 of the stat. 36 Geo. 3, c. 52 (*ante*, p. 207); subsequently the husband died bequeathing his personal estate to the surviving wife; the executors disclaimed the original bequest, and contended that by the disclaimer the

**Legacy Duty.**

*Liability of Executors.*

testator's residuary estate passed to his daughter as next of kin, and was chargeable with duty at the rate of 1 per cent., instead of at the rate of 10 per cent., the rate then payable by the husband (*a*) : but it was held that the disclaimer by the executors did not affect the liability to pay the duty at the higher rate : *Att.-Gen.* v. *Munby*, 3 H. & N. 826.

Duty payable on each successive devolution of title.

Legacy duty (like probate duty, see *ante*, p. 184) is chargeable in respect of every successive testamentary disposition or intestacy under or by virtue of which the title of the person ultimately entitled is derived.

*Att.-Gen.* v. *Malkin.*

In *Att.-Gen.* v. *Malkin* a sum of 12,000*l.* was bequeathed in trust for several persons successively for their respective lives, with remainder as for such persons as one of them, who was a married woman, should by will appoint, and in default of appointment "to and for the benefit of her executors or administrators" : the lady died without making any appointment, leaving her husband surviving ; he subsequently died, without having taken out administration to the estate, but having by his will bequeathed all his property to his daughter : it was held that the beneficial title of the daughter to the reversionary interest in the 12,000*l.* was derived under the will of her father, and that it was consequently liable to two probate and two legacy duties. See also *Att.-Gen.* v. *Maxwell*, 10 Ir. C. L. R. 262 ; *Att.-Gen.* v. *Cleave*, 31 L. T. N. S. 86.

What words exempt a legacy from payment of duty.

*Gifts Free of Legacy Duty.*]—The duty is payable out of the subject of the bequest, unless the will contains words of exemption showing that the general personal estate is to bear the charge. What expressions have this effect is often a litigated point. Where a testator, after giving pecuniary legacies, directed his executors to make payment of all the legacies, "without any deduction," as given and bequeathed by that his will, at the expiration of six months from his decease, or sooner if convenient—Lord *Eldon* was of opinion, after much hesitation, that the words "without deduction" referred to the

(*a*) But see now stat. 18 & 19 Vict. c. 51, s. 11, *post*, p. 250.

Legacy Duty.

*Gifts Free of Duty.*

duty, which, therefore, was to be paid out of the general estate: *Barksdale* v. *Gilliat*, 1 Swanst. 562. In *Hales* v. *Freeman*, 1 Br. & B. 391, a contrary decision was made, but the point does not seem to have been raised. So, where a testator gave all his real and personal estate to his executors, in trust, among other things, out of the dividends and interest of the trust monies, to pay to his daughter, J. D., for her separate use, for her life, an annuity of 46*l.* clear of all deductions whatsoever, by half-yearly payments, *Shadwell*, V. C., ruled that the legacy tax could not be deducted; though it was contended, for the contrary construction, that the words excluding deduction referred to the payment of the land-tax, being applicable to the annuity only as a charge on the real estate: *Dawkins* v. *Tatham*, 2 Sim. 492. So, where the direction was to pay certain annuities and legacies "clear of property tax and all expenses whatsoever attending the same": *Courtroy* v. *Vincent*, T. & R. 433. A direction that annuities should be paid to the legatees, "without any deduction or abatement out of the same, on any account or pretence whatsoever," was construed as a direction to pay the annuities in full, without deducting the duty, on the ground that there were no other deductions to which the annuitants were liable that the testator could have had in his contemplation: *Smith* v. *Anderson*, 4 Russ. 352.

Annuity "clear of all taxes and deductions."

*Stow* v. *Davenport.*

So, where lands were devised to the use that A. should take thereout an annuity, to be paid "clear of all taxes and deductions whatsoever;" remainder to B. for life. It was held, that A. took the annuity free from duty, and that B., who had paid it, could not recover it back from A., although he might originally have disclaimed the devise: *Stow* v. *Davenport*, 5 B. & Ad. 359; 2 Nev. & M. 805. So, a legacy of 100*l.*, "to be paid to J. D., free of all expense," was held to be payable clear of duty: *Gooden* v. *Dotterell*, 1 My. & K. 56; or, "to be paid clear": *Ford* v. *Ruxton*, 1 Coll. 403; or, "free from any charge or liability in respect thereof": *Warbrick* v. *Varley*, 30 Beav. 241; and in *Louch* v. *Peters*, 1 My. & K. 488, the duty was held to be within a gift

"Free of all expenses."

*Louch* v. *Peters.*

**Legacy Duty.**

*Gifts Free of Duty.*

"Clear of all taxes and outgoings."

of "one annuity or clear yearly sum of 500*l.*," to be paid out of real estate, "clear of all taxes and outgoings." Lord *Brougham*, C., said, "Where a testatrix gives a *clear* annuity, and directs it to be paid clear of all taxes and outgoings, she would be a good deal surprised to find it held, that the legacy duty was considered to be neither an outgoing nor a tax; the very tax and outgoing which, from the nature of the thing—from the subject-matter being a legacy—she was more likely to have present to her mind than any other. To deny that the legacy duty is an outgoing, surely seems strong, especially in reading a will; but to doubt that it is a tax appears really a subtlety that passes all understanding." To the objection that there were other taxes and outgoings to which the words might refer, his Lordship replied, that the very same objection might be urged if the point were as to the exemption from any one of such other taxes and outgoings. In *Smith* v. *Anderson*, 4 Russ. 352, *Leach*, M. R., had said, "I admit that it is to be stated as the fair result of Lord *Eldon's* judgment in *Barksdale* v. *Gilliat*, that he considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the legacy duty, if from the nature of the property out of which the annuities were payable there was any other deduction to which the annuities might be subject." Upon this, Lord *Brougham*, in *Louch* v. *Peters*, observed, "On this case of *Smith* v. *Anderson*, agreeing entirely in the decision, I cannot go along with the commentary of the learned Judge upon Lord *Eldon's* judgment, for you will in vain search through the case as reported in 1 Swanst., to find a word pointing towards the proposition that the words 'without deduction' would not clear a legacy from the duty if there were from the nature of the property on which it is charged other outgoings that might be intended."

*Sanders* v. *Kiddell.*

Gift of a "sum sufficient to produce a *clear* annual sum."

But, in *Sanders* v. *Kiddell*, 7 Sim. 536, where the testatrix bequeathed "such a sum of money as that the annual produce thereof when invested would produce the *clear* yearly sum of 500*l.*," upon certain trusts, the trust as to one-fifth being for M. C. G.

Legacy Duty.

*Gifts Free of Duty.*

for his life, and after his decease for any wife who might survive him, during her life, and after the decease of the survivor for his children, in equal shares, at twenty-one or marriage; *Shadwell*, V. C., held, that the legacy was not given free from duty, because it appeared from the will that what the testatrix directed to be done was meant to be done at once. Now M. C. G. might or might not marry a relation of the testatrix, and his children might or might not be related to the testatrix, so that the fund to be set apart could not be ascertained at once, and therefore the word "clear" must be taken to refer to the expenses of investment, &c. As the legacy would have been free of these expenses, though there had been no express exemption, this decision reduces the word "clear" to a nullity.

*Gude* v. *Mumford.* "Clear yearly sum."

On the other hand, in *Gude* v. *Mumford*, 2 Y. & C. 448, where the testator gave "one annuity or *clear* yearly sum of 100*l.*," which he charged upon real estate, it was held, that it was meant to be clear of duty. The trustees were, in a subsequent part of the will, directed to deduct the costs, charges, and expenses attending the raising and paying the annuity out of the profits of the land, but though the Court relied on this as confirming the construction adopted, it is evident that it would not alone be sufficient to exempt an annuity from the duty. *Alderson*, B., said, the word "clear" must mean "clear of all deductions," and the words in the Stamp Act are, that the executor shall "deduct" the duty. Sir J. *Leach's* doctrine as to the grounds of Lord *Eldon's* judgment was clearly erroneous. See *Burrowes* v. *Cottrell*, 3 Sim. 376, *infra*. In *Marris* v. *Burton*, 11 Sim. 161, the direction was to set apart a sum, not more than 7500*l.*, "the dividends of which when invested would amount to or produce the *clear* yearly sum of 300*l.*, *clear of all deductions whatsoever*," and to pay such annuity to M. for life. There was a provision for supplying any future deficiency of the fund, so that the point in *Sanders* v. *Kiddell* did not arise; and *Shadwell*, V. C., held, that the legacy was given free from duty, and seemed to rely on the presence of the words "clear of all

*Marris* v. *Burton.* Gift of annuity "clear of all deductions."

**Legacy Duty.**

*Gifts Free of Duty.*

deductions," which did not occur in *Sanders* v. *Kiddell.*

In *Pridie* v. *Field*, 19 Beav. 497, a testator directed his trustees to set apart and invest a sufficient sum "to raise and pay an annuity or clear yearly sum of 100*l.*," which was given to several persons in succession; the decision in *Sanders* v. *Kiddell, supra,* was followed by *Romilly,* M. R., who held, that the gift was liable to legacy duty, on the grounds that there is a distinction between a gift of a sufficient sum to raise and pay an annuity or clear yearly sum "and a direct gift of" a clear yearly sum, and also that the annuity was given to several persons in succession who stood in different degrees of relationship to the testator.

*Foster* v. *Ley.*

Bequest for payment of debts.

In *Foster* v. *Ley*, 2 Sc. 438, a direction by a testatrix, in the first place "to pay off and discharge all and every debt and debts" of her first husband, was held not to imply that the creditors were to take free from duty, although the effect of the decision was that they were not fully paid. The will contained express directions as to the legacy duty in other places.

Exemption of *pecuniary* legacies does not extend to stock.

A bequest of a sum of stock in the public funds is not within a direction that the duty on all "*pecuniary* legacies" shall be paid out of the residue: *Douglas* v. *Congreve*, 1 Keen, 410. But a debt forgiven by the will is a pecuniary legacy within the meaning of such a general direction: *Morris* v. *Livie*, 11 L. J. (N. S.) Ch. 172; and so is a gift of a "legacy": *Ansley* v. *Cotton*, 16 L. J. Ch. 55. A direction that all the legacies are to be paid free of legacy duty includes specific legacies: *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

Whether legacy given by codicil is included in an exemption in the will.

Where the legacies bequeathed by a will were to be paid free from legacy duty, and the testator by a codicil bequeathed to the husband of one of the legatees, who had died, an equal legacy, "instead of" the legacy given by the will to the deceased wife, it was held by Lord *Eldon,* that the legacy given by the codicil was an independent, distinct, substantive bequest, and therefore was not within the exemption: *Chatteris* v. *Young*, 2 Russ. 183.

Legacy Duty.

*Gifts Free of Duty.*

See *Burrowes* v. *Cottrell*, 3 Sim. 375. But where a testator gave a legacy free from duty, and by a codicil revoked it, giving another sum *upon the same trusts*, the latter was held to be exempt: *Cooper* v. *Day*, 3 Mer. 154. And in *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237, where the testator gave to A. a *clear* annuity of 1000*l.* until he should attain twenty-five, and then an annuity of 2000*l.*, and directed all the legacies and annuities hereby given to be free from duty; and by a codicil revoked the annuities, and gave to A. a clear yearly sum of 3000*l.* *in lieu thereof*; *Shadwell*, V. C., held the substituted annuity was free of duty, because, being a mere substitution for the gift in the will, it was to be taken with all its accidents (*b*). The effect of the word *clear* does not seem to have been noticed. In *Byrne* v. *Currey*, 2 Cr. & M. 603, the testator gave legacies to charitable institutions, "which three charitable legacies I direct to be paid out of my personal estate prior to the payment of my debts and the other legacies thereby given. I direct all my legacies to be paid within two years after my decease, free of any deduction for tax or duty." By a codicil he gave some legacies raiseable immediately. It was held, that the exemption from duty in the will applied to legacies generally, and therefore to the legacies given by the codicil. See also *Williams* v. *Hughes*, 24 Beav. 474.

Rule where the exemption is directed with reference only to a tenant for life of a specific fund.

Where a testator bequeathed some specific chattels, and a sum of 100*l.*, to A., and directed his executors to invest in the funds such a sum as would produce 200*l.* a year clear of legacy duty and all other de-

(*b*) On the same principle it has been held, that, if an annuity is given to A. for her separate use, and by a codicil a further annuity is given "in addition," A. takes the latter for her separate use: see *Martin* v. *Drinkwater*, 2 Beav. 215; *Day* v. *Croft*, 4 Beav. 561; and if a legacy is given payable out of a particular fund, and by a codicil the legacy is revoked, and a smaller legacy given to the same person by words in juxtaposition, showing that it was intended to be substitutional ("I bequeath to each only 100*l.*"), the substituted legacy is payable only out of the fund named in the will: *Bristow* v. *Bristow*, 5 Beav. 289; see *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *Crowder* v. *Clowes*, 2 Ves. jun. 449.

Legacy Duty.

*Gifts Free of Duty.*

ductions, which annuity was to be paid to A. during her life, and after her decease he bequeathed the principal fund to other parties who, as well as A., were strangers in blood; and he directed his executors, out of the residue of his estate, to pay the legacy duty on the specific and pecuniary legacies and yearly sum by his will given to or in trust for A. It was held, that the executors, having necessarily set apart the fund, in the first instance, free from duty, and paid the duty out of the residue, could not, after A.'s death, call it back from the ulterior legatees: *Calvert* v. *Sebbon*, 2 Keen, 672.

Gift of legacies free of duty does not extend to residue.

A general direction that all legacies are to be paid free of legacy duty does not of course extend to the residue, which is the fund out of which the payment of the duty must be made: *Lord Londesborough* v. *Somerville*, 19 Beav. 295.

Abatement of gift of legacy duty.

Where a specific or pecuniary legacy is given free of legacy duty, the gift of the duty must be deemed to be a common pecuniary legacy for the benefit of the legatee, and, in case the assets prove to be deficient, must abate along with the other pecuniary legacies: *Wilkinson* v. *Barber*, L. R. 14 Eq. 96; *Farrer* v. *St. Catherine's College, Cambridge*, L. R. 16 Eq. 19.

36 Geo. 3, c. 52.

Money left to pay duty.

*Statutory Exemptions from Legacy Duty.*]—The stat. 36 Geo. 3, c. 52, sect. 21, exempts from liability and legacy duty money applied pursuant to the testator's direction in payment of duty on legacies given by his will. As to what will amount to a direction that legacy duty is to be paid, or legacies, so as to give rise to this exemption, see *supra*.

55 Geo. 3, c. 184.

The Schedule to the stat. 55 Geo. 3, c. 84, contains the following exemptions from legacy duty:—

*Exemptions.*

Gifts to husband or wife, &c.

Legacies and residues or shares of residue of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the royal family.

Gifts of articles to

And all legacies which were exempted from duty by the Act passed in the 39 Geo. 3, c. 73, for exempting certain specific

legacies given to bodies corporate or other public bodies from the payment of duty.

The first of these exemptions merely continues the exemption formerly in force under the stat. 36 Geo. 3, c. 52, sect. 2. The second re-enacts the provisions of the stat. 39 Geo. 3, c. 73, *ante*, p. 210.

corporate bodies.

The stat. 5 & 6 Vict. c. 82, sect. 38, exempts from duty legacies "given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable."

5 & 6 Vict. c. 82, s. 38. Charitable bequests in Ireland.

The last words have been held to extend only to charitable purposes in Ireland, and therefore a gift by a testator domiciled in Ireland to charitable purposes in England or Scotland, or to such purposes generally without an express restriction to Ireland, are not within the exemption: *Att.-Gen.* v. *Hope*, 2 Ir. C. L. R. 368. See *Att.-Gen.* v. *Delaney*, 10 Ir. C. L. R. 104; *Kening* v. *Att.-Gen.* 11 L. R. Ir. Ch. 253. As to what legacies are, or are not within the exemption, see *Att.-Gen.* v. *Bagot*, 13 Ir. C. L. R. 48; *Mahoney* v. *Duggan*, 11 L. R. Ir. Ch. 260; *Cullen* v. *Att.-Gen.*, L. R. 1 H. L. 190.

By the Succession Duty Act (16 & 17 Vict. c. 51), sects. 1 and 19, leasehold estates are not to be chargeable with legacy duty as personalty.

16 & 17 Vict. c. 51. Leaseholds.

By the stat. 43 Vict. c. 14, sect. 13, it is enacted that,—

43 Vict. c. 14.

"Where it appears upon an examination of the account rendered to the Commissioners of Inland Revenue that the value of the whole of the personal estate of any person dying after the passing of this Act does not amount to the sum of one hundred pounds, no legacy duty shall be charged in respect thereof or of any portion thereof."

Personal estate less than 100*l.*

The stat. 44 Vict. c. 12, sect. 36, enacts as follows:—

44 Vict. c. 12.

"The payment of the sum of thirty shillings for the fixed duty on the affidavit or inventory in conformity with this Act (*a.*) shall be deemed to be in full satisfaction of any claim to legacy duty or succession duty in respect of the estate or effects to which such affidavit or inventory relates."

Relief from legacy duty in cases under 300*l.*

**Legacy Duty.**

*Statutory Exemptions.*

Cesser of legacy duty at the rate of 1 per cent. in certain cases.

And by sect. 41 of the same Act it is enacted that,—

"In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act 55 Geo. 3, c. 184, shall not be payable."

See as to the construction of this section, *Re Haygarth's Trusts*, 22 Ch. D. 575, stated *post*, p. 300.

Payment of legacy duty is not in practice required upon any sum not exceeding 100*l.* paid over to the representatives of persons in Her Majesty's naval, military, and civil services under the several stats. 26 & 27 Vict. c. 57; 27 & 28 Vict. c. 36 (extended by the 31 & 32 Vict. c. 90); and 28 & 29 Vict. c. 111: see *ante*, p. 195.

# CHAPTER IV.

## SUCCESSION DUTY.


| | PAGE |
|---|---|
| *Rates of Succession Duty* | 249 |
| *Enactments Relating to Payment of Duties on Successions* | 252 |
| *What Property is Chargeable with Succession Duty* | 266 |
| *Domicil* | 266 |
| *Money Payable under an Engagement* | 271 |
| *Legacies and Annuities charged on Realty* | 272 |
| *What Dispositions or Devolutions of Property confer Successions* | 274 |
| *Mode of Assessment of Duty* | 289 |
| *Charge of Duty and Accountable Persons* | 293 |
| *Exemptions* | 299 |
| *Tables and Rules* | 300 |


Succession Duty.

*Rates of Succession Duty.*]—The Legacy Duty Acts are confined in their application to testamentary dispositions of personal property: see *ante*, p. 213. But by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), which came into operation on the 19th of May, 1853 (sect. 54), the following rates of duties were made payable on "Successions," that is to say, on "any property chargeable with duty under this Act" (sect. 1), as from that date up to the 1st day of July, 1888, when the provisions of the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), relating to succession duty, came into operation (*a*).

*Rates of Duty.*

Rates of duty on successions (*b*).

By sect. 10 of the Succession Duty Act, 1853, the following duties were imposed:—

"Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one pound per centum upon such value:

"Where the successor shall be a brother or sister, or a descendant of a brother or sister of the predecessor, a duty at the rate of three pounds per centum upon such value:

(*a*) It is to be observed that throughout these Acts the term "succession" denotes the property passing by a disposition or devolution taking effect upon a death, and not the act of succeeding.

(*b*) There is no corresponding provision in the Act with regard to the *predecessor* who has been married to a wife or husband of nearer consanguinity than himself to the successor.

**Succession Duty.**

*Rates of Duty.*

"Where the successor shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the predecessor, a duty at the rate of five pounds per centum upon such value:

"Where the successor shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, a duty at the rate of six pounds per centum upon such value:

"Where the successor shall be in any other degree of collateral consanguinity to the predecessor than is hereinbefore described, or shall be a stranger in blood to him, a duty at the rate of ten pounds per centum upon such value."

Provision as to married persons chargeable with succession or legacy duties (*c*).

Sect. 11. "Where any such person chargeable with duty under this Act in respect of any succession, or chargeable with duty under the Legacy Duty Acts in respect of any legacy bequeathed to him or her by a testator dying after the time appointed for the commencement of this Act, or in respect of the personal estate of any person dying after the same period, shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, testator, or deceased person, then the person taking such succession, legacy, or personal estate shall pay in respect thereof the same rate of duty only as such his or her wife or husband would have been chargeable with if she or he had taken the same."

51 Vict. c. 8.

## By the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), the following additional duties on successions are made payable:—

Charge of additional succession duty.

Sect. 21. "(1.) In addition to the duties chargeable in respect of successions under section ten of the Succession Duty Act, 1853, there shall be levied and paid to her Majesty in respect of every succession therein referred to, upon the death of any person dying on or after the first day of July, one thousand eight hundred and eighty-eight, according to the value thereof, the following duties (that is to say):—

"Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of ten shillings per centum upon the value of the interest of the successor:

"In all other cases mentioned in such section, a duty at the

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(*c*) There is no corresponding provision in the Act with regard to the *predecessor* who has been married to a wife or husband of nearer consanguinity than himself to the successor.

rate of one pound ten shillings per centum upon the value of the interest of the successor.

Succession Duty.

"Provided that additional duty under this Act shall not be payable upon the interest of a successor in leaseholds passing to him by will or devolution by law, or in property included in an account according to the value whereof duty is payable under the Customs and Inland Revenue Act, 1881" (*d*).

*Rates of Duty.*

The rates of duty now payable in respect of successions upon deaths of persons dying on or after the 1st day of July, 1888, are therefore as follows:—

Rates of succession duty now payable.

| | |
|---|---|
| In case of a lineal descendant or lineal ancestor of the predecessor . . . | 1½ per cent. |
| In case of a brother or sister or descendant of a brother or sister . . . | 4½ „ |
| In case of an uncle or aunt or descendant of an uncle or aunt . . . . | 6½ „ |
| In case of a great uncle or great aunt or descendant of a great uncle or great aunt . . . . . | 7½ „ |
| In case of any other relative of the predecessor, or of a stranger in blood . . . | 11½ „ |

Determination of rate of duty.

The rate of duty payable is determined by the degree of consanguinity existing at the time when the succession is first created: see Hanson, Prob., &c., Duty Acts, 238.

Illegitimate children.

An illegitimate child being in law *filius nullius*, is deemed to be a stranger in blood to his putative father or mother, and if he takes any property under any disposition or devolution as a successor from either of his parents, the duty will be payable at the rate of 10 per cent. Where, however, succession duty becomes payable in respect of real property of a person who has died domiciled abroad (as to which see *post*, p. 266), the existence or degree of alleged relationship between the deceased and his successors, according to which the rate of duty payable is to be ascertained under sect. 10 of the Act (see *ante*,

(*d*) Leaseholds are expressly exempted from legacy duty and subjected to succession duty: see stat. 16 & 17 Vict. c. 51, ss. 1, 19. As to account duty under the stat. 44 & 45 Vict. c. 12, see *ante*, p. 197.

Succession Duty.

*Rates of Duty.*

p. 249), is determined by the law of England, not by that of the place of domicil. A., an Englishman domiciled in Italy, cohabited with an Italian woman by whom he had four illegitimate children; he acknowledged these children in his lifetime, and thereby rendered them legitimate according to the law of Italy; by his will he gave all his real estate whether in Italy or in England to his four children by name equally between them; on the testator's death the real estate in England was sold, and the proceeds of sale were paid into Court: it was held that with respect to the fund in Court, the children were to be deemed strangers in blood to the testator, and that the Crown was entitled to duty at the rate of 10 per cent. on their successions: *Atkinson* v. *Anderson*, 21 Ch. D. 100 (*e*). As regards moveable personalty in this country belonging to a person domiciled abroad it would seem that, according to the general principle that such property follows the law of the domicile, the rate of succession duty payable according to degree of relationship or otherwise would be determined by that law and not by the law of that country, as is the rule with regard to legacy duty: see the case as to legacy duty, *ante*, p. 215.

Stat. 16 & 17 Vict. c. 51.

*Statutory Enactments relating to Payment of Duties on Successions.*]—The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), which is intituled "An Act for Granting to Her Majesty Duties on Succession to Property, and for altering certain Provisions of the Acts charging Duties on Legacies, and Shares of Personal Estates," came into operation on the 19th of May, 1853.

Title and commencement of Act.

Interpretation of terms:

Sect. 1 of the Act contains the following definitions for the purposes of the Act:—

"real property";

"The term 'real property' shall include all freehold, copyhold,

(*e*) In this case the completeness of the legitimation of the children, according to the law of Italy, was disputed (see sections 743 and 744 of the "*Codice Civile*"); but this question does not appear to have influenced the decision.

customary, leasehold (*f*), and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments:

"The term 'personal property' shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property: "personal property";

"The term 'property' alone shall include real property and personal property: "property";

"The term 'succession' shall denote any property chargeable with duty under this Act." "succession."

And by sect. 2 the terms "Succession," &c., are thus defined:—

"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." What dispositions and devolutions of property shall confer successions (*g*). Definition of the terms "successor," "predecessor."

By sect. 3, where any persons have any property vested in them jointly, by a title not conferring a succession, any beneficial interest accruing by survivorship is a succession; the person to whom the interest accrues is the successor; and the person Joint tenant.

(*f*) Leaseholds are by sect. 19, *post*, expressly exempted from legacy duty.

(*g*) See for a full consideration of this subject, *post*, pp. 274 *et seq.*

**Succession Duty.**

*Enactments Relating to Duty.*

upon whose death the accruer takes place is the predecessor; persons taking any succession jointly are to pay the duty in proportion to their respective interests; and any beneficial interest accruing to any of them by survivorship is a new succession, derived from the predecessor from whom the joint title was derived.

General powers of appointment to confer successions.

Sect. 4. A person exercising a general power of appointment, taking effect upon a death, is to be "deemed to be entitled, at the time of his exercising such power, to the property or interest, appointed as a succession derived from the donor of the power"; and a person taking property by the exercise of a limited power is to be "deemed to take the same as a succession derived from the person creating the power as predecessor."

Extinction of determinable charges to confer successions.

Sect. 5. The increase of benefit accruing to any person upon the extinction or determination by death, or at a period ascertainable only by reference to death, of any charge, estate, or interest, is a succession, and the person from whom the title to the property charged is derived is the predecessor.

Dispositions accompanied by the reservation of a benefit to the grantor, &c., to confer successions.

Sect. 7. A disposition of property (not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favour the same is made) accompanied by the reservation of any benefit to the grantor, or other person, for life or for any period ascertainable only by reference to death, confers at the determination of such benefit a succession equal in annual value to the benefit reserved on the person in whose favour the disposition is made.

Dispositions for evading duty.

Sect. 8. Dispositions to take effect at a period ascertainable only by reference to the deaths confer successions; and where a present disposition is made, but by an engagement, secret trust, or arrangement the beneficial ownership of the property does not *bonâ fide* pass according to the disposition, but in fact devolves to any person on death, or at some period ascertainable only by reference to death, then such person is deemed to acquire a succession derived from the person making the disposition as the predecessor; and the Court may declare any

fraudulent disposition made for the purpose of evading the duty to have conferred a succession.

Sect. 9. Commissioners of Inland Revenue to manage the duties.

Sects. 10, 11. As to rates of duty payable, see *ante*, pp. 249, 250.

What duties payable when the successor is also the predecessor.

Sect. 12. Where a person takes a succession under a disposition made by himself, then, if at the date of the disposition he is entitled to the property expectantly on a death, he is chargeable with duty as if no disposition had been made; but a successor is not in any other case chargeable upon a succession under a disposition made by himself, and no person is chargeable upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he was entitled to the property subjected thereto expectantly on a death.

The Act contains the following important provisions with respect to the transmission of successions, and transfer of interests :—

Duty on transmitted successions.

Sect. 14. "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them.

Duties payable in respect of transferred interests.

Sect. 15. "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect

Succession Duty.

*Enactments Relating to Duty.*

thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

Trusts for charitable and public purposes (*h*).

By sect. 16 property becoming subject to trusts for charitable and public purposes, under dispositions which, if made in favour of an individual, would confer a succession, is charged with duty at the rate of 10 per cent. on the amount or value of the property.

Life policies and post obit bonds.

Sect. 17. No policy of life insurance creates the relation of predecessor and successor between the insurers and the assured, or his assignee; and no "bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person," creates the relation of predecessor and successor between the parties; but any disposition or devolution of the moneys payable under such policy or bond, if otherwise such as to create a succession, confers a succession.

Exemptions.

Sect. 18 contains certain exemptions from succession duty, as to which see *post*, p. 299.

Leaseholds.

Sect. 19 exempts leaseholds from *legacy duty*.

Duties to be paid on the successor becoming entitled in possession, but in the case of outstanding interests, on the determination thereof (*i*).

Sect. 20. The duty is to be paid when the successor becomes entitled in possession, or to the receipt of the income and profits; except that if there is any prior charge, estate, or interest, not created by the successor himself, the duty in respect of the increased value accruing upon its determination is to be paid at such determination; and except that in case of an annuity, or property chargeable as an annuity, the duties are to be paid by instalments.

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(*h*) As to what are charitable and public purposes, see *ante*, Vol. IV., sub tit. MORTMAIN. Charitable successions in Ireland are exempted from succession duty.

(*i*) The effect of this section is that where a succession is subject to an outstanding interest, as in the case of land devolving subject to a lease at a ground rent, the duty is not payable until

Succession Duty.

*Enactments Relating to Duty.*

## No duty is payable upon the determination of a lease at rackrent (*k*).

Sect. 21. "The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity for the purposes of this Act shall be valued according to the tables in the schedule annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due, provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest."

The interest of a successor in real property to be considered as an annuity (*l*).

## Sect. 22 enacts as follows:—

"In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rentcharges, and other

Rules for valuing lands, houses, &c.

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the determination of the interest. This right to postpone payment of the duty is, however, expressly limited to cases where the outstanding interest is not created by the successor himself, unless indeed it be such an interest as to confer a new succession, in respect of which the grantee would be chargeable with duty: Hanson, Prob., &c., Duty Acts, 299. "If a person upon whom a succession devolves upon the death of another, by anticipation charges the estate with an annuity, for the benefit of a third person, the latter is liable to pay duty in respect of his annuity, and the person who created the charge only pays duty upon the increased value of his estate when the annuity ceases:" *per Wilde*, B., in *Re Peyton*, 7 H. & N. at p. 287.

(*k*) See as to beneficial leases, sect. 25, *post*, p. 259.

(*l*) See as to effect of this section, *post*, pp. 289, *et seq.* Alternative modes of payment are now permitted by the Customs and Inland Revenue Act, 1888, sect. 22, set out *post*, pp. 291, *et seq.*

Succession Duty.

*Enactments Relating to Duty.*

property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings" (*m*).

Rule as to timber (*n*).

Sect. 23. Timber, trees, or wood, not being coppice of underwood, are chargeable yearly with duty upon the net moneys, after deducting all necessary outgoings for the year, from time to time received from sales; but no duty is payable on such net moneys unless they exceed 10*l.*; and the successor may commute the duty on application to the Commissioners.

Rule as to advowsons.

Sect. 24. Advowson is not chargeable with duty unless the same or some right of presentation, or some interest therein is disposed of for money or money's worth, in which case it is chargeable on the amount or value of the consideration.

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Necessary outgoings.

(*m*) No allowance will be made in respect of income tax: *Re Elwes*, 3 H. & N. 719; or of expenses of collecting rents, or management of the property: *Re Earl Cowley*, L. R. 1 Ex. 288. In the former case, *Watson*, B., observed: "Necessary outgoings would appear to be *permanent* charges made on the occupiers of the land, or falling entirely on the land, such as repairs, poor-rates, highway, sewer, and county rates, town rates, drainage rates, and the like, some of which may be payable occasionally; still they are permanent charges, and capable of valuation so as to render it possible to calculate the annual amount." The term only includes such outgoings as are *intrinsically* necessary, not such as are optional, however necessary for the owner's convenience: *per Bramwell*, B., *ibid.*

Timber, &c.

(*n*) Timber, &c., is not, by the terms of this section, rendered liable to duty until severed and sold, and it would therefore seem that growing timber is not to be taken into consideration in calculating the annual value of the succession; but see *Lord Advocate* v. *Marquis of Ailsa*, 19 Sco. L. R. 28, where it was held that a successor was chargeable with duty on the whole value of woodlands, as entered in the valuation roll, but was entitled to credit in respect of timber, &c., not yielding any value except from sales. If an estate be sold by the successor, with the timber growing thereon, no duty will be payable on the price of such timber if valued separately from the land. Coppice and underwood, being capable of yielding an income, must be taken into account on the same footing as the land, and duty must be paid thereon, subject to an allowance for poor rates (see 43 Eliz. c. 2), as a "necessary outgoing" within sect. 22 of this Act: see Hanson, Prob., &c., Duty Acts, 308. Timber actually used for repairs is not liable to duty, but if it is sold, the proceeds of sale will be liable, though expended in repairs; an allowance would, however, apparently be made for such repairs as might be shown to be necessary.

Sect. 25. Where a successor, entitled to real property, subject to beneficial lease, has not paid duty on the full yearly value of the property, he is chargeable with duty upon his interest in any fine or other consideration which may be received during his life for the renewal of such lease or the grant of any reversionary lease of the same property.

Rule as to property subject to beneficial leases.

Sect. 26. The yearly value of a manor, mine, or other real property of a fluctuating yearly income is either to be calculated upon the average profits or income (deducting necessary outgoings) during a period to be agreed upon between the commissioners and the successor, before the first payment of duty becomes due; or if no such period is agreed upon, then the principal value is to be ascertained, and the annual value is to be considered as equal to interest at the rate of 3 per cent. per annum on such principal value.

Rule as to manors, mines, &c. (*o*).

Sect. 27. The duty payable by a body corporate, company, or society becoming entitled, as successors (*q*), to real property, is to be assessed upon the principal value, but to be payable by instalments as if assessed in respect of property devolving on a successor in fee simple.

Corporations, &c., taking real estates (*p*).

Sect. 28. A deduction is allowed of the amount of any fines, casualties of superiority, compositions, reliefs, or charges (*r*) incident to tenure from the assessable value of a successor's interest in copyhold or other real property.

Allowance for fines, &c.

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(*o*) It would seem that, in default of agreement, either the successor or the Commissioners may require the value to be so ascertained.

Manors, &c.

(*p*) The Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), sect. 11, imposes a duty of 5 per cent. per annum on the annual value income and profits, after deducting outgoings, of all real and personal property of bodies corporate and incorporate.

Duty on corporate property, &c.

(*q*) A body corporate purchasing a reversionary interest become entitled as successors within the meaning of this section: *Sol.-Gen.* v. *Law Reversionary Interest Society*, L. R. 8 Ex. 233.

(*r*) These expressions will include an allowance in respect of the value of a rentcharge created by a copyholder, who is compelled by his lord to enfranchise. But no allowance will be made where the enfranchisement is voluntary, or in respect of renewal fines: see Hanson, Prob., &c., Acts, 312.

**Succession Duty.**

*Enactments Relating to Duty.*

Real property directed to be sold to be charged as personalty (*s*).

Sect. 29. The interest of a successor in moneys to arise from the sale of real property under a trust for sale, so far as not chargeable under the Legacy Duty Acts, is to be deemed personal property chargeable with succession duty; provided that where such moneys are subject to a trust for re-investment in real property, to which the successor would not be absolutely entitled, such moneys are to be deemed real property, and each successor's interest therein is to be considered as an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession.

Personal property to be invested in real property how to be charged.

Sect. 30. The interest of a successor in personal property subject to a trust for investment in real property to which the successor would be absolutely entitled is, so far as not chargeable under the Legacy Duty Acts, chargeable with succession duty as personal property; and personal property subject to a trust for investment in real property to which the successor would not be absolutely entitled is, so far as not chargeable under the Legacy Duty Acts, chargeable with succession duty as real property; and each successor's interest therein is to be considered as an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession.

Valuation of annuities.

Sect. 31. Annuities under this Act and the Legacy Duty Acts are to be valued according to the Tables annexed to this Act (*t*).

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(*s*) For the purposes of this enactment, a discretionary power of sale, if exercised, is equivalent to a trust for sale: see *Att.-Gen.* v. *Simcox*, 1 Exch. 749.

The proceeds of sale of lands compulsorily purchased, paid into Court under the Lands Clauses Acts or other statutory enactment, retain the character of realty: *Shard* v. *Shard*, 14 Ves. 348; and accordingly are chargeable with duty calculated on the value of an annuity under sect. 21: see *Re De Beauvoir*, 2 De G. F. & J. 5; *Re Pick's Settlement*, 10 W. R. 365.

(*t*) This enactment applies only to cases where the testator or predecessor died before the commencement of this Act; in other

Sect. 32. The provisions as to assessments of personalty contained in sects. 8, 10, 11, 12, 14, and 23, of the stat. 36 Geo. 3, c. 52, are to be applicable to personal property comprised in any succession, as if such property were a legacy from the predecessor to the successor, but according to the Tables annexed to this Act (*u*). Assessments of personalty.

Sect. 33. Where the donee of a general power of appointment becomes chargeable with duty in respect of the property appointed by him, he may deduct any duty he may have already paid in respect of any limited interest in the property. Allowance to donee of general power of appointment (*x*).

Sect. 34. No allowance is made in respect of any incumbrance created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance is to be made in re- What allowance to be made for incumbrances (*y*).

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cases the duty is payable according to the old tables: *Re Earl Cornwallis*, 11 Exch. 580.

(*u*) These provisions are noticed, *ante*, p. 206. Where a person absolutely entitled to a reversionary interest, settles it, and on the reversion falling into possession, pays the whole succession duty out of his own moneys, he is entitled to be recouped out of the settled fund: *Cuddon* v. *Cuddon*, 4 Ch. D. 583.

(*x*) See sects. 4 and 21, and the remarks on the effect of those sections, *post*, p. 280.

(*y*) Incumbrances created in exercise of a joint power by a tenant for life and tenant in tail in remainder by a disentailing deed are deemed to have been created by the latter alone. Incumbrances created under joint powers.

P., a tenant for life, and his son, the first tenant in tail, disentailed the settled property and resettled it to the use of P. for life, with remainder to the use that his widow, after his death, should receive an annuity of 1000*l.* during her life, and subject thereto to such uses as P. and his son should jointly appoint, and in default of appointment, to the use of the son for life with remainders over. Subsequently, P. and his son, in exercise of their joint power, mortgaged the property, partly for the benefit of P. alone and partly for their joint benefit; and they also created an immediate annuity of 500*l.* for a grandson of P. for the lives of P. and his son and the life of the survivor: it was held that, on the death of P., the son was entitled in estimating the value of his succession to an allowance in respect of the annuity of 1000*l.*, inasmuch as the widow was chargeable with duty in respect of it; but that the mortgage-debts and the annuity of 500*l.* for the grandson were incumbrances on the succession created by the son, and that consequently he was not entitled to any allowance in respect thereof.

Portions charged upon a successor's interest by a prior tenant for life, in exercise of a limited power in a resettlement, to which Portions.

Succession Duty.

*Enactments Relating to Duty.*

spect of all other incumbrances, and also in respect of any moneys which the successor may previously to his possession have laid out in the substantial repairs or permanent improvement; the allowance in respect of any prior principal charge is limited to the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value *pro tanto* of the property.

Contingent incumbrances, and contingencies.

Sects. 35, 36. No allowance is to be made in respect of contingent incumbrances, unless they take effect; and the duty on successions is to be calculated without regard to contingencies upon the happening of which the property may pass to some other person; but if any such contingent incumbrance takes effect, or contingency happens, the successor is to be entitled to a return of duty accordingly.

Allowance or return of duty.

Sect. 37. A successor is chargeable only on the value of the property or benefit obtained by him; and any duty paid by mistake, or was in respect of property which the successor is unable to recover, or from which he is evicted, &c., is to be refunded.

Sect. 38 enacts that—

Allowance in respect of relinquished property (*z*).

"Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

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the successor was a party, are made "in execution of a prior special power of appointment," and the successor is entitled to an allowance in respect thereof accordingly: see *Att.-Gen.* v. *Floyer*, 9 H. L. C. 477.

(*z*) It makes no difference with regard to an allowance under this section that no person may become liable for duty in respect of the property relinquished. Where a person was entitled under his marriage settlement to a life annuity determinable in the event (which happened) of his coming into possession of the family estate on the death without issue of his elder brother: it was held that, on the annuitant coming into possession of the estates, he was entitled to an allowance in respect of the cesser of the annuity as being personal property, consisting of money payable under an engagement, of which he was deprived: *Re Micklethwait*, 11 Exch. 452.

If a tenant for life and a tenant in tail in remainder resettle the estate on the terms that the latter shall receive an annuity during

Powers of Commissioners to compound duties, &c.

Sects. 39, 40, 41. The Commissioners are empowered, in cases of difficulty or complication affecting the valuation of property, to compound duties, and, in special cases, to enlarge the time for payment; also to receive payment of duty in advance, allowing discount at the rate of 4 per cent. per annum, without prejudice to rights as regards repayment of duty so paid (*a*); also to commute future duties presumptively payable, having regard to contingencies (*b*).

Duty to be a first charge on property (*c*).

By sect. 42 it is enacted as follows :—

"The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the Crown from the successor, having in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession; provided, that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorising by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in

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the life of the former, an allowance must be made in respect of the annuity on the death of the tenant for life: *Commissioners of Inland Revenue* v. *Harrison*, L. R. 7 H. L. 1. See also *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150; *Le Marchant* v. *Commissioners of Inland Revenue*, 1 Ex. Div. 185.

(*a*) In practice this provision is applied also to legacy duty.

(*b*) As to commutation under sect. 41, see *Bailey* v. *Tindall*, 18 Jur. 668.

(*c*) See as to the meaning and effect of this and the next four following sections, *post*, pp. 293, *et seq.*

Succession Duty.

*Enactments Relating to Duty.*

substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys."

Provision for the separate assessments of properties.

Sect. 43. Separate assessments of the duty on the interest of the successor in any separate properties, or in defined portions of the same property, may be required by any successors; and the respective properties will then be chargeable only with the duty assessed in respect thereof; and any duties already assessed, whether collectively or distributively, in respect of any succession, may be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment has been made, in which case the charge of such duties is to be thenceforth limited according to such further distribution.

What persons accountable for duty.

Sects. 44, 45, 46. Besides the successor, every trustee, guardian, committee, tutor, or curator, or husband, in whom property, or the management of property, subject to duty, may be vested, and every person in whom the same may be vested by alienation or other derivative title at the time of the succession becoming an interest in possession, may "compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor;" and in the event of nonpayment of duty, every such person is personally accountable in respect of the unpaid duty. The persons so made accountable must, in the case of personal property, at the time of first payment of the same or any part thereof to or for the successor, and in the case of real property, when the duty first becomes payable, give notice to the Commissioners of their liability to duty, and deliver to them a full and true account of the property and the value thereof, and

Notice of succession, and return of property.

other particulars; and the Commissioners, if satisfied with the account, may assess the duty accordingly; or otherwise the Commissioners may appoint persons to value the property and assess the duty, according to such valuation, subject to appeal. Any one wilfully neglecting to give notice of succession, or to deliver the prescribed account, is liable to a penalty of 10 per cent. on the amount of duty calculated at a uniform rate of 1 per cent. on the value of the succession for every month during which the neglect continues; and every person wilfully neglecting to pay the duty payable within twenty-one days after it has been finally ascertained, is liable to a similar penalty.

Penalty.

Sect. 48. As to proceedings for recovery of legacy duty.

Legacy Duty.

Sect. 49. Persons liable to deliver accounts may be required by the Commissioners to verify their accounts by production of books and documents; and the Commissioners may, without payment of any fee, inspect and take copies of public books; but such information is to be deemed to be confidential.

Verification of accounts.

Sect. 50. Power for accountable parties to give notice of appeal against assessments, within twenty-one days thereafter, to the Court of Exchequer (now the Queen's Bench Division); a statement of the grounds of appeal is to be delivered within the further period of thirty days.

Appeal against assessment.

Sect. 51. Payments of duty are to be entered by the Commissioners in a book to be kept for the purpose, and stamped receipts are to be given for such payments; and certificates of payment are from time to time to be delivered to persons interested in property affected by duty.

Entries of payments and receipts (*d*).

Sect. 52. Every receipt and certificate purporting to be in discharge of the whole duty payable is to exonerate a *bonâ fide* purchaser for value, without

Protection to *bonâ fide* purchasers.

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(*d*) Where the Commissioners had required payment of legacy duty, succession duty being properly payable, it was held that a certificate of payment of the legacy duty discharged the land from all liability to succession duty: *Earl Howe* v. *Earl of Lichfield*, L. R. 2 Ch. 155.

Succession Duty. — *Enactments Relating to Duty.*

notice, notwithstanding any suppression or misstatement in the account, or any insufficiency of assessment; and no *bonâ fide* purchaser for value under a title not appearing to confer a succession is to be chargeable by reason of extrinsic circumstances of which he had not notice at the time of such purchase.

Registered land.

By sect. 18 of the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), land registered under that Act is expressly subjected to succession duty; and the certificate of the Commissioners of Inland Revenue is to be conclusive evidence that no duty is owing in respect of such land. See also sect. 83 as to liability to duty in respect of registered charges under that Act.

Legacies, &c., charged on realty.

By sect. 21 of the Customs and Inland Revenue Act, 1888, legacies, &c., charged on real estate (which have hitherto been liable to legacy duty) are, as regards the estate of any person dying on or after the 1st of July, 1888, rendered liable to succession duty. See *post*, p. 272.

Real property.

*What Property is chargeable with Succession Duty.*]—Leaseholds are chargeable with succession duty as realty (see *ante*, p. 253), as well as freeholds, copyholds, and customary and other hereditaments. All estates in such hereditaments are also liable to the duty; estates *pur autre vie* applicable as personal estate are chargeable with legacy duty as personalty: see stat. 36 Geo. 3, c. 52, sect. 20, *ante*, p. 208. Such estates *pur autre vie* as devolve on the heir as special occupant (see *ante*, Vol. V., p. 403 n.) are not liable to legacy duty, but it is clear that they are chargeable with succession duty as real property under the stat. 16 & 17 Vict. c. 51 (*e*).

Personal property belonging to a person domiciled abroad.

Neither legacy duty (see *ante*, p. 215) nor succession duty is chargeable in respect of a legacy of personal property, other than chattels real, belonging

(*e*) Whether the heir is chargeable as succeeding by "devolution by law" or under the "disposition" creating the estate *pur autre vie* is perhaps open to question, but the point is of merely speculative interest.

Succession Duty.

*Property Chargeable with Duty.*

to a testator, whether a foreigner (*f*) or a British subject, domiciled abroad, and passing by a will made and validated according to the laws of the country of the domicil, inasmuch as moveable property is regarded in law as situate in the country of the owner's domicil: *Wallace* v. *Att.-Gen.*, L. R. 1 Ch. 1. In that case Lord Harry Seymour, a British subject domiciled in France, left certain testamentary dispositions made and registered according to the law of France, whereby he bequeathed his residuary personal estate to the "Hospices" of Paris and London, and appointed English executors; the personalty in England consisted of a leasehold house, and of about 72,000*l.* consols: it was held that succession duty was payable on the house, but not on the consols. And it seems clear that the same rule would apply to personalty devolving by reason of the intestacy of a person domiciled abroad. Lord *Cranworth*, C., in his judgment in *Wallace* v. *Att.-Gen.* (at p. 7) expressed his opinion, that in order to bring a legatee within the terms of the 2nd section of the Succession Duty Act, he must be a person who becomes entitled by virtue of the laws of this country, and his lordship pointed out that any wider construction would give rise to serious difficulties (*g*).

*Wallace* v. *Att.-Gen.*

A person taking under a general power of appoint- Duty payable

(*f*) In the absence of express provision to the contrary, the presumption seems to be that foreigners are not to be deemed to be affected by statutory enactments: see *Tatnell* v. *Hankey*, 2 Moo. P. C. 342; *Jeffreys* v. *Boosey*, 4 H. L. C. 815.

(*g*) By the stat. 24 & 25 Vict. c. 114, sect. 1, wills and testamentary dispositions of personalty made by British subjects out of the United Kingdom are to be admitted to probate, if made according to the forms required by the laws of the place where made, or by the laws of the testator's domicil at the time of making his will or disposition, or by the laws of his domicile of origin. If therefore a British subject domiciled abroad dies, having by a will, which is valid only by the laws of this country, disposed of personal property locally situate here, it does not seem clear that his legatees would not be within the terms of sect. 2, as persons entitled by virtue of the laws of this country, and chargeable with succession duty accordingly, although they would not in such a case be liable to legacy duty: see *ante*, p. 216.

**Succession Duty.**

*Property Chargeable with Duty.*

ment which is contained in a British settlement and which is exercised by will is chargeable with succession duty, notwithstanding the foreign domicil of the donee of the power; for in such a case the appointee takes by virtue not only of the foreign will but also of an instrument which derives its validity from British law. By a settlement made on the marriage of Mr. and Mrs. Lovelace certain personal property in this country belonging to her was vested in trustees upon certain trusts during their lives and the life of the survivor, and in the event, which happened, of there being no issue of the marriage to attain a vested interest, upon such trusts as she should appoint by deed or will, and in default of appointment, for her next of kin; Mr. Lovelace died in 1852; Mrs. Lovelace died in 1856, domiciled abroad, having exercised her power of appointment by will in favour of two persons also domiciled abroad: it was held that succession duty was payable: *Re Lovelace's Settlement*, 4 De G. & J. 340.

where donee of a power is domiciled abroad.

*Re Lovelace's Settlement.*

So where an English testator by his will bequeathed a fund to trustees upon trust to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint; the testator died in May, 1856; the daughter subsequently died domiciled in Jersey, having disposed of the fund by her will whereby she gave legacies to two persons, and the residue to her husband: it was held that though by reason of the foreign domicil, the legacies were not liable to legacy duty, yet that, notwithstanding such domicil, they were liable to succession duty: *Re Wallop's Trust*, 1 De G. J. & S. 656. It will be observed by a comparison of these two cases that it makes no difference whether the donee of the power became entitled thereto before or after the commencement of the Act.

*Re Wallop's Trust.*

Moreover (whether or not a simple legacy given by a person domiciled abroad by a will, which is valid only by British law, is liable to succession duty, as to which see *ante*, p. 267, note (*g*)), it is now settled that if personalty locally situate in this

Personalty in this country of person domiciled abroad, which is settled by English will or deed.

**Succession Duty.**

*Property Chargeable with Duty.*

country is settled either by will or by disposition *inter vivos*, upon trusts enforceable by British law, the persons taking beneficial interests under the settlement will be chargeable with duty notwithstanding the foreign domicil of the settlor.

*Re Badart's Trusts.*

So where a testator, domiciled in Belgium, by his will directed a fund to be held in trust for A. for life, with remainder for his nephews and nieces, most of whom were domiciled abroad: it was held that upon the death of A. succession duty was payable on the fund: *Re Badart's Trusts*, L. R. 10 Eq. 288; see also *Re Smith's Trusts*, 10 L. T. (N. S.) 598; 12 W. R. 933.

*Att.-Gen.* v. *Campbell.*

In *Att.-Gen.* v. *Campbell*, L. R. 5 H. L. 524, a person domiciled abroad made his will in English form whereby he appointed executors, some of whom were domiciled in England, and directed them to realize his personalty which was in Portugal and to invest the same in consols, and to appropriate what should be necessary to pay an annuity, on the termination of which the appropriated fund was to revert to and form part of his residuary personal estate, which he bequeathed among his children: it was held that this constituted a succession upon the death of the annuitant, and was liable to duty accordingly: Lord *Westbury* said (at p. 529), "If a man dies domiciled abroad possessed of personal property, the question whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicile, and that on the principle of *mobilia sequuntur personam*. His domicile sets up the forum of administration. Now apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country and investing it here in consols, which they are directed to hold upon certain trusts mentioned by the will.

**Succession Duty.**

*Property Chargeable with Duty.*

But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country, and invested here in such a mode of investment as gives to the property whilst it remains here the character of English property in respect of locality.

*Lyall* v. *Lyall.*

In *Lyall* v. *Lyall*, L. R. 15 Eq. 1, L. by his marriage settlement assigned to trustees domiciled in England a policy of life assurance effected with an English company, a sum in consols, and a sum of 1000*l.* cash, in trust for his wife for life, with remainder for himself for life, and then for division among the children of the marriage; the husband died domiciled in New South Wales: it was held that on the subsequent death of the wife, succession duty was payable by the plaintiff, who was the only child of the marriage, on the funds he took under the settlement. L. also by his will directed his executors to get in his personal property in New South Wales, and to remit it for investment to trustees in England, to be held upon trust for his wife for life, with remainder for the plaintiff absolutely; the wife survived her husband only a few months, and died in New South Wales; at the time of her death, no remittances had been made, but subsequently the whole of the residuary estate was received by the English trustees, pursuant to the directions of the will: it was held that no succession duty was payable on the funds representing the residuary estate(*h*). In *Re Cigala's Settlement*, 7 Ch.

*Re Cigala's Settlement.*

Remarks on *Lyall* v. *Lyall.*

(*h*) The grounds on which Lord *Romilly*, M.R., held that the funds constituting the residuary estate, passing by the will in this case, were not subject to succession duty were not stated by his lordship. These funds were payable to English trustees, who were to invest them in England, and to hold them for the testator's widow for life and then for the plaintiff; and it would seem clear, according to the rule laid down in *Att.-Gen.* v. *Campbell*, *supra*, that, if the funds had been brought to this country and invested here, as directed by the will, immediately after the testator's decease and before that of the widow, a succession would have ensued, on which the duty would have been payable. Presumably, the *ratio decidendi* as regards the residuary estate in

**Succession Duty.**

*Property Chargeable with Duty.*

D. 351, the principle of the previous decisions was extended to moveable property locally situate abroad, such as funds of a foreign government, and shares in a foreign trading corporation, which were comprised in a British settlement and vested in British trustees, and subject to the jurisdiction of our Courts. In that case, by a settlement made on the marriage of an English lady with a domiciled Italian, certain property consisting partly of French *rentes*, and shares in the Bank of France, belonging to the lady were assigned to trustees, of whom one was a domiciled Italian, and the others were English, upon trusts after the death of the survivor of the husband and wife, for the children of the marriage; the Italian trustee having died, an English trustee was appointed in his place; the wife and husband died successively, both domiciled in Italy, leaving two children, who were domiciled Italians: it was held that succession duty was payable upon the death of the husband, on the *rentes* and shares, as they were settled by a British settlement, and vested in legal owners subject to British jurisdiction, and as any claim of the children in respect of the property was enforceable by a British Court.

Foreign investments comprised in a British settlement.

Succession duty is payable upon a sum of money, secured either by covenant or bond, for the benefit of the children of the intended marriage of the covenantor or obligor, and to be paid within a certain period after his death: *Maxwell* v. *Commissioners of Inland Revenue*, 4 Sco. Sess. Ca. (3rd Ser.) 1121; see *Lord Advocate* v. *Robert's Trustees*, 20 Sco. Sess. Ca. (2nd Ser.) 449; also upon the cesser of an annuity similarly secured: *Re Micklethwaite*, 11 Exch. 452. If, however, the agreement is for payment of a certain sum on death, and in the meanwhile to pay interest thereon at a certain rate, it seems that no succession is created: see Hanson,

Money payable under an engagement.

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this case was that when the remittances actually arrived in this country and first came into the possession of trustees subject to the jurisdiction of our Courts, there was no succession outstanding, and no trusts to be enforced except the ultimate trust in favour of the plaintiff absolutely.

**Succession Duty.**

*Property Chargeable with Duty.*

Prob., &c., Duty Acts, p. 227. In *Day* v. *Turnell* (29 Ch. D. 697; 31 Ch. D. 142) a settlor covenanted to pay to the trustees of the settlement *during his life*, or within a year after his death, a sum of money "free from all deductions" for the benefit of his daughter; the liability to succession duty was admitted by the parties, and the question was whether it was payable out of the fund, or out of the settlor's estate; but *Bacon*, V.-C., and also Lord *Halsbury*, C., and *Fry*, L.J. (in the Court of Appeal), expressed doubts as to the liability to the duty. But see *Att.-Gen.* v. *Montefiore's Executors*, W. N. 1888, p. 173.

Legacies, &c., charged on realty.

Legacies and annuities charged on real estate have hitherto been liable to legacy duty, but are now by the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), liable to succession duty at the increased rate imposed by that Act. By sect. 21, sub-sect. (2) of that Act, it is enacted as follows:—

> "The duties chargeable under the Acts now in force for charging duties on legacies and shares of the personal estates of deceased persons shall not be levied and paid under such Acts in respect of any legacy payable or having effect or being satisfied out of or charged or rendered a burden upon the real or heritable estate of any person dying on or after the 1st day of July, 1888, or any real or heritable estate, or the rents or profits thereof, which such person shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise from the sale, mortgage, or other disposition of any such real or heritable estate, or any part thereof, but the duties under the Succession Duty Act, 1853, and the additional duties under this Act shall be levied and paid in respect of every such legacy (whether given by way of annuity or in any other form) as a succession to personal property."

The following remarks on points which have arisen with regard to the liability of legacies and annuities charged on real estate to legacy duty, appear to be still applicable notwithstanding the recent enactment.

Rentcharges.

A rent charged by will on real estate, whether by direct charge or in the form of a limitation of a use, is subject to the duty, and it is immaterial that the land subject to the charge is devised

**Succession Duty.**

*Property Chargeable with Duty.*

over in equal shares to two persons, one in fee and the other for life: *Att.-Gen.* v. *Jackson*, 2 Cr. & J. 101; *Stow* v. *Davenport*, 5 B. & Ad. 359; and, if given free from duty, the duty is an additional charge on the land: *Ib.*; see *Noel* v. *Hurley*, Dan. 211. A jointure or other rent, limited under a power given by a will, is also liable to duty as a legacy given by that will: *Att.-Gen.* v. *Pickard*, 3 M. & W. 552; *Pickard* v. *Att.-Gen.*, 6 M. & W. 348; *Stow* v. *Davenport*, 5 B. & Ad. 359. If appointed by will, such a rentcharge is apparently not liable as a legacy under the second will: *Ib.* See also *Att.-Gen.* v. *Hertford*, 14 M. & W. 284.

Perpetual rentcharge.

It has been doubted whether a perpetual rentcharge created by will is a legacy within the Legacy Duty Acts, which have the word "annuity" only, the provisions in the 36 Geo. 3, c. 52, s. 8, not being applicable to perpetual annuities; but the effect of the decisions seems to be that a gift in fee of a perpetual rentcharge is liable, in the case of a testator who died before the 1st day of July, 1888, to legacy duty in the hands of the first taker, but that upon his death it would, like any other rentcharge in fee, be liable as realty to succession duty in the hands of subsequent takers: see Hanson, Prob., &c., Duty Acts, 131. Of course, in the case of a testator dying on or after the first day of July, 1888, the rentcharge would be liable to succession duty in the hands of the first taker.

Calculation of value of annuities.

By sect. 8 of the stat. 36 Geo. 3, c. 52 (*ante*, p. 206), it is provided that the value of annuities and the amount of legacy duty payable in respect thereof is to be calculated according to tables in the schedule annexed to that Act, and that the duty shall be payable by instalments. Other tables of duties are now substituted by the Succession Duty Act, 16 & 17 Vict. c. 51, *post*, pp. 300, *et seq.*(*i*). Annuities must always be calculated and paid in accordance with this enactment, even though the annuitant and the person ultimately entitled, subject to the annuity,

(*i*) This Act applies to Ireland as well as to England.

Succession Duty.

*Property Chargeable with Duty.*

are of the same degree of relationship: *Crow* v. *Robinson*, 10 W. R. 306; 6 L. T. (N. S.) 372. A larger amount of duty is payable where an annuity is given for a single life, than where it is given for the joint lives of two or more persons: see *Att.-Gen.* v. *Lord Wynford*, 9 Exch. 746, where the question arose on the construction of a will, as to whether a legatee took an annuity for his own life only, or for the joint lives of himself and his wife.

For the purposes of the duty, the value of an annuity must be calculated according to the tables in force at the time when the annuity became payable, not when the duty is actually paid: *Re Lord Cornwallis*, 11 Exch. 580.

Maintenance out of realty.

A charge on real estate of an annual sum for the maintenance of the devisee of the estate during his infancy, has been held not to be liable to legacy duty; for it is not a charge on property which belongs or is given over to another, but a mere direction as to the mode of dealing with the infant's own estate. Where a testator gave real estate to trustees for 500 years, with remainder to the first and other sons of C. J., and directed the trustees of the term, after paying certain annuities, to apply so much of the rents as they should think fit, but not exceeding a certain sum in any one year, towards the maintenance and education of C. J. during her minority, and to accumulate the surplus for her benefit, and, after her majority, to pay all the rents to her for her separate use for life: it was held, that the duty was not payable on the money applied for maintenance; nothing but what is a charge upon the estate of another person will come within the act: *Shirley* v. *Ferrers*, 1 Phill. 167.

As to proceeds of sales, &c., of real estate, see *ante*, p. 224.

All successions now liable to duty.

*What Dispositions or Devolutions of Property confer Successions.*]—The Legacy Duty Acts are confined in their application to testamentary dispositions of personal property. Until the Succession Duty Act, 1853, came into operation, no duty was payable in respect of any successions to realty, or successions to per-

Succession Duty.

*Dispositions, &c., Conferring Successions.*

sonalty accruing otherwise than under a will. But now "by the operation of sect. 2 of this Act (which embodies the whole principle of the Act) every person who by reason of any disposition of property now becomes entitled to any beneficial interest after the death of another, has conferred on him a succession that is according to the interpretation clause (sect. 1) a 'property chargeable with duty under this Act:'" see the judgment in *Sol.-Gen.* v. *Law Reversionary Interest Society*, L. R. 8 Ex. at p. 237. The statute is to be construed, not according to the technicalities of the law of real property, but according to the popular use of the language employed, so that all such property may be subject to the succession duty: *Lord Saltoun* v. *Adv.-Gen.*, 3 Macq. 659; and see the observations on that case of *Campbell*, C., in *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150.

Act retrospective as regards dispositions.

Sect. 2 of the Act applies to dispositions of property made before the commencement of the Act, *i.e.* the 19th of May, 1853, as well as to dispositions made after that date; and it is now settled that the words "past or future disposition" includes all reversionary interests created by disposition, and falling into possession since the commencement of the Act, although the right thereto may have become vested previously: *Wilcox* v. *Smith*, 4 Drew. 40; *Att.-Gen.* v. *Lord Middleton*, 3 H. & N. 125; *Att.-Gen.* v. *Gell*, 3 H. & C. 615; *Ring* v. *Jarman*, L. R. 14 Eq. 357.

Conveyance by way of sale of reversionary interest.

A conveyance or assignment of a reversionary interest in property by way of *bonâ fide* sale does not create a succession liable to the duty: see sect. 17 of the Act, *ante*, p. 256. "In framing the Act the word 'succession' was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bonâ fide* contract of purchase. Money or property, the right to which might arise upon death under a contract made *bonâ fide* in return for other money or property, was not as between the contracting parties to be treated as a succession. If the owner of a freehold estate in fee simple contracts to sell it for

**Succession Duty.**

*Dispositions, &c., Conferring Successions.*

a sum of money, subject to the reserving of a life interest to himself, the relation of predecessor and successor will not arise between the vendor and purchaser. So if two persons contract with a third for the purchase of a freehold estate, and they pay for it jointly, directing the conveyance to be made to one for life, with remainder to the other in fee, there will not be the relation of predecessor and successor between the vendor and remainderman, although it is clear that the remainder in fee will be a succession. But it was not intended to except property arising upon death under contracts for valuable consideration generally. Marriage is, by the law of England, a valuable consideration for a contract, and that of the highest kind; but property arising under a contract, in consideration of marriage, is not excepted, even in favour of persons coming directly within that consideration." *Per* Lord *Westbury*, C., in *Floyer* v. *Bankes*, 3 De G. J. & S. at p. 311. In that case it was held that a release of a possibility of dower or freebench is not a valuable consideration in money's worth. See also *Re Jenkinson*, 24 Beav. 64; *Att.-Gen.* v. *Baker*, 4 H. & N. 19. In *Fryer* v. *Morland*, 3 Ch. D. 675, F. having become absolutely entitled to the life estate of Lord C. in certain settled lands, expectant upon the death of the Earl of D., his father, sold the reversionary estate to the Earl himself in consideration of 15,000*l.* cash, and of 52,000*l.* which the Earl agreed should be paid upon his own death, and charged upon the reversion; F. having contracted to sell this charge, the purchaser objected to the title on the ground that it was liable to succession duty: but *Jessel*, M.R., held that this being a *bonâ fide* sale, no succession duty was payable in respect of the 52,000*l.* See also *Lord-Adv.* v. *Earl of Fife*, 21 Sco. L. R. 151.

**Tontine.**

A tontine does not create a succession, but is within the exemption from duty given by sect. 17 of the Act: *Oldfield* v. *Preston*, 3 De G. F. & J. 398.

**Purchase or transfer of property by a father in joint names of himself and a son.**

A purchase or transfer of stock or other property by a father in the joint names of himself and his son, if intended as an advancement for the benefit of the latter, would seem to be a "disposition" con-

Succession Duty.

*Dispositions, &c., Conferring Successions.*

ferring on him a succession contingent on his surviving his father, derived from the father as predecessor, within the meaning of sect. 2 of the Succession Duty Act. But as regards cases where the benefit accrues by a death occurring on or after the 1st of June, 1881, the beneficial interest is expressly rendered liable to account duty by the stat. 44 & 45 Vict. c. 12, sect. 38 (2 *b*), set out *ante*, p. 190. No succession or account duty will however be payable by the father if the sole absolute interest in the property reverts to him by the death of the son in his lifetime (*k*).

Liability to duty restricted to beneficial title and enjoyment.

Succession duty is payable on dispositions conferring a beneficial title and enjoyment; and accordingly no such liability accrues upon the death of one of several co-trustees. And the right of the Crown to the duty is restricted to the property which passes to the successor as beneficial owner. If, therefore, the beneficial ownership is defeated by title paramount the claim to duty will also be defeated; as where a succession is defeated by the exercise of an overriding power; or where joint tenants sever their tenancy; or where an owner makes a voluntary settlement, which he subsequently defeats by sale to a purchaser for value. So also, where realty is directed to be sold for payment of debts, or where leaseholds are sold by executors or administrators in the course of administration, the duty will be payable only on the amount or value of the surplus property, which remains after the debts, &c., are paid; and in either case the purchaser is entitled to assume, in the absence of notice to the contrary, that the sale was properly made for the purposes of administration, and consequently that the property purchased by him is not liable to succession duty.

Sales under powers.

Where a settlement contains a power of sale, and

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Presumption as to advancement.

(*k*) Where property is purchased by a father in the name of his son it is *primâ facie* an advancement; but the presumption may be rebutted by evidence of a different intention: *Sidmouth* v. *Sidmouth*, 2 Beav. 447; see *Deacon* v. *Colquhoun*, 2 Drew. 21; *Bone* v. *Pollard*, 24 Beav. 283.

**Succession Duty.**

*Dispositions, &c., Conferring Successions.*

a direction for re-investment of the proceeds of sale in other lands, the prospective liability to duty will be transferred from the lands sold to the interim investments of the purchase-money, and ultimately to the lands purchased and settled in substitution for those sold. See *Dugdale* v. *Meadows*, L. R. 6 Ch. 501; *Re Warner's Settled Estates*, 17 Ch. D. 711. See further on this subject, *post*, pp. 295, *et seq.*

Beneficial title acquired "upon a death" is liable to duty.

In order to confer a succession, a disposition must create an interest to accrue upon, or with reference to a death of some person. Money raisable after a death, upon the happening of a contingency, is a succession liable to duty, if the contingency happens: *Re Jenkinson*, 24 Beav. 64. It makes no difference whether the death upon which the interest accrues is that of the disposer himself, or that of a stranger: *Att.-Gen.* v. *Yelverton*, 7 H. & N. 306; see *Att.-Gen.* v. *Gardner*, 1 H. & C. 639; and the death need not be that of a person himself having an interest in the property, by whose death the title to the property passes to the successor, if the death is the event upon, or by reference to which, the interest falls into possession: see *Att.-Gen.* v. *Gell*, 3 H. & C. 615; *Ring* v. *Jarman*, L. R. 14 Eq. 357. In both these cases the testators died a few years before the commencement of the Succession Duty Act having respectively by their wills left property upon trust for accumulation during "intervals" of twenty-one years after their deaths, which terms expired after the commencement of the Act: in the latter case the persons, who took the property on the expiration of the term, became so entitled by reason of the death after the commencement of the Act, of a person, who himself never took any interest whatever in the property.

Alternative conditions of succession.

Where a settlor, by an irrevocable deed, settled personal property upon trust for himself for a period of four years if he should so long live, and on the expiration of the period or if he should die within the period (which event happened) then from and after his death upon trust for his three nieces; it was held by the Court of Appeal (reversing the decision of *Grove*, J.) that as the succession actually

Succession Duty.

*Dispositions, &c., Conferring Successions.*

fell into possession on the death of the settlor, succession duty was payable on the whole of the fund, and not merely on the income for the interval between the settlor's death, and the expiration of the period: *Att.-Gen.* v. *Noyes*, 8 Q. B. D. 125.

"After an interval."

Where property is left to a widow for life or until marriage with a remainder over, the remainderman will, in the event of the marriage of the widow, become liable, "after the interval" of her widowhood, to duty upon a succession derived from the testator as predecessor. See Hanson, Prob., &c., Duty Acts, 234.

"Substitutive limitation."

The words "substitutive limitation" include a power of appointment: see *Re Lovelace*, 4 De G. & J. 340; *Re Peyton*, 7 H. & N. 265. See also *post*, p. 286.

Successions conferred by "devolution by law."

"Devolutions by law" conferring successions include cases where property passes on a death to the heir-at-law or next of kin of the deceased, and also, apparently, cases where an heir takes an estate *pur autre vie* as special occupant; perhaps, however, the correct view may be that the heir in such a case takes as a *persona designata* under the "disposition" creating the estate: see Hanson, Prob., &c., Duty Acts, 237. "Devolution by law takes place wherever the title is such that an heir takes under it by descent from an ancestor according to the rules of law applicable to heritable estates; and in all cases of descent the estate of the successor is immediately derived from the ancestor from whom the estate descends": *per* Lord *Selborne* in *Earl of Zetland* v. *Lord Adv.*, 3 App. Ca. at p. 520. The word "ancestor" for the purposes of the Act does not, however, necessarily mean lineal ancestor, but means any person who really preceded in the estate, although that person may not be the progenitor of the successor: *Ibid.*, *per* Lord *Hatherley*, at p. 518. See also *Re de Lancey*, L. R. 4 Ex. 345, and *De Lancey* v. *The Queen*, L. R. 7 Ex. 140.

Determination of rate of duty payable.

A succession is created upon the taking effect of the disposition whereby it is conferred, that is to say, in the case of a settlement made *inter vivos*, upon its execution, and in the case of a will upon

Succession Duty.

*Dispositions, &c., Conferring Successions.*

the death of the testator, and the liability to duty attaches immediately thereupon, although it does not become payable until the succession falls into possession (see sect. 20, *ante*, p. 256). And, accordingly, the rate of duty payable is determined by the circumstances existing when the succession is first created, and not by any subsequent circumstances which may occur in the meantime, before it falls into possession: Hanson, Prob., &c., Duty Acts, 237; and see *Floyer* v. *Banks*, 3 De G. F. & J. 306.

Person from whom the successor's interest is derived.

The question who is the "predecessor" is determined by the consideration whether the succession is by "disposition" or by "devolution by law"; where the succession is by "disposition" the settlor is the "predecessor," where it is by devolution the last possessor is the "predecessor": *Lord Saltoun* v. *Att.-Gen.*, 3 Macq. 659; *Lord Zetland* v. *Lord Adv.*, 3 App. Ca. 505. The latter class of cases presents no difficulties, but the question as to who is to be deemed to be the predecessor, when a succession is conferred by a disposition, has been the subject of numerous judicial decisions.

Powers of appointment.

It is expressly enacted by sect. 4 of the Succession Duty Act, 1853, that a succession created by the exercise of a limited power of appointment is derived from the donor of the power; and the same principle has been held to apply in cases not falling within the provisions of that section, whether created by deed or will; also to general powers: see *Re Lovelace's Settlement*, 4 De G. & J. 340, stated *ante*, p. 268; *Re Barker*, 7 H. & N. 109; *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548; 4 De G. & J. at p. 348. In *Re Lovelace's Settlement*, Lord Justice *Turner*, after reading the second section of the Act, said, "Taking this section by itself there cannot, I think, be any reasonable doubt that appointees under general powers of appointment were meant to be included, and are included within it. It extends to all persons who are, by reason of any past or future disposition of property, entitled either originally or by substitutive limitation, and it cannot, I think, be said that

appointees under a general power are not entitled, by reason of the disposition which created the power. They derive their title, indeed, through the instrumentality of the donee of the power, but they could have no title if the disposition creating the power had not existed." Where, however, a general power of appointment takes effect upon a death after the commencement of the Act, so as to bring the case within sect. 4, the appointee takes a succession derived from the donee of the power as predecessor. See also *post*, p. 286.

Resettlements of family estates.

Questions have frequently arisen as to the rate of duty payable in cases where family estates have been disentailed and resettled by a tenant for life and tenant in tail in remainder. Where a father and son being respectively entitled, under the will of a deceased brother of the father, to certain estates, as tenant for life in possession and first tenant in tail in remainder respectively, by a disentailing deed conveyed the property to such uses as they should jointly appoint, and by a subsequent deed in exercise of the power charged the property with an annuity for the son, and subject thereto appointed the property to the use of the father for life, with remainder to the use of the son for life with remainders over; on the death of the father, after the commencement of the Act, the question arose, what rate of duty was payable; it was contended on behalf of the son that he and his father were joint predecessors within the meaning of sect. 13 of the Act, and that consequently, that as to one moiety of the property he was to be deemed to have derived his succession from his father as predecessor, and chargeable with duty at the rate of 1 per cent. only accordingly; but it was held that the son took the whole property under "a disposition made by himself" alone, within the meaning of sect. 12, and that therefore he was liable to duty at the rate of 3 per cent., as if no disposition had been made: *Att.-Gen.* v. *Sibthorp*, 3 H. & N. 424. And this decision was confirmed by the House of Lords in a subsequent case, where the circumstances were very similar: *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C.

**Succession Duty.**

*Dispositions, &c., Conferring Successions.*

150, affirming the decision of the Court of Exchequer in *Att.-Gen.* v. *Lord Braybrooke*, 5 H. & N. 488. And in such a case, all persons succeeding to the possession of the property after the son, would derive their interests from him as predecessor: *Att.-Gen.* v. *Floyer*, 9 H. L. C. 477; *Att.-Gen.* v. *Smythe*, Ibid. 497. In the case of *Charlton* v. *Att.-Gen.*, 4 App. Ca. 427, certain settled estates were disentailed, and limited to such uses as the father and his eldest son W. should jointly by deed appoint, and in default, subject to an annuity in favour of W., to the father for life, remainder to W. for life, remainder to his first and other sons successively in tail male; in default remainder to such uses as the father and his second son T. should jointly appoint, and in default to T. for life, with remainders over; W. died unmarried, without having exercised the first power; and the father and T. made an appointment under which, in the events which happened, T.'s daughter became entitled in possession: it was held that her succession was derived from W., her uncle, as the donor of the power, and that duty at the rate of 3 per cent. was payable accordingly.

Bequest of amount subscribed for in the "Customs Annuity and Benevolent Fund."

Succession duty is payable by a person entitled under the will of an officer of Customs to the amount, for which the officer had subscribed in the "Customs Annuity and Benevolent Fund," and which becomes payable at his death; the testator by subscribing to the fund creates the disposition which he carries into effect by his will, and the person becoming entitled to the fund derives his succession from the testator accordingly: *Att.-Gen.* v. *Abdy*, 1 H. & C. 266. Where, however, a subscriber to the fund irrevocably assigned the moneys to become payable on his death by way of mortgage to secure an advance, it was held that the interest of the mortgagees was within the 17th section of the Act (*ante*, p. 256), and not liable to duty: *Re Maclean's Trusts*, L. R. 19 Eq. 274.

Tenant for life purchasing a charge on the estate.

Where a tenant for life as the result of his dealings with the settled property becomes a creditor on the estate for a sum of money payable at a future time, the persons who under the disposition which

he makes of the money become entitled to it on his death are successors, deriving title from him as their sole predecessor. So where C., being tenant for life of real estate, concurred with G., his nephew, who was tenant in tail in remainder in disentailing the property, and conveyed it to such uses as C. and G. should jointly by deed appoint; by a subsequent indenture in exercise of their joint power, C. and G. charged the property from and after the death of C. with 25,000*l.*, as to 5,000*l.* for C. himself, and, as to the remaining 20,000*l.* for the benefit of his daughters, and subject thereto appointed the property to G. in fee; by the same deed C. covenanted to pay the annuity during his life, and charged his life estate as a security for the same; C. died in 1855 having disposed of the 5,000*l.* by his will; as to the 5,000*l.* it was held that no succession duty was payable inasmuch as C. was a purchaser thereof for valuable consideration, and therefore exempt under sect. 17 (see *ante*, p. 256); and as to the 20,000*l.*, it was held that C. was a purchaser for value of the charge, and was the predecessor from whom the daughters derived their title to the money, and that consequently their succession thereto was chargeable with duty at the rate of 1 per cent. only: *Re Jenkinson*, 24 Beav. 64. Similarly, where W., a tenant for life, concurred with C., the first tenant in tail in remainder, in disentailing the property, and C. in consideration of advances made to him by W. charged the disentailed estates, subject to certain limitations in favour of C. and E. and their respective issue, with a sum of 20,000*l.*, which was to be held for the benefit of such persons as W. should by deed appoint, and in default of appointment for W. absolutely; W. by a subsequent deed appointed the 20,000*l.* in favour of persons who were strangers in blood to him, and died in 1855, without issue; E. also died without issue in 1857, whereupon the money became payable: it was held that the appointment conferred a succession liable to duty at the rate of 10 per cent.: *Att.-Gen.* v. *Yelverton*, 7 H. & N. 306.

Succession Duty.

*Dispositions, &c., Conferring Successions.*

A disposition made in consideration of a release of claims is deemed to be made by the releasor of the claims. Where the niece of an intestate set up a claim to part of his personal estate as one of his next of kin, and, under an arrangement for a compromise, she and her husband released their claim to the administrator in consideration of his settling a sum of stock upon trusts for the niece and her husband successively for life, with remainder for their children as they should jointly appoint with remainders over: it was held that the children to whom the stock was appointed derived their succession from their mother (who died after the commencement of the Act), and not from the intestate, who was a stranger in blood to them, and consequently, that duty was payable at the rate of 1 per cent. only: *Att.-Gen.* v. *Baker*, 4 H. & N. 19.

Release of claims against an estate.

Family arrangement for resettlement.

A lunatic was tenant in tail in possession of land with remainder to his brother R. and his sister D. successively in tail. R. converted his estate into a base fee in remainder, and mortgaged it for more than the fee simple of the property was worth, so that he had no beneficial interest in the equity of redemption. Subsequently a family arrangement was made for the benefit of all parties, with the consent of the Lord Chancellor as protector of the settlement, in pursuance of which R., D., and the mortgagees conveyed the land, subject to the estate tail of the lunatic, but freed from the mortgage and equity of redemption, to trustees in fee, upon trust after the determination of the lunatic's estate to raise 37,000*l.*, to be paid to the mortgagees, and subject thereto, to the use of D. for life, with remainder to his sons successively in tail; on the death of the lunatic, D. accordingly entered into possession as tenant for life: it was held by the Court of Appeal, that upon the death of D., her eldest son derived his title from his mother D., and not from his uncle R., as predecessor, and was therefore liable to duty at the rate of 1 per cent. only: *Att.-Gen.* v. *Dowling*, 6 Q. B. D. 177, affirming the decision of the Exchequer Division, S. C. 5 Ex. D. 139.

Disposition in

But the consideration must be money or money's

worth; marriage, though a valuable consideration in law, is not sufficient to render a person a predecessor as being a purchaser. Where a husband settled a sum of 10,000*l.* belonging to him upon trust for himself and his wife successively for life, with remainder for the children of their marriage, and in default of such issue (which event happened), upon trusts for the benefit of the children of the wife by a former marriage: it was held that on the death of the survivor of the husband and wife, her children derived their title from her second husband, not from herself, and that duty at the rate of 10 per cent. was payable: *Re Ramsay's Settlements*, 30 Beav. 75.

consideration of marriage.

The terms of sect. 3 of the Act (*ante*, p. 253) are of very wide application. "The first branch of this section applies to any *property*, the second to any *succession*, taken by two or more persons under a joint title, as to both of which it makes the beneficial interest accruing by survivorship a succession in the surviving joint tenant which is derived in cases of joint property from the deceased co-owner, and in cases of joint succession from the original predecessor:" Hanson, Prob., &c., Duty Acts, 253. It will be observed that there is no exception in favour of purchases for valuable consideration of money or money's worth of property to be held jointly so as to create a beneficial interest accruing by survivorship; in such a case upon the death of one co-owner a succession will accrue to the other or others derived from the deceased co-owner, not from the vendor, as predecessor: see the observations of Lord *Westbury*, C., in *Floyer* v. *Bankes*, 3 De G. J. & S. at p. 311.

Joint property and joint successions.

Where there is a gift to a husband and wife, they do not take as joint tenants but by entireties, being in law but one person; and on the death of one of them the entirety belongs to the other without any succession in respect of which duty would be payable: see *Doe* v. *Wilson*, 4 B. & Al. 303; *Hatton* v. *Finch*, 4 Beav. 186; *Moffatt* v. *Burnie*, 18 Beav. 211.

Gift to husband and wife.

A joint succession is conferred only where there is actually a benefit accruing by survivorship. If,

Severance of joint tenancy.

**Succession Duty.**

*Dispositions, &c., Conferring Successions.*

therefore, the joint tenancy is severed, or the property is sold and conveyed to a purchaser, no duty will be payable upon the death of any of the persons who were formerly the joint tenants of the property.

Account duty.

As to account duty on property transferred or invested in the joint names of the owner and another person so as to pass a beneficial interest by way of survivorship, see *ante*, pp. 197, *et seq.*

Succession conferred by powers of appointment.

The exercise of a general power of appointment will confer a succession under sect. 4 of the Act, under which the appointor will become liable to duty, if the power takes effect upon a death happening after the commencement of the Act, although the power may have been exercised previously: *Re Lovelace's Settlement*, 4 De G. & J. 340. A power apparently takes effect when an appointment made under it becomes effective by coming into possession: *per* Lord *Selborne* in *Charlton* v. *Att.-Gen.*, 4 App. Ca. at p. 447. But the appointor will not be liable to duty as a successor if the appointment is only to take effect on his own death, as if the power be only to appoint by will, or if property be given a person for life with remainder as he shall by deed or will appoint: see *Att.-Gen.* v. *Mitchell*, 6 Q. B. D. 548. And by the terms of the section the liability of the donee of the power will only attach "in the event of his making any appointment thereunder." The succession is derived from the donor of the power, so that if an appointment is made by the donee in favour either of himself or of another person, the donee will be personally liable to duty, and the property appointed will be chargeable therewith, as if it had been given absolutely to him upon a death. If the appointment passes an immediate possession the duty will be payable at once upon the exercise of the power; but if the interest appointed is reversionary, the duty will not be payable until the interest falls into possession. See further, Hanson, Prob., &c., Duty Acts, 255, *et seq.*

As to whether appointees under a general power derive their title from the donor or the donee of the power, see *ante*, p. 280. The section expressly provides that in the case of a limited power the suc-

cession shall be deemed to be derived from the person creating the power.

**Succession Duty.**

*Dispositions, &c., Conferring Successions.*

By sect. 5 the extinction of determinable charges, estates, and interests is to confer successions. The lapse of an annuity created before the commencement of the Act, and charged upon property which had before that date become vested in the heir of entail of the former owner was held to confer a succession liable to duty under this section: *Lord Advocate* v. *Macdonald*, 24 Sco. Sess. Ca. (2nd Ser.) 1175. Where real estate, out of which a widow is dowable, is sold by order of the Court free from dower, duty is payable on the dower, and the Court will provide for the payment thereof accordingly: *Harding* v. *Harding*, 2 Giff. 597. See further as to the effect of this section, *Wilcox* v. *Smith*, 4 Drew. 55.

Increase of benefit by determination of charges, &c.

Under the 14th section of the Succession Duty Act, a single duty only is payable, where a succession, before it falls into possession, devolves or is disposed of, so as to create a new succession. Where a succession devolves on the legatees or next of kin of a successor, only one duty is payable, but in such a case the duty payable will be legacy duty under the will or intestacy of the original successor, and the property having thus borne its proper burthen is exempt from succession duty altogether under sect. 18 of the Act: *Re Chapman's Trusts*, 2 H. & M. 447; *Att.-Gen.* v. *Littledale*, L. R. 5 H. L. 290. See *Att.-Gen.* v. *Cleave*, 31 L. T. (N. S.) 86.

Duty on transmitted successions.

The 15th section of the Act does not impose any new duty on the person taking by alienation or derivative title, but, where reversionary property passes through a number of persons successively it secures payment of the duty imposed by previous sections of the Act applicable to the particular case. Where a person buys an existing succession he must pay the original duty: *Fryer* v. *Morland*, 3 Ch. D. 687; see also *Sol.-Gen.* v. *Law Reversionary Soc.*, L. R. 8 Ex. 233. Or, in other words, the alienee, or other derivative owner, is placed in the same position in respect of liability to duty as the original owner of the succession. A testator devised real property to his wife for life with remainder to her son by a

Duty on transferred interests.

**Succession Duty.**

*Dispositions, &c., Conferring Successions.*

former marriage in fee; he died in 1844, intestate, leaving a son, his heir-at-law; upon the death of the tenant for life in 1859 the heir became entitled in possession: it was held that, under sect. 15, duty was payable at the rate of 10 per cent., being the same rate at which his father would have been chargeable if he had become possessed of the property, not at the rate of 1 per cent. as on a succession derived from the father: *Att.-Gen.* v. *Rushton*, 2 H. & C. 812.

Succession by alienation, &c.

Where a father and son, being respectively tenant for life and tenant in tail of real estate, barred the entail, and resettled the property; by the settlement a sum of 20,000*l.* was made raisable for a younger son after the death of the tenant for life; by a subsequent deed this sum was directed to be raised in a certain event (which happened) whether the younger son should survive the tenant for life or not; the eldest son died in the lifetime of his father: on the death of the latter it was held that the 20,000*l.* was not a succession which had become vested in the younger son "by alienation or by any title not conferring a new succession" under the second clause of sect. 15, and that succession duty at the rate of 3 per cent. was payable as upon a succession derived from his brother: *Att.-Gen.* v. *Lord Eustace Cecil*, L. R. 5 Ex. 263. The words "by alienation or by any title not conferring a new succession" mean "either by alienation, or by any title other than alienation, in both cases not conferring a new succession." Under a settlement real property was limited to A. for life, with remainder to B. in fee; A. and B. sold and conveyed the property to C. in fee, who died devising the property to D. in fee; D. paid duty on his succession from C., and then sold the property: it was held that on the death of A. no further succession duty was payable: *Re Cooper and Allen's Contract*, 4 Ch. D. 802.

Rate of duty payable.

The rate of duty payable is to be the same "as if no such alienation had been made." Where, therefore, a succession, which has been alienated, does not fall into possession until after the death of the alienor, the duty is apparently payable at the same

Succession Duty.

*Dispositions, &c., Conferring Succession.*

time and rate as if no alienation had been made, and as if the alienor had survived, and himself become liable to the duty; the duty, however, in such a case must be calculated on the value of the alienee's life interest under sect. 21: *Sol.-Gen.* v. *Law Reversionary Society*, L. R. 8 Ex. 233.

Acceleration of title.

Where upon a re-settlement by a tenant for life and remainderman, an immediate annuity is made payable to the latter, this does not amount *pro tanto* to a "surrender or extinction" of the tenant for life's interest so as to accelerate the title to the succession; the annuity comes out of the tenant for life's interest and is not subject to duty, and in calculating the duty payable on the death of the tenant for life, an allowance must be made under sect. 38 in respect of the amount of the annuity: *Commissioners of Inland Revenue* v. *Harrison*, L. R. 7 H. L. 1. See also *Lord Braybrooke* v. *Att.-Gen.*, 9 H. L. C. 150. And it makes no difference that the annuity is expressly limited to determine at the time when the remainderman comes into possession of the property: *Le Marchant* v. *Commissioners of Inland Revenue*, 1 Ex. D. 185. As to advancements made under a power in a settlement, see *Ex parte Sitwell, Re Drury Lowe's Settlement*, W. N. 1888, p. 174.

Assessment of duty on personalty.

*Mode of Assessment of Duty.*]—As regards successions to personalty the duty is to be assessed and paid in the same manner as if they were legacies: sect. 32. The duty is accordingly assessed upon the principal amount or value of the property and is to be raised and paid immediately.

Assessment of duty on realty.

In the case of realty the interest of the successor is to be deemed to be of the value of a life annuity equal to the annual value of the property: sect. 21, *ante*, p. 257. The grounds on which this difference in the mode of assessment is made are that realty is not readily convertible for the purpose of raising the duty, and also that it must necessarily devolve by a series of successions so that an assessment of the duty on the principal value upon each succession, might subject the property to an inequitable burthen. The duty is charged on the capital value of such annuity, as representing the presumable

**Succession Duty.**

*Assessment of Duty.*

personal enjoyment of the successor, according to tables contained in the schedule to the Act (see *post*, p. 300) by eight half-yearly instalments commencing twelve months after the successor comes into possession; the last instalment thus becomes payable on the expiration of four and a half years after that event. If the successor dies before all the instalments are paid, then if he has only a life interest, the unpaid instalments cease to be payable, but if he is absolutely entitled, they become a continuing charge on the property, in exoneration of the other property of the deceased successor.

Annual value of property.

In order to render a real succession to the duty, the property (except in cases specially provided for) must be of an ascertainable annual value, at the time when the successor enters into possession. Unproductive land of no present value is not liable to duty by reason of its subsequently becoming valuable: *Att.-Gen.* v. *Earl of Sefton*, 11 H. L. C. 257.

Competency to dispose by will of a continuing interest.

The competency of a successor to make a disposition by will depends on the quantity of his estate, and not on his personal capacity to make a will: *Att.-Gen.* v. *Hallett*, 2 H. & N. 368. While a tenant for life has a general power to appoint the property by will, his competency to dispose of it will cause any instalments of duty unpaid at his death to be a continuing charge on the property whether or not he has exercised the power. Lord *Lilford*, being tenant in tail under a will, shortly after becoming entitled in possession to the property, barred the entail, and died within twelve months after the death of the tenant for life whom he had succeeded, so that no instalment of succession duty had become due: it was held by the Court of Exchequer (*Att.-Gen.* v. *Lord Lilford*, 3 H. & C. 239) that the instalments of unpaid duty were a continuing charge on the property, payable by the defendant, who was the next owner; but *Pollock*, C.B., dissented from this view on the ground that the liability to the duty must be determined by the state of circumstances existing at the time when the succession fell into possession, and that Lord *Lilford* was then only tenant in tail and consequently not competent to dispose by will of a continuing interest in the pro-

Succession Duty.

*Assessment of Duty.*

perty: the decision of the majority of the Court was however upheld on appeal by the House of Lords on the ground that the power of barring the entail and so becoming competent to dispose of the property by will, was incident to the estate tail which Lord *Lilford* took under the will: *Lord Lilford* v. *Att.-Gen.*, L. R. 2 H. L. 63. "The interest which Lord *Lilford* took was an interest, though only of a tenant in tail, which had in it a certain potentiality which ripened into a power to dispose of the estate, and to give it a continuing interest to his successor. It was part of the quality of the succession; and being part of the quality of the succession, and he having exercised that power, or being competent to exercise that power, it must be considered that he was in the predicament which the statute contemplates:" *per* Lord *Colonsay*, *S. C.* at p. 71. The view thus expressed seems quite consistent with the well-known principle laid down and relied upon by the learned Chief Baron; and apparently it would have made no difference in the decision of the House of Lords if Lord *Lilford* had not disentailed his estate, as the taking of that step was within his competence and depended merely on his own pleasure.

Joint tenants.

Real property will not continue to be chargeable in the hands of a surviving joint tenant, with unpaid instalments of duty in respect of the succession of his deceased co-owner, as the latter is clearly not competent to dispose of the property by will.

As to deductions in respect of unpaid instalments of duty continuing chargeable on the property, see *post*, p. 299.

Several points requiring observation with regard to assessment of duty in respect of special kinds of duty are noticed in the notes to the summary of the provisions of the Act, *ante*, pp. 256, *et seq.*

51 Vict. c. 8, sect. 22.

The Customs and Inland Revenue Act, 1888, contains the following provisions permitting alternative modes of payment of succession duty on realty at the option of the successor:—

Duty on succession to real property

Sect. 22. "(1.) The duty chargeable on the interest of a successor in real property, considered as an annuity in conformity with

**Succession Duty.**

*Assessment of Duty.*

chargeable as annuity. How to be paid.

section twenty-one of the Succession Duty Act, 1853, shall, where the successor has become entitled to his succession upon the death of any person dying on or after the first day of July one thousand eight hundred and eighty-eight, be paid, as follows,—

"(*a.*) by eight equal half-yearly instalments, according to the provisions of the said section; or, at the option of the successor,

"(*b.*) by two equal moieties, whereof the first moiety shall be paid by four equal yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the three following instalments at yearly intervals to be computed from the day on which the first instalment shall have become payable; and the second moiety shall be paid on the day for payment of the last instalment of the first moiety, or, if not so paid, shall be payable by four equal yearly instalments, with interest at the rate of four pounds per centum per annum from such last-mentioned day on so much of the second moiety as shall for the time being remain unpaid, the first of such instalments, with the interest, to be paid at the expiration of twelve months from that day.

"(2.) In the event of a successor availing himself of the option given to him by this section, he shall be entitled to tender the duty in advance, and receive discount thereon at such rate and subject to such regulations in all respects as the Commissioners of the Treasury may prescribe.

"(3.) In the event of the successor availing himself of the option given to him by this section, and dying before all the duty with the interest (if any) shall have been fully paid, then the unpaid part of the duty with the interest (if any) shall,—

"(*a.*) where the successor shall have been competent to dispose by will of a continuing interest in such property, be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest; and

"(*b.*) where the successor shall not have been so competent, be a debt due to her Majesty, and payable out of his estate, either in advance under the provision in this section in that behalf, or at the same time or times and in the same manner as the amount unpaid would

Succession Duty.

*Assessment of Duty.*

have been payable by him if he had not died; provided that if the death of the successor shall have happened before the day for payment of the last instalment of the first moiety of duty, the debt shall be reduced by so much as would have ceased to be payable if the duty had been payable by eight half-yearly instalments under section twenty-one of the Succession Duty Act, 1853.

"(4.) A successor entitled to his succession upon the death of a person dying before the first day of July one thousand eight hundred and eighty-eight shall have the option given by this section, if no instalment of duty has become due from him, or if only one such instalment has become due from him, and has been paid before the first day of July one thousand eight hundred and eighty-eight."

Charge of duty.

*Charge of Duty, and Accountable Persons.*]—By sect. 42 the duty is made a first charge on the interest in realty of the successor, not only in his own hands, but also in the hands of all persons "claiming in his right." And in the case of personalty, the duty is a first charge on the successor's interest while held by him or others on his behalf. Moreover by sect. 44 all trustees and other persons in whom property is vested for the benefit of the successor and all persons taking the property as alienees or by derivative title from him, are made personally accountable for payment of the duty.

Effect of sect. 42 as regards sales of settled land by tenant for life and remainderman concurrently.

Where land is settled and limited to a person for life with remainder to another in fee simple, then if the tenant for life and remainderman concur in selling the fee, by conveying their respective interests to a purchaser, the land in the hands of the purchaser will be chargeable with the succession duty, to become payable on the death of the tenant for life, as if no sale had been made. In such a case no merger of interests takes place until the property is actually conveyed to the purchaser, who thus clearly takes the interest of the successor "in his right;" and such interest remains liable to the expectant duty. But if the sale is effected in exercise of a power of sale overriding the limitations of the settlement, in which the successor's concurrence is

**Succession Duty.**

*Charge of Duty, &c.*

necessary, then notwithstanding that a purchaser might perhaps be regarded as taking the successor's interest in his right, inasmuch as he takes by virtue of the successor's concurrence in the exercise of the power, yet, by the concluding proviso of the 42nd section, the land thus sold is expressly exonerated from all liability to the duty, which will attach by way of substitution to the proceeds of sale, and all mesne investments thereof, and ultimately to all lands purchased therewith, and conveyed to the uses of the settlement.

Whether land sold by tenant for life under statutory powers is liable to duty.

The question whether, upon a sale by a tenant for life or other limited owner in exercise of his statutory powers under the Settled Land Acts (45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18), the land sold is free from the charge in respect of succession duty is one of some doubt and difficulty. Neither of these Acts contains any express provision on the subject, and there are as yet no reported decisions with regard to it. It has been seen (*ante*, sub tit. PURCHASES, Vol. V., p. 48), that a conveyance by a tenant for life operates under sect. 20 so as to pass the common law estates in freeholds and leaseholds, and the right of admittance to copyholds, and the Acts contain no provision corresponding to the 22nd section of the Settled Estates Act, 1877, on which so much stress was laid by *Jessel*, M.R., in *Re Warner's Settled Estates*, 17 Ch. D. 711, that the conveyance shall operate by way of revocation and reappointment of use. The statutory power under the Settled Land Act, 1882, is analogous to a common law authority enabling the tenant for life to transfer the seisin: see Wolst. and Turn. S. L. Acts, p. 33. The decision in *Re Warner's Settled Estates* does not therefore seem completely to cover the case of a tenant for life selling under his statutory powers (*l*). On the other hand, the tenant for life's powers being

(*l*) The learned editors of Dart, V. & P., 6th ed., at p. 669, apparently take a different view as to the operation of an exercise of the power of sale given by the Settled Land Act, 1882, and accordingly they regard the principle of this decision as applying with equal force to a sale under the statutory power.

Succession Duty.

*Charge of Duty, &c.*

exercisable without the concurrence of those entitled in remainder, it would seem that the purchaser cannot be regarded as taking the successor "in his right" so as to charge the land with duty in the hands of the former within sect. 42 of the Succession Duty Act. Moreover it is expressly enacted by sect. 20 of the Settled Land Act, 1882, that a conveyance by a tenant for life under the Act shall be "effectual to pass the land conveyed, &c., discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests and *charges subsisting or to arise thereunder*." These last words seem to be sufficient to include the charge in respect of succession duty even if it should be considered that a sale of land by a tenant for life in exercise of his statutory powers comes within the terms of sect. 42 of the Succession Duty Act. On the whole, therefore, it is conceived that should the question of the liability of land to duty arise as between a vendor and purchaser, on a sale by a tenant for life, the land would be held to be exonerated from all expectant duty payable on successions arising by virtue of the limitations of the settlement.

Direction for sale of lands.

Where land is under a will subject to a trust or direction for sale, the property is now subject to succession duty, see *ante*, p. 272; so, also, where there is a discretionary power of sale, if exercised, for purposes of division: see *ante*, p. 226.

Land sold under power in a settlement is freed from duty.

Where a sale of settled land is effected by the exercise of an ordinary power of sale in a settlement, it would seem that the purchaser does not take any interest of any successor "in his right," and that the 42nd section does not apply at all to such a case, so as to render the *land* chargeable with succession duty in the purchaser's hands. In *Dugdale* v. *Meadows*, L. R. 6 Ch. 501, lands charged with the payment of subsisting jointure, were conveyed to the uses of a settlement, whereby a power of sale, with the consent of the tenant for life for the time being, was given to the trustees; a portion of the property was sold by the trustees with the concurrence of the tenant for life and jointress: it was held

*Dugdale* v. *Meadows.*

Succession Duty.
*Charge of Duty, &c.*

by the Court of Appeal, affirming the decision of *James*, V.-C. (*S. C.*, L. R. 9 Eq. 212), that the property sold was discharged from liability to the duty, which would become payable on the death of the jointress, and that the purchaser must complete without any indemnity against the duty (*m*). In *Re Warner's Settled Estates*, 17 Ch. D. 711, this principle was extended to the case of a sale by the Court under the provisions of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and it was held that the land sold was freed from expectant succession duty, and that the liability attached to the proceeds of sale. The principle of decision is thus explained by *Jessel*, M.R., in his judgment in that case: "First I will consider the ordinary case of a sale under a

Sale by Court.
*Warner's Settled Estates.*

(*m*) The decision in *Dugdale* v. *Meadows* has been questioned (in a note, Dav. Conv., 4th ed., vol. ii., p. 313), on the ground that it ignores sect. 5 of the Succession Duty Act, and proceeds upon principles which apply only where the proceeds of sale are to be laid out in the purchase of land, or are to be retained by the trustees. But it is obvious that the "increase of benefit" chargeable as a succession under sect. 5 accrues to the person entitled to the proceeds of sale, to which the jointure charge itself attaches, and not to the land sold or the purchaser thereof. In a previous passage of the same note (which is cited with apparent approval by *Jessel*, M.R., in *Re Warner's Settled Estates*, *supra*) it is stated that the operation of the 42nd section of the Act on the exercise of a power of sale is to shift the duty to the purchase-money or its investments. But it is, with deference, submitted that the exempting proviso at the end of the section only extends to powers of sale "exercisable *with the consent of the successor, or by the successor* with the consent of another person." The Editor ventures to suggest that the view stated in the text is more in accordance with the language of the statute, that is to say, that sales in exercise of ordinary powers in settlements are to be regarded as altogether outside the provisions of sect. 42, inasmuch as the purchaser does not, in such a case, take the interest of a successor in the land "in his right," which land therefore is not chargeable with duty by virtue of that section.

It is to be observed that the Crown was not represented in either of the cases cited in the text, and therefore cannot be regarded as bound by these decisions. But the rule there laid down is stated without objection by the late Mr. Hanson, Comptroller of Legacy and Succession Duties (Prob., &c., Acts, p. 232), from which it would appear that the principle of the decisions is acquiesced in by the advisers of the Crown.

Succession Duty.

*Charge of Duty, &c.*

power contained in a settlement. The effect of the exercise of the power in the settlement is to revoke the uses, and consequently there is no succession left, there is nothing on which the duty can be charged, and if there were no succession duty on personal property, the land would be free and the purchase-money too; but where there is a power of sale and a trust to lay out the money in the purchase of land, in the meantime until so laid out it is a settlement of the purchase-money. In this way the Crown takes the duty out of the purchase-money, as it would take it in respect of the land when the permanent investment was made. But the settlement of the land originally settled is entirely destroyed by virtue of the overriding power contained in the settlement itself, and with the destruction of the settlement the right to duty in respect of the land originally comprised in it goes. That being so, in my opinion, there would be no duty payable in respect of the land in the hands of a purchaser. . . . . Now the 22nd section of the Settled Estates Act, 1877, says that the exercise of the power of the Court under that Act shall take effect as if there had been a power in the settlement exercisable so as to operate by revocation and reappointment of use. This being so, the result is exactly the same as if the limitation of uses had been revoked by a power contained in the settlement itself. The reasoning on the first supposition, therefore, exactly applies, and consequently I shall declare that no succession duty is payable by the purchaser or otherwise in respect of the estate. Of course it will be payable as regards the purchase-money or any future investment of it."

Accountable persons.

The personal liability in respect of duty imposed by sect. 44 of the Succession Duty Act is of wide application. It includes trustees, guardians, committees, tutors or curators, husbands, alienees, and persons taking by derivative title from the successor. The term "trustee" includes "an executor and administrator, and any person having or taking upon himself the administration of property affected by any express or implied trust": sect. 2.

**Succession Duty.**

*Charge of Duty, &c.*

Succession duty on portions.

Where portions are raisable under a settlement of real estate, the trustees should take care that the succession duty is paid by the portionists, or else they should deduct the amount from the money raised before paying it over to the portionists; otherwise the trustees will be personally liable for the duty under sect. 44; and the property out of which the portions are raised would apparently also continue chargeable with the duty under sect. 42: see *Att.-Gen.* v. *Jackson*, 1 C. & J. 101. A trustee, or an owner of the settled land, paying the duty, can remove it from the portionist, unless the portion was expressly given free from duty: see *Hales* v. *Freeman*, 1 B. & B. 391 (*n*).

Purchase of reversionary interests, &c.

Where an absolute possessory interest in property is purchased the question of the liability to duty on future successions, as between the vendor and purchaser, depends on whether the latter has or has not notice of the state of the title; as, for instance, in the case of an ordinary sale of stock or shares, it seems quite clear that the purchaser on ascertaining the liability to duty might require the vendor to discharge it. But even where a purchaser has notice of the property being in settlement, if the contract is entire for the purchase of an absolute interest, and not separable as being for the purchase of the several component interests, it would seem that the vendors might be called upon by the purchaser to pay the duty. A purchaser of a reversion, however, should be careful to stipulate in his contract that the vendor shall either compound for, and pay the duty at once, or undertake to pay it and to indemnify the purchaser therefrom; otherwise, it will be assumed that the purchaser is buying the property charged with the duty, and he will not be entitled to require the vendor to discharge it: see *Barraud* v. *Archer*, 2 R. & W. 751; *Bliss* v. *Putnam*, 7 Beav. 40; *Hales* v. *Freeman*, 1 B. & B. 391; *Cooper* v. *Trewby*, 28 Beav. 194.

Unpaid duty

The charge and personal liability imposed by

(*n*) As to what expressions will be held to imply a gift free from duty, see the cases on legacy duty, noticed *ante*, p. 240.

Succession Duty.

*Charge of Duty, &c.*

sects. 42 and 44 of the Act of course extend to duty payable in respect of the past death of a predecessor, and to instalments of duty on real estate, whether actually payable or not, in respect of such a death. A purchaser should therefore be careful to require the production of the proper receipts or certificates of due payment of duty payable in respect of any past succession disclosed on examination of the title, and should also require any unpaid instalments of duty to be compounded for and paid by the vendor, or deducted out of the purchase-money.

in respect of past successions.

*Exemptions from Succession Duty.*]—By the 18th section of the Succession Duty Act, 1853, it is enacted as follows :—

"Where the whole succession or successions derived from the same predecessor and passing upon any death to any person or persons shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this Act in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession, which, as estimated according to the provisions of this Act, shall be of less value than twenty pounds in the whole, or upon any moneys applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act; and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."

Exemptions. Estates under 100*l.* in value.

Successions under 20*l.* in value.

Successions exempt under Legacy Duty Acts.

Surrendered interests.

Property chargeable with legacy duty.

The exemptions from duty under the Legacy Acts are stated and considered *ante*, pp. 240, *et seq.*

The Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), sect. 36, exempts from succession duty, all property properly included in an affidavit or inventory charged with the fixed probate

Property under gross value of 300*l.*

**Succession Duty.**

*Exemptions.*

duty of 1*l.* 10*s.* under sect. 33 of the Act, in cases where the gross value of the estate does not exceed 300*l.* See *ante*, p. 195.

Cesser of succession duty.

By sect. 41 of the same Act succession duty at the rate of 1*l.* per cent. is not payable "in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act."

A person entitled to a reversionary interest, expectant on his father's death, in a settled fund, died intestate and unmarried; letters of administration to his estate were granted to his father, who paid duty on the affidavit, under sect. 27 of this Act, upon the estimated value of the estate, including the reversionary interest; it was held that the succession duty at the rate of 1 per cent. in respect of the son's succession to his father ceased to be payable: *Re Haygarth's Trusts*, 22 Ch. D. 545.

Value of annuities, how ascertained.

*Tables and Rules.*]—The Schedule to the Succession Duty Act, 1853, contains tables and rules for ascertaining the value of annuities for the purpose of calculating the succession duty payable in certain cases.

TABLE I.

THE VALUES OF AN ANNUITY OF £100 PER ANNUM HELD ON A SINGLE LIFE.

| YEARS. | VALUES. £ | *s.* | *d.* | YEARS. | VALUES. £ | *s.* | *d.* |
|---|---|---|---|---|---|---|---|
| Birth | 1,892 | 8 | 6 | 13 | 1,833 | 18 | 6 |
| 1 | 1,906 | 13 | 0 | 14 | 1,817 | 7 | 6 |
| 2 | 1,919 | 2 | 0 | 15 | 1,800 | 8 | 6 |
| 3 | 1,926 | 8 | 0 | 16 | 1,783 | 13 | 0 |
| 4 | 1,928 | 16 | 0 | 17 | 1,767 | 16 | 0 |
| 5 | 1,926 | 19 | 6 | 18 | 1,753 | 5 | 6 |
| 6 | 1,921 | 12 | 0 | 19 | 1,740 | 11 | 0 |
| 7 | 1,913 | 4 | 6 | 20 | 1,729 | 9 | 6 |
| 8 | 1,902 | 16 | 6 | 21 | 1,719 | 17 | 0 |
| 9 | 1,890 | 19 | 6 | 22 | 1,713 | 1 | 0 |
| 10 | 1,878 | 3 | 0 | 23 | 1,706 | 16 | 6 |
| 11 | 1,864 | 7 | 0 | 24 | 1,700 | 11 | 6 |
| 12 | 1,849 | 12 | 0 | 25 | 1,694 | 0 | 0 |

TABLE I.—*continued.*

| YEARS. | VALUES. £ | s. | d. | YEARS. | VALUES. £ | s. | d. |
|---|---|---|---|---|---|---|---|
| 26 | 1,686 | 14 | 6 | 61 | 943 | 15 | 6 |
| 27 | 1,677 | 5 | 6 | 62 | 914 | 2 | 0 |
| 28 | 1,667 | 1 | 0 | 63 | 883 | 6 | 0 |
| 29 | 1,656 | 1 | 0 | 64 | 852 | 9 | 0 |
| 30 | 1,644 | 7 | 6 | 65 | 821 | 12 | 6 |
| 31 | 1,632 | 0 | 0 | 66 | 790 | 15 | 0 |
| 32 | 1,619 | 0 | 6 | 67 | 761 | 19 | 0 |
| 33 | 1,605 | 4 | 0 | 68 | 733 | 8 | 6 |
| 34 | 1,590 | 9 | 6 | 69 | 705 | 4 | 0 |
| 35 | 1,574 | 17 | 6 | 70 | 677 | 9 | 0 |
| 36 | 1,558 | 9 | 6 | 71 | 650 | 8 | 0 |
| 37 | 1,541 | 10 | 6 | 72 | 623 | 19 | 6 |
| 38 | 1,524 | 0 | 0 | 73 | 597 | 7 | 6 |
| 39 | 1,506 | 1 | 6 | 74 | 569 | 13 | 0 |
| 40 | 1,487 | 10 | 0 | 75 | 541 | 0 | 6 |
| 41 | 1,468 | 4 | 0 | 76 | 511 | 9 | 6 |
| 42 | 1,447 | 11 | 6 | 77 | 477 | 17 | 0 |
| 43 | 1,426 | 2 | 0 | 78 | 444 | 9 | 6 |
| 44 | 1,403 | 10 | 0 | 79 | 412 | 9 | 6 |
| 45 | 1,379 | 14 | 6 | 80 | 381 | 3 | 0 |
| 46 | 1,354 | 16 | 6 | 81 | 350 | 14 | 6 |
| 47 | 1,328 | 2 | 6 | 82 | 321 | 14 | 6 |
| 48 | 1,300 | 9 | 6 | 83 | 292 | 10 | 0 |
| 49 | 1,271 | 19 | 6 | 84 | 263 | 2 | 0 |
| 50 | 1,242 | 19 | 6 | 85 | 234 | 18 | 6 |
| 51 | 1,213 | 17 | 0 | 86 | 207 | 16 | 0 |
| 52 | 1,185 | 14 | 0 | 87 | 184 | 11 | 6 |
| 53 | 1,157 | 17 | 6 | 88 | 164 | 17 | 6 |
| 54 | 1,130 | 13 | 0 | 89 | 148 | 7 | 0 |
| 55 | 1,103 | 18 | 0 | 90 | 133 | 9 | 0 |
| 56 | 1,077 | 10 | 0 | 91 | 122 | 16 | 0 |
| 57 | 1,051 | 10 | 0 | 92 | 107 | 7 | 0 |
| 58 | 1,025 | 10 | 0 | 93 | 93 | 3 | 0 |
| 59 | 999 | 1 | 0 | 94 | 79 | 8 | 6 |
| 60 | 972 | 1 | 0 | 95 | 64 | 11 | 0 |

## TABLE II.

THE VALUES OF AN ANNUITY OF £100 PER ANNUM, HELD ON THE JOINT CONTINUANCE OF TWO LIVES.

| AGES OF THE ELDER LIVES. | AGES OF THE YOUNGER LIVES. | VALUES OF THE ANNUITIES. |
|---|---|---|

*[Here follows the Table, which is too long for insertion.]*

Succession Duty.

*Tables and Rules.*

## TABLE III.

THE VALUES OF AN ANNUITY OF £100 PER ANNUM FOR ANY NUMBER OF YEARS NOT EXCEEDING NINETY-FIVE.

| YEARS. | VALUES. £ | s. | d. | YEARS. | VALUES. £ | s. | d. |
|---|---|---|---|---|---|---|---|
| 1 | 96 | 3 | 0 | 49 | 2,134 | 2 | 6 |
| 2 | 188 | 12 | 0 | 50 | 2,148 | 4 | 0 |
| 3 | 277 | 10 | 0 | 51 | 2,161 | 14 | 6 |
| 4 | 362 | 19 | 6 | 52 | 2,174 | 15 | 0 |
| 5 | 445 | 3 | 6 | 53 | 2,187 | 5 | 0 |
| 6 | 524 | 4 | 0 | 54 | 2,199 | 5 | 6 |
| 7 | 600 | 4 | 0 | 55 | 2,210 | 17 | 0 |
| 8 | 673 | 5 | 0 | 56 | 2,221 | 19 | 6 |
| 9 | 743 | 10 | 6 | 57 | 2,232 | 13 | 0 |
| 10 | 811 | 1 | 6 | 58 | 2,242 | 19 | 0 |
| 11 | 876 | 0 | 6 | 59 | 2,252 | 16 | 6 |
| 12 | 938 | 10 | 0 | 60 | 2,262 | 6 | 6 |
| 13 | 998 | 11 | 0 | 61 | 2,271 | 9 | 6 |
| 14 | 1,056 | 6 | 0 | 62 | 2,280 | 5 | 6 |
| 15 | 1,111 | 16 | 6 | 63 | 2,288 | 14 | 6 |
| 16 | 1,165 | 4 | 6 | 64 | 2,296 | 17 | 0 |
| 17 | 1,216 | 11 | 0 | 65 | 2,304 | 13 | 0 |
| 18 | 1,265 | 18 | 6 | 66 | 2,312 | 3 | 6 |
| 19 | 1,313 | 7 | 6 | 67 | 2,319 | 8 | 0 |
| 20 | 1,359 | 0 | 6 | 68 | 2,326 | 7 | 0 |
| 21 | 1,402 | 18 | 0 | 69 | 2,333 | 0 | 6 |
| 22 | 1,445 | 2 | 0 | 70 | 2,339 | 9 | 0 |
| 23 | 1,485 | 13 | 6 | 71 | 2,345 | 12 | 6 |
| 24 | 1,524 | 13 | 6 | 72 | 2,351 | 11 | 0 |
| 25 | 1,562 | 4 | 0 | 73 | 2,357 | 5 | 0 |
| 26 | 1,598 | 5 | 6 | 74 | 2,362 | 15 | 0 |
| 27 | 1,632 | 19 | 0 | 75 | 2,368 | 0 | 6 |
| 28 | 1,666 | 6 | 0 | 76 | 2,373 | 2 | 0 |
| 29 | 1,698 | 7 | 0 | 77 | 2,377 | 19 | 6 |
| 30 | 1,729 | 4 | 0 | 78 | 2,382 | 13 | 6 |
| 31 | 1,758 | 16 | 6 | 79 | 2,387 | 4 | 0 |
| 32 | 1,787 | 7 | 0 | 80 | 2,391 | 10 | 6 |
| 33 | 1,814 | 15 | 0 | 81 | 2,395 | 14 | 0 |
| 34 | 1,841 | 2 | 0 | 82 | 2,399 | 14 | 0 |
| 35 | 1,866 | 9 | 0 | 83 | 2,403 | 11 | 6 |
| 36 | 1,890 | 16 | 6 | 84 | 2,407 | 5 | 6 |
| 37 | 1,914 | 5 | 0 | 85 | 2,410 | 17 | 0 |
| 38 | 1,936 | 15 | 6 | 86 | 2,414 | 5 | 6 |
| 39 | 1,958 | 8 | 6 | 87 | 2,417 | 11 | 6 |
| 40 | 1,979 | 5 | 6 | 88 | 2,420 | 14 | 6 |
| 41 | 1,999 | 6 | 0 | 89 | 2,423 | 15 | 6 |
| 42 | 2,018 | 11 | 0 | 90 | 2,426 | 14 | 6 |
| 43 | 2,037 | 1 | 6 | 91 | 2,429 | 10 | 6 |
| 44 | 2,054 | 17 | 6 | 92 | 2,432 | 5 | 0 |
| 45 | 2,072 | 0 | 0 | 93 | 2,434 | 17 | 0 |
| 46 | 2,088 | 9 | 0 | 94 | 2,437 | 7 | 0 |
| 47 | 2,104 | 5 | 6 | 95 | 2,439 | 15 | 6 |
| 48 | 2,119 | 10 | 0 | | | | |

## RULES.

### Rule for Determining the Value of an Annuity of £100 per Annum, held on the Longest of Two Lives.

The values of an annuity of 100*l.* per annum held on each of the single lives, to be added together, (from Table I.,) and from this sum the value of an annuity held on the joint continuance of the two lives (from Table II.,) to be subtracted; the result is the value of an annuity of 100*l.* per annum, held on the longest of the two lives.

### Rule for Determining the Value of an Annuity of £100 per Annum, held on the Joint Continuance of Three Lives.

The value of an annuity of 100*l.* per annum on the joint continuance of the two elder lives is to be found from Table II. The age of a single life of the same (or nearest) value, with the annuity on the said joint lives, to be found from Table I. The value of an annuity of 100*l.* per annum on the joint continuance of this life and the younger life from Table II., five pounds being deducted from this sum, the remainder is the value of an annuity of 100*l.* per annum held on the joint continuance of the three lives.

### Rule for Determining the Value of an Annuity of 100*l.* per Annum, held on the Longest of Three Lives.

The values of an annuity of 100*l.* per annum for each of the three single lives to be extracted from Table I., and to be added together. The value of an annuity of 100*l.* per annum on the joint continuance of the two youngest lives, also the value of an annuity of 100*l.* per annum on the joint continuance of the two eldest lives, also the value of an annuity of 100*l.* per annum on the joint continuance of the oldest life and the youngest life, (all found by Table II.,) to be subtracted from the sum or addition of the annuities on the three single lives: To the result is to be added the value of an annuity of 100*l.* per annum held on the joint continuance of the three lives; the amount is the value of an annuity of 100*l.* per annum on the longest of the three lives.

### Further Rule.

And in all cases where the annuity shall be for more than three lives, the same shall be valued as an annuity for the three youngest of such lives: And where the annuity shall be given for a longer term of years than ninety-five years, or in perpetuity, the same shall be valued as an annuity for ninety-five years only.

# WILLS.

## PRELIMINARY DISSERTATION.

## CHAPTER I.

### INTRODUCTORY CHAPTER.


| | PAGE | | PAGE |
|---|---|---|---|
| 1. Form of the Instrument, &c. | | 2. By what Local Law Wills are Regulated. | |
| *What Instruments are Testamentary* | 304 | *General Principles* | 312 |
| *Effect of Probate in Determining the Character of Instruments* | 310 | *Conflict of Laws* | 315 |
| | | *Domicil* | 321 |


### 1. Form of the Instrument.

Ambulatory nature of wills.

*What Instruments are Testamentary.*]—A will is an instrument by which a person disposes of his property after his decease; until which event it is to remain ambulatory and inoperative. The latter quality forms the distinguishing characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting until the death of the disposer, yet this result must be produced by the express terms, and cannot flow from the nature of the instrument. Thus, if a man should by deed limit lands to himself for life, with remainder to A. in fee, the effect upon the usufructuary enjoyment would be the same as if he made an immediate devise by will to A. in fee; and yet the case fully illustrates the distinction in question: for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee; while, in the latter, he

takes no interest whatever until the decease of the testator.

Form of Wills.

The law has not required to the validity of a will that it should assume any particular form, or be expressed in testamentary language. It is only necessary that the instrument should disclose the intentions of the deceased owner respecting the posthumous destination of his property.

Form of wills.

A letter (*West's Case*, Mo. 177, pl. 314; *Manly* v. *Lakin*, 1 Hagg. 130; *Re Dunn*, Ibid. 488; *Henderson* v. *Farbridge*, 1 Russ. 479), a deed-poll (*Habergham* v. *Vincent*, 2 Ves. 7, 204; 4 B. C. C. 355), and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation: see *Hixon* v. *Wytham*, 1 Ch. Cas. 248; Finch, 195: *Green* v. *Proude*, 3 Keb. 310, *S. C.* 1 Mod. 117: *Peacock* v. *Monk*, 1 Ves. sen. 127; *S. C.*, Bell, Suppl. 82: *Tomkyns* v. *Ladbroke*, 2 Ves. sen. 591: *Hogg* v. *Lashley*, 3 Hagg. 415 n.

Instruments in the form of deeds, agreements, &c., held to be testamentary.

A question of this kind was discussed in *Att.-Gen.* v. *Jones*, 3 Price, 368, where A., by indenture dated 25th March, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to C. and D.; also certain stock in the funds, with the dividends which should be due thereon at his decease, the arrears of any pension that might be due to him at his death, and his household furniture, &c., and all other his personal estate then belonging to him, or which should belong to him at his decease, upon trust for himself for life and after his decease, for a daughter. The instrument reserved to A. a power of revocation by deed or will. By will, dated 16th April, 1813, A. confirmed the deed except as to certain particulars, which he specified, and appointed the same persons as were trustees in the deed executors. A. did not transfer the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed. The question was, whether the property assigned by it was liable to the legacy duty; and the Court of Exchequer (*Wood*, B., diss.) decided in the affirmative. But this case

Property professedly settled by deed, held to be liable to the legacy duty.

Form of Wills.

has not been approved of by the profession, and may now be regarded as overruled. See *Thompson* v. *Browne*, 3 My. & K. 32; *Marjoribanks* v. *Hovenden*, Dru. 11; *Sheldon* v. *Sheldon*, 1 Rob. 81; *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Brown* v. *Att.-Gen.*, 1 Macq. Sc. Ap. 85; and see *ante*, p. 214, sub tit. Stamp Duties, &c.

Rule in as to instruments testamentary in substance but not in form.

The Courts have acted fully up to the principle of regarding an instrument as testamentary which is intended not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos*; and more especially if it be incapable of operation in the intended form; and, accordingly, in repeated instances, probate has been granted of such documents as the assignment of a bond by indorsement; *Musgrave* v. *Down*, T. T. 1784; receipts for stock and bills indorsed: *Sabine* v. *Goate and Church*, Ibid. 1782; orders on a banker: *Jones* v. *Nicolay*, 2 Rob. 288; 14 Jur. 675; *Re Marsden*, 1 Sw. & Tr. 542; cheques: *Bartholomew* v. *Henley*, 3 Phill. 317; *Gladstone* v. *Tempest*, 2 Curt. 650; a letter: *Drybutter* v. *Hodges*, E. T. 1793; *Denny* v. *Barton*, 2 Phill. 575; *Re Mundy*, 2 Sw. & Tr. 119; 7 Jur. (N. S.), 52; 9 W. R. 171; deeds of gift: *Thorold* v. *Thorold*, 1 Phill. 1; *Shergold* v. *Shergold*, cit. ib. 10; *Re Montgomery*, 5 No. Cas. 99; *Fielding* v. *Walshaw*, 27 W. R. 492; marriage articles: *Marnell* v. *Walton*, T. T. 1796; and promissory notes, and notes payable by executors, in order to avoid the legacy duty: *Maxee* v. *Shute*, H. T. 1799; severally cit. 2 Hagg. 247. And it was decided by Sir *J. Nicholl* that the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him to the trustees of the marriage settlements of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death, were to be received as testamentary: *Masterman* v. *Maberly*, 2 Hagg. 235.

Instrument professing to be a deed of

In a subsequent case, the facts shortly were, that, in 1819, A., and B. his wife, executed a deed, con

veying property to trustees for the use of A. and B.; and, upon the death of the survivor, to pay over the property to different persons. A. survived his wife, and died without having exercised a power reserved to him of revoking the trusts. Probate to the trustees was prayed, on the ground that the deed was, in its whole purport and effect, testamentary, not being to operate until after the death of A., and the Court decreed accordingly: *Re Knight*, 2 Hagg. 554; and see *Re Lowry*, 5 No. Cas. 619; *Re Newns*, 7 Jur. (N. S.) 688; *Re Morgan*, L. R. 1 P. & D. 214; *Cock* v. *Cooke*, ib. 241; *Robertson* v. *Smith*, L. R. 2 P. & D. 43; *Re Coles*, ib. 362.

settlement held to be testamentary.

But it would seem that, if the instrument is not testamentary, either in form or in substance, none of the gifts in it being expressed in testamentary language, or in terms postponed to the death of the maker, and no collateral evidence is adduced to show that it was intended as a will, probate will not be granted of it as such. Thus where a minor (aged nineteen) wrote a paper in these words:—"I, A. B., of, &c., in the presence of the two undermentioned witnesses, C. D., of &c., and E. F. of &c., do give all my goods and chattels to M. D., of —— spinster." This paper was dated and witnessed by the two persons referred to in the body of it. The Court was of opinion that, as the paper bore upon the face of it no evidence of its being intended to be testamentary; but it rather appeared, both from its contents, and the evidence dehors (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted: *King's Proctor* v. *Daines*, 3 Hagg. 218.

Paper containing words of present gift held to be not testamentary.

And in another instance probate was refused of a letter by the deceased to a friend, directing the sale of stock, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale: *Glynn* v. *Oglander*, 2 Hagg. 428. And see *Griffin* v. *Ferard*, 1 Curt. 97; *Majoribanks* v. *Hovenden*, Dru. 11; *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Re Robinson*, L. R. 1 P. & D. 384; *Re Halpin*, Ir. R. 8 Eq. 567; *Thorncroft* v. *Lashmar*, 10 W. R. 783.

**Form of Wills.**

Admissibility of evidence to show testamentary character.

In all the above cases the question whether or not the document under consideration was to be regarded as having a testamentary character has depended mainly on extrinsic evidence, showing what was the probable intention of the deceased, such evidence being always admissible: *Re English*, 3 Sw. & Tr. 586 (*a*).

Conditional wills and codicils.

A will may be made so as to take effect only on a contingency; and if the contingency does not happen the will has no effect: *Roberts* v. *Roberts*, 2 Sw. & Tr. 337; and in such a case it will not be admitted to probate (*b*): *Parsons* v. *Lanoe*, 1 Ves. sen. 190; 1 Wils. 243; *Re Hugo*, 2 P. D. 72. But a contingent codicil will be admitted to probate where the contingency has not happened, as it may operate as a republication of the will. *Re Da Silva*, 2 Sw. & Tr. 315; *Re Colley*, 3 L. R. Ir. 243; but see *Re Smith*, L. R. 1 P. & D. 717. "It is the common feature of wills in respect of which this sort of question arises, that the testator therein refers to a possible impending calamity in connection with his will; and the question arises, whether he intends to limit the operation of the will to the time during which such calamity is imminent. If the language used by him can by any reasonable interpretation be construed to mean that he refers to the calamity and the period of time during which it may happen, as the reason for making a will, then the will is not conditional; but if he refers to the calamity or the possible occurrence of some event as a reason for a certain disposition of his property, and mixes up the disposition of the property with the event so that one is dependent on the other, then the Court must hold the will to be conditional." *Per* Lord *Penzance* in *Re Porter*, L. R. 2 P. & D. 22. Thus the will

(*a*) Conversely, extrinsic evidence is also admissible to show that an instrument, though in the form of and duly executed as a will, was not intended to take effect as such: *Nicholls* v. *Nicholls*, 2 Phill. 183; *Lister* v. *Smith*, 3 Sw. & Tr. 282; *Re Nosworthy*, 11 Jur. (N. S.) 570.

(*b*) Where the contingency is still in suspense at the time of the testator's death the will will be admitted to probate at once: *Re Cooper*, 1 Deane, Eccl. R. 9; *Re Bangham*, L. R. 1 P. D. 429.

Form of Wills.

was held to be contingent where the words were "Should anything happen to me on my passage, &c., I leave, &c.," the will was held to be contingent, *Roberts* v. *Roberts, ubi supra,* and "Should anything happen to me whilst abroad, I wish, &c.," *Re Porter, ubi supra*: "In case anything should happen to me during the voyage from hence to S., then I give and bequeath, &c.": *Re Robertson,* L. R. 2 P. & D. 171. And for other cases of contingent wills, see *Parsons* v. *Lanoe, ubi supra; Sinclair* v. *Hone,* 6 Ves. 607: *Re Da Silva, ubi supra; Re Hugo, ubi supra; Lindsay* v. *Lindsay,* L. R. 2 P. & D. 459; *Re Winn,* 2 Sw. & Tr. 147. On the other hand, where the will was held not to be conditional where the words were "I request that in the event of my death while serving in this horrid climate:" *Re Thorne,* 4 Sw. & Tr. 36; "In case of any fatal accident happening to me, being about to travel by railway, I leave," &c., *Re Dobson,* L. R. 1 P. & D. 88: and see *Re Martin, ib.* 380; *Re Mayd,* 6 P. D. 17. Where a testator concluded a codicil with the words "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary," it was held that the validity of the codicil was conditional on the assent of the wife: *Re Smith,* L. R. 1 P. & D. 717. Where a will is clearly contingent and the contingency has failed, parol evidence cannot be admitted to show that the testator intended to adhere to the will after the expiration of the period within which the event could have happened: *Parsons* v. *Lanoe, ubi supra*; *Re Winn,* 2 Sw. & Tr. 147: but evidence is admissible to show that at the time when a testator executed a will apparently conditional, the period during which the event could have happened had already expired: *Re Cawthron,* 33 L. J. Prob. 23.

Revocable nature of wills.

A will is in all cases revocable by the testator during his life-time: *Vagnor's Case,* 8 Co. 82 a; and where two or more persons execute a joint will, it will continue to be revocable by the survivor: *Hobson* v. *Blackburn,* 1 Add. 274. But, although the notion of a mutual will binding on the survivor is, strictly speaking, unknown to our law,

Form of Wills.

an effective agreement may be entered into by two or more persons to leave their property in a certain manner; and where the survivor takes the benefit of the disposition in his favour by the other party, he will be held bound by the agreement: see *Dufour* v. *Periera*, 1 Dick. 419; explained in *Lord Walpole* v. *Lord Orford*, 3 Ves. 401: and an effective covenant may be entered into not to revoke a will; for breach of which an action will lie against the executor: *Robinson* v. *Ommanney*, 23 Ch. D. 285. As to proving joint wills, see *Re Stracey*, 1 Deane, 6; 1 Jur. (N. S.) 1117; *Re Lovegrove*, 2 Sw. & Tr. 453; *Re Raine*, 1 Sw. & Tr. 144; *Re Miskelly*, I. R. 4 Eq. 62. As to a promise to leave property by will see *Maddison* v. *Alderson*, L. R. 8 App. 467; *Humphreys* v. *Green*, 10 Q. B. D. 148. See as to the revocation of wills, *post*, p. 366 *et seq.*

Probate conclusive as to testamentary character of instruments relating to personalty.

Here it may be observed that the granting of probate is conclusive as to the testamentary character of the instrument in relation to personal estate (*Douglas* v. *Cooper*, 3 My. & K. 378), and cannot, in the absence of fraud, be subsequently disputed by legatees, who are, as a general rule, regarded as represented by their executors in suits respecting the validity of the will: *Medley* v. *Wood*, 1 Hagg. 645; *Calvin* v. *Fraser*, 2 Hagg. 292; *Hale* v. *Hasted*, 1 Curt. 236; *Newell* v. *Weeks*, 2 Phill. 224; but see *Reynolds* v. *Thrupp*, 1 Curt. 570, where the Court, under special circumstances, ordered the beneficiaries to be brought before it. And where it is alleged that the whole or any part of a will has been obtained by fraud, the objection cannot be entertained so long as the probate of the will is subsisting: *Allen* v. *Macpherson*, 1 H. L. C. 191; *Meluish* v. *Milton*, 3 Ch. D. 27; and see *Hindson* v. *Wetherill*, 5 De G. M. & G. 301. See however *Mitchell* v. *Gard*, 3 Sw. & Tr. 95. Formerly therefore the Probate Court possessed exclusive jurisdiction with regard to such questions; and now, although since the Judicature Acts every judge of the High Court has jurisdiction to grant or revoke probate, judges of other divisions will not exercise

Form of Wills.

that jurisdiction but will leave it to be exercised by the Probate Division: *Pinney* v. *Hunt*, 6 Ch. D. 98; and see *Tarn* v. *Commercial Bank of Sydney*, 12 Q. B. D. 294; *Priestman* v. *Thomas*, 9 P. D. 210; *Bradford* v. *Young*, 26 Ch. D. 656: see also *Betts* v. *Doughty*, 5 P. D. 26; *Wilson* v. *Birchall*, 29 W. R. 461. Everything in the probate copy, and nothing else, is to be taken as the will: *Gann* v. *Gregory*, 3 De G. M. & G. 777; *Barnaby* v. *Tassell*, L. R. 11 Eq. 363, 368; *Re Bywater*, 18 Ch. D. 17, 22.

Probate, how far conclusive as to instruments relating to realty.

As regards real estate, however, probate in common form has no effect: *Hume* v. *Rendell*, 6 Mad. 331; *Bouser* v. *Bradshaw*, 5 Jur. (N. S.) 86. But by sect. 64 of 20 & 21 Vict. c. 77, it is provided that, where it is sought in an action to prove a devise or other testamentary disposition of real estate, the party seeking to prove such devise or testamentary disposition may give the other party notice that he intends to give in evidence the probate copy of the will, as proof thereof, and such probate copy shall be sufficient evidence of the will, unless the other party give notice that he disputes its validity. On the construction of this section see *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612. And by sect. 62 of the same Act it is provided that where the will is proved in solemn form, or its validity declared in a contentious matter, the probate shall be conclusive evidence of the validity and contents of the will in all proceedings affecting real estate: see *Campbell* v. *Lucy*, L. R. 2 P. & D. 209.

Production of original will to explain ambiguities.

The granting of probate however has, even as regards personalty, no other effect than to establish the testamentary nature of the document; and for the purpose of determining its construction it is still permissible to look at the original will to see if any ambiguity in the probate can be explained thereby: *Manning* v. *Purcell*, 7 De G. M. & G. 55; *Sandford* v. *Raikes*, 1 Mer. 651; and see *Heron* v. *Stokes*, 2 Dr. & W. 98; *Gordon* v. *Gordon*, L. R. 5 H. L. 276.

As to probate of testamentary appointments.

Where the paper of which probate was sought professed to be an appointment under a power, the Probate

Form of Wills.

Court applied to it the ordinary principles of testamentary law, without attempting, on that proceeding, to pronounce on its sufficiency as a due execution of the power under which it purported to be made: *Draper* v. *Hitch*, 1 Hagg. 674; *Stevens* v. *Bagwell*, 15 Ves. 139; *Barnes* v. *Vincent*, 5 Moo. P. C. 201; but, inasmuch as since the Judicature Acts, the Court is bound in any action to determine every question in controversy between the parties, which can be conveniently determined in that action, it would seem that where a will is made under a power, if the Court has all the persons interested before it, it ought to decide the question not only whether there was a power, but whether it was well executed: *Re Tharp*, 3 P. D. 76.

Attestation of wills.

The facility with which loose papers were proved in the Ecclesiastical Courts has been sometimes complained of by judges, on whom the task of expounding the testamentary jargon thus transmitted has devolved (see *Matthews* v. *Warner*, 4 Ves. 208, 210); in all probability, it was induced by the consideration that a leaning on this side is less injurious than an error on the opposite side, the effect of which would be to deliver parties from the further litigation of their rights under the contested instrument. By 1 Vict. c. 26, s. 9, it is now provided that no will shall be valid unless attested by two witnesses, in the manner therein prescribed, and the effect of this provision has been to check the admission of informal and irregular testamentary papers, by the exclusion of all which are not so attested. See further as to the execution and attestation of wills, *post*, p. 360 *et seq.*

### 2. By what Local Law Wills are Regulated.

Local law governing wills.

*General Principles.*]—As the form of testamentary dispositions varies in different countries, the present seems to be the proper place for showing by what local law wills are regulated.

Realty and chattels real ruled by *lex rei sitæ*.

A will of lands, or of a leasehold interest therein (*Freke* v. *Lord Carbery*, L. R. 16 Eq. 461), is

By what Local Law Regulated.

generally governed by the *lex loci rei sitæ*. The place where, and the language in which such a will is written, are wholly unimportant as affecting both its construction and the formalities of its execution; the locality of the lands alone is to be considered. Thus, a will made in Holland and written in Dutch must, in order to operate on lands in England, contain expressions which, being translated into our language, would comprise and destinate the lands in question, and must be executed and attested in the same manner as if the will were made in England: *Bovey* v. *Smith*, 1 Vern. 85, 145; see also *Bowman* v. *Reece*, Pre. Ch. 577; *Drummond* v. *Drummond*, 6 B. P. C. Toml. ed. 601; see *Brodie* v. *Barry*, 2 Ves. & B. 131; *Coppin* v. *Coppin*, 2 P. Wms. 291; *Curtis* v. *Hutton*, 14 Ves. 537. And, of course, lands in England, belonging to a British subject domiciled abroad dying intestate, will descend according to the English law: see *Doe* v. *Vardill*, 5 B. & C. 438.

Moveable personalty ruled by *lex domicilii*.

In regard to moveable property, however, whether in the case of testacy or intestacy, the *lex domicilii* prevails (*c*). If a foreigner, therefore, is domiciled in England, his moveable property, in case he died intestate, will be distributed according to the English law of succession (*d*); and any will he may have left, though made in his native country, must be construed according to the law of England: *Anstruther* v. *Chalmer*, 2 Sim. 1; *Peilon* v. *Brooking*, 25 Beav. 218; *Enohin* v. *Wylie*, 10 H. L. C. 1; *Ewing* v. *Orr-Ewing*, 9 App. Cas. 34; *Hernando* v. *Sawtell*, 27 Ch. D. 284; by which law also his personal capacity to make a will will be determined: *Price* v. *Dewhurst*, 8 Sim. 299; 4 My. & C. 76; *Robins* v. *Dolphin*, 7 H. L. C. 390. And it is scarcely necessary to observe that stock in the public funds,

(*c*) This position respects only the devolution of the property and not the court of administration, which, by our law, is regulated by the *lex loci rei sitæ*: *Preston* v. *Melville*, 8 Cl. & F. 1; *Enohin* v. *Wylie*, 10 H. L. C. 1; and see *Eames* v. *Hacon*, 16 Ch. D. 407; 18 Ch. D. 347.

(*d*) See *Re Goodman's Trust*, 17 Ch. D. 266.

By what Local Law Regulated.

British or foreign, is undistinguishable in this respect from other moveable property: see *Re Ewin*, 1 Cr. & J. 151 (*e*).

On the other hand, if a British subject becomes domiciled abroad, the law of the place which at his death constituted his domicil will govern the distribution of his moveable property in England, in case of intestacy: *Balfour* v. *Scott*, 6 B. P. C. Toml. ed. 550; *Bruce* v. *Bruce*, *ibid.* 566; *S. C.*, 2 B. & P. 299, n.; *Hog* v. *Lashley*, 6 B. P. C. Toml. ed. 577; *Bempde* v. *Johnson*, 3 Ves. 198; *Somerville* v. *Lord Somerville*, 5 Ves. 750; and will, if he left a will, determine the validity and regulate the construction of such will: *Re Osborne*, 1 Deane, 4; *Re Maraver*, 1 Hagg. 498; *Kilpatrick* v. *Kilpatrick*, 6 B. P. C. 584; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Barlow* v. *Orde*, L. R. 3 P. C. 104; of which, therefore, an English Court will not grant probate unless it be an effectual testamentary instrument, according to the law of the domicil: *Stanley* v. *Bernes*, 3 Hagg. 375.

Principle adopted by the Court in granting probate.

And, by parity of reasoning, the Court will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicil though clearly invalid as an English will, as was done by the Prerogative Court in the instance of the will of a married lady domiciled in Spain (*f*), on its being shown that by the Spanish law a *feme covert* may, under certain limitations, dispose of her property by will as a *feme sole*: *Re De Vera Maraver*, 1 Hagg. 498.

And it is the constant practice of the Court to grant probate of a will of a testator domiciled in a foreign country, which has been previously proved there, without inquiring into the grounds of the foreign proceeding, though the bulk of the property of the deceased testator happens to be in England:

(*e*) In this case the question was as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicile, alienage, &c. See as to legacy duty, *ante*, p. 202 *et seq.*

(*f*) The testatrix was a native of Spain; but this, it is conceived, was immaterial.

*Re Read,* 1 Hagg. 474; *Hare* v. *Nasmith,* 2 Add. 25; *Re Gaynor,* 4 No. Cas. 696; *Re Cosnahan,* L. R. 1 P. & D. 183; *Re Earl,* L. R. 1 P. & D. 450; *Miller* v. *James,* L. R. 3 P. & D. 4.

By what Local Law Regulated.

*Conflict of Laws.*]—The necessity of conforming in the testamentary act to the law of the domicil is a most important doctrine to the numerous British residents in foreign countries; and it appears from the case of *Stanley* v. *Bernes,* 3 Hagg. 373, that the circumstances of the will being English in language and form, and of its showing that the testator contemplated returning to England (*g*) (but which intention he never executed), are insufficient to exclude the *lex domicilii.* If an Englishman, domiciled abroad, has real property in England, he ought to make two wills, one devising such property duly executed and attested according to the English law, and the other bequeathing, if permitted, the personalty conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to exclude some perplexing questions involving the application to an uncertain extent of the conflicting principles respectively governing real and personal property.

Remarks upon wills of Englishmen domiciled abroad.

Similar questions may arise, and similar doctrines would apply in regard to the property of Englishmen domiciled in Scotland, and of Scotchmen domiciled in England, the law of succession and testamentary disposition being, in some respects, dissimilar in these two parts of the United Kingdom. In the case of *Brodie* v. *Barry,* 2 Ves. & B. 131, Sir *W. Grant* thus stated two of the most remarkable cases involving the difficulties arising from a conflict between the law of England and that of Scotland—"Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to

Conflict of English and Scotch law. *Brodie* v. *Barry.*

(*g*) As to the *animus revertendi,* see also *Bruce* v. *Bruce,* 2 B. & P. 299, n.

By what Local Law Regulated.

determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies; and how much upon the law of personal property, which must be taken from the country of the domicil, and to blend both together so as to form a rule applicable to the mixed question, which neither law separately furnishes sufficient materials to decide. I have argued, in the House of Lords, cases in which difficulties of that kind occurred. Two of the most remarkable were those of *Balfour* v. *Scott* (stated in *Somerville* v. *Lord Somerville*, 5 Ves. 750; 6 Br. P. C. 550 (ed. 1803)), and *Drummond* v. *Drummond*, 6 Br. P. C. 601 (ed. 1803). In the former, a person domiciled in England died intestate, leaving real estate in Scotland. The heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that, by the law of Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate; that is, bringing it into a mass with the personal estate to form one common subject of division: Ersk. Inst. Law of Scotl. 701 (5th ed.). It was determined, however, that he was entitled to take his share without complying with that obligation. There the English law decided the question. In *Drummond* v. *Drummond*, a person domiciled in England had real estate in Scotland; upon which he granted an heritable bond (as to the effect and nature of an heritable bond, see Bell's Comm. on Laws of Scotl. 206; Ersk. Inst. 194; and Hope's Minor Pract. 35), to secure a debt contracted in England. He died intestate; and the question was, by which of the estates this debt was to be borne. It was clear, that, by the English law (*h*), the personal estate was the primary fund for the payment of debts. It was equally clear, that, by

(*h*) But see now Locke King's Act (17 & 18 Vict. c. 113), sect. 1, set out and considered, *ante*, sub tit. MORTGAGES, Vol. III., p. 873.

By what Local Law Regulated.

the law of Scotland, the real estate was the primary fund for the payment of the heritable bond. Here was a direct *conflictus legum*. It was said for the heir, that the personal estate must be distributed according to the law of England, and must bear all the burthens to which it is by that law subject. On the other hand, it was said, that the real estate must go according to the law of Scotland, and bear all the burthens to which it is by that law subject. It was determined, that the law of Scotland should prevail; and that the real estate must bear the burthen. In the first case, the disability of the heir did not follow him to England; and the personal estate was distributed as if both the domicile and the real estate had been in England. In the second, the disability to claim exoneration out of the personalty did follow him into England; and the personal estate was distributed as if both the domicil and real estate had been in Scotland."

Analogy between a devise in Scotland and a devise of copyhold in England.

In the same case of *Brodie* v. *Barry*, Sir *W. Grant* noticed the analogy between a devise in Scotland and a devise of copyhold in England; the will operating as a declaration of the use of a previous surrender in the latter case; and, "in Scotland, if there be a conveyance previously executed according to the proper feudal forms, the party may by will declare the use and trust to which it shall enure." In the case before him, his Honour decided, that an heir at law of heritable property in Scotland being a legatee of personal property in England must be put to his election.

*Att.-Gen.* v. *Mill.*

The case of *Att.-Gen.* v. *Mill*, 3 Russ. 328 (*S. C.* in Dom. Proc. 5 Bli. (N. S.) 593; 2 Dow. & Cl. 393), stated *ante*, Vol. IV., p. 11, may be referred to as a striking example of a testator's intention being defeated by this conflict of laws, or rather by the ignorance of the testator and his legal advisers.

*Bempde* v. *Johnstone.*

In the case of *Bempde* v. *Johnstone*, 3 Ves. 198, Lord *Loughborough* said: "The point has been established in the cases in the House of Lords, which, if it was quite new and open, always appeared to me to be susceptible of a great deal of argument: whether, in the case of a person

By what Local Law Regulated.

dying intestate, having property in different places and subject to different laws, the law of each place should not obtain in the distribution of the property situated there. Many foreign lawyers have held that proposition. There was a time when the courts of Scotland certainly held so. The judgments in the House of Lords have taken a contrary course; that there can be but one law: they must fix the place of the domicil; and the law of that country where the domicil is, decides, wherever the property is situated. That I take to be fixed law now. The Court of Session has conformed to those decisions; according to which the Courts of Great Britain, both of Scotland and England, are bound to act." Yet, so far back as 1750, Lord *Hardwicke*, in the case of *Thorne* v. *Watkins*, 2 Ves. sen. 35, where it was insisted for the defendant, that so much of the personal estate of William Watkins as should arise from the personal estate of Richard Watkins, who resided in Scotland and died there, should be distributable according to the law of Scotland, said, "This is a strange imagination, for which there is no ground, either from the nature of the property or the manner in which that property is to be recovered. . . . A subject of England residing here and administration of his personal estate taken out here, with debts due to him or demands in the nature of choses in action in Scotland to be recovered by his administrator—whether that is to fall under a different rule of disposition from the rest of his personal estate. That never was thought of, and would create confusion. And this question relates not to the articles of union, which indeed preserve the laws of the different countries, the jurisdictions, forums, and tribunals of each country; but this question would be the same after as before the union of the two crowns, and would be the same on a question of this sort arising in France or Holland, whether to be distributable according to the laws of those countries or of England. The reason is, that all debts follow the person, not of the debtor, in respect of the right of property, but of the creditor to whom due." See also the case

of *Pipon* v. *Pipon*, decided by the House of Lords, Ambl. 25 ; *S. C.* Ridgw. 165 ; 9 Mod. 431.

**By what Local Law Regulated.**

Conflict of English and Foreign law.

The earlier cases all had reference to sons, being British subjects, dying domiciled in some part of the British dominions, different parts of those dominions having different rules of distribution. Such were the cases of *Bruce* v. *Bruce*, cit. 5 Ves. 761 ; of Sir Charles Douglas (*Ommanney* v. *Bingham*, cit. 5 Ves. 757) ; of *Balfour* v. *Scott*, cit. 5 Ves. 754, stated 2 Ves. & B. 131; of the Marquis of Annandale (*Bempde* v. *Johnstone*, 3 Ves. 198) ; and of Lord Somerville (*Somerville* v. *Lord Somerville*, 5 Ves. 750). No case had gone further than to adopt the *lex domicilii*, when the domicil was in some part of the British dominions, and when it was a case as to the distribution of the effects, or the construction of the instrument, not as to the right to the representation or the validity of the will. In the case of *Curling* v. *Thornton*, 2 Add. 6, Sir *J. Nicholl* said, "it may be doubted whether a British subject is entitled so far *exuere patriam*, as to select a foreign domicil in complete derogation of his British." And he held, in that case, a will made according to the English forms, by a British subject domiciled in France, to be valid, although the will disposed of the property in favour of an illegitimate child and its mother, to the exclusion of his wife and his legitimate child, which is not permitted by the French law. But Lord *Eldon* appears to have doubted whether the will in that case, which, though valid by the law of England was invalid by the law of France, had any operation beyond appointing the executor : see *Thornton* v. *Curling*, 8 Sim. 310. In the later case of *Stanley* v. *Bernes*, 3 Hagg. 373, which was the case of a will and several codicils, made and executed according to the law of Portugal, and several codicils not made and executed according to the law of Portugal, where the testator was domiciled, Sir *J. Nicholl* pronounced for the will and codicils, and directed probate to be taken of them all. But so much of this sentence was reversed, on appeal, by the High Court of Delegates, as pronounced for the codicils not made and executed according to the *lex*

By what Local Law Regulated.

*domicilii, i.e.*, the law of Portugal: 3 Hagg. 465. See also the subsequent case of *Moore* v. *Darell and Budd*, 4 Hagg. 346, which was the case of a Spanish domicil. And in the case of *Price* v. *Dewhurst*, 4 My. & C. 76, Lord *Cottenham*, C., affirming the decision of the Vice-Chancellor (8 Sim. 279) said, "The law of the country in which the deceased was domiciled at the time of the death not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will." And see *Bremer* v. *Freeman*, 10 Moo. P. C. 306.

Probate of wills made abroad.

By 24 & 25 Vict. c. 114, which applies only to wills made by persons dying after 6th August, 1861, it is enacted that (s. 1) every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin. (S. 2) Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. (S. 3) No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same.

By what Local Law Regulated.

In determining what papers are testamentary under the provisions of this Act, the Court will have regard to the law of one country only at a time, and will not mix up the legal precepts of different countries. Thus in *Pechell* v. *Hilderley*, L. R. 1 P. & D. 673, where the deceased was a British subject having an English domicil, and he left a will which was not duly executed, with a codicil written on the back of it which was duly executed according to the law of Italy where it was made. According to that law, however, the codicil could not have an independent existence, or establish the will on which it was endorsed; and Lord *Penzance* accordingly held that neither the will nor the codicil could be admitted to probate. See also *Re Lacroix*, 2 P. D. 94. The Act applies to British subjects only (*Bloxam* v. *Favre*, 8 P. D. 101), but extends to naturalized British subjects: *Re Gally*, 1 P. D. 438. But see *Re Gatti*, 27 W. R. 323. See also *Re Reid*, L. R. 1 P. & D. 74, on the construction of this Act.

Domicil of origin.

*Domicil, how ascertained.*]—Everyone is regarded by the law as having some place of domicil, and, at least with reference to the law of succession to personal estate, a man cannot have two domiciles: *Somerville* v. *Somerville*, 5 Ves. 750. Every person, as soon as he is born, acquires, if legitimate, the domicil which his father had at that time; or, if illegitimate, that which his mother then had: *Countess of Dalhousie* v. *Macdonall*, 7 Cl. & F. 817; *Munro* v. *Munro*, Ib. 842. The domicil does not depend upon the place of birth, but upon the domicil of the parent at the time of birth: *Udney* v. *Udney*, L. R. 1 H. L. Sc. 441, 457; *Firebrace* v. *Firebrace*, 4 P. D. 63, 66. This is usually called the "domicil of origin," and will continue to be the domicil until some other domicil is acquired. A fresh domicil is acquired involuntarily by an infant during the lifetime of his father, where the father acquires a fresh domicil of choice: *Re Patten*, 6 Jur. (N. S.) 151. After the death of the father, the domicil of an infant follows that of his mother: *Potinger* v. *Wightman*, 3 Mer.

By what Local Law Regulated.

67; *Johnson* v. *Beattie*, 10 Cl. & F. 42, 66. It is doubtful whether the domicil of an infant orphan can be changed by his guardian: *Douglas* v. *Douglas*, L. R. 12 Eq. at p. 625. A person who is a lunatic from the time of his coming of age until his death retains his incapacity to acquire a domicil by his own choice, and therefore his domicil continues to be that of his father during the lifetime of the latter: *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611. The domicil of a married woman is that of her husband, even where she is living apart from him under a deed of separation: *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Whitcomb* v. *Whitcomb*, 2 Curt. 351; *Dolphin* v. *Robins*, 7 H. L. 390; *Re Daly*, 25 Beav. 456. *Secus*, after a divorce: *Williams* v. *Dormer*, 2 Rob. 505; or as it would seem after a judicial separation: *Dolphin* v. *Robins*, 7 H. L. C. at p. 416; *Le Sueur* v. *Le Sueur*, 1 P. D. 139.

Domicil of choice.

As soon as an individual is *sui juris*, he is capable of acquiring a new domicil in substitution for the one he previously had. But in order that he may do so, "he must choose a new domicil by taking up his sole or principal residence in a new country with the intention of residing there for a period not limited as to time:" per *Jessel*, M.R., in *King* v. *Foxwell*, 3 Ch. D. 520. "The question of domicil," said Lord *Loughborough*, in the case of *Bempde* v. *Johnstone*, 3 Ves. 201, "*primâ facie*, is much more a question of fact than of law. The actual place where a person is, is *primâ facie*, to a great many purposes, his domicil. You may encounter that, if you show it is either constrained, or from the necessity of his affairs, or transitory, that he is a sojourner, and you take from it all character of permanency." The decisions in most of the cases reported on domicil turn to a great extent upon the express circumstances of each particular case, but the following rules for determining whether a new domicil of choice has been acquired may be extracted from them.

Residence of necessity.

As it is necessary to acquire such a domicil that the individual should himself select it, a constrained residence in any place will not confer a domicil: *De Bonneval* v. *De Bonneval*, 1 Curt. 856; *Pitt* v. *Pitt*,

12 N. R. 1089. And a naval or military officer who in the performance of his duties remains in any country does not thereby acquire a domicil therein: *Re Patten*, 6 Jur. (N. S.) 155; *Brown* v. *Smith*, 15 Beav. 444. But a person entering the military or naval service of a foreign state acquires a domicil in that state: *President of the United States* v. *Drummond*, 33 Beav. 449. So service under the East India Company was held to give an Anglo-Indian domicil: *Bruce* v. *Bruce*, 2 B. & P. 229 n.; *Munroe* v. *Douglas*, 5 Mad. 379; *Craigie* v. *Lewin*, 3 Curt. 435. But a native of a British colony or dependency does not lose his domicil of origin by entering the British service: *Brown* v. *Smith*, 15 Beav. 444; *Yelverton* v. *Yelverton*, 1 Sw. & Tr. 574. And as the residence must be intended to be permanent, a temporary residence in discharge of any political or judicial office will not suffice: *Att.-Gen.* v. *Pottenger*, 6 H. & N. 733, 747; *Att.-Gen.* v. *Rowe*, 1 H. & C. 31; *Att.-Gen.* v. *Napier*, 6 Ex. 217; *Sharpe* v. *Crispin*, L. R. 1 P. & D. 611. But where the employment abroad is of a permanent nature the domicil will be altered: *Commissioners of Inland Revenue* v. *Gordon's Executors*, 12 Cas. Court Sess. 657. And where a man has already acquired a foreign domicil, he will not lose it by being appointed ambassador or consul in the country of his residence to the sovereign of his native country: *Heath* v. *Sampson*, 14 Beav. 441; *Att.-Gen.* v. *Kent*, 1 H. & C. 12. A trader who has settled in a foreign country will generally be presumed to have acquired a domicil there: *Allardice* v. *Onslow*, 12 W. R. 397; *Maltass* v. *Maltass*, 3 Curt. 231; 1 Rob. 67; *Moore* v. *Budd*, 4 Hagg. 346; *Doucet* v. *Geoghegan*, 9 Ch. D. 441. Nor will the fact of his being a British officer on half-pay prevent his acquiring a foreign domicil: *Att.-Gen.* v. *Pottenger*, 6 H. & N. 733. Nor does the obligation of a peer of the British Parliament to attend the House of Peers whenever his presence is required incapacitate him from acquiring a domicil of choice abroad: *Hamilton* v. *Dallas*, 1 Ch. D. 257. And where a person has actually taken up a permanent residence abroad, he may acquire a domicil

**By what Local Law Regulated.**

Permanent residence will change domicil.

By what Local Law Regulated.

there notwithstanding that he retains a vague intention to return to his native country at some indefinite period: *Att.-Gen.* v. *Kent*, 1 H. & C. 12; *Att.-Gen.* v. *Fitzgerald*, 3 Dr. 610; *Re Steer*, 3 H. & N. 594; *Doncet* v. *Geoghegan*, 9 Ch. D. 441; *Sottomayor* v. *De Barros*, 3 P. D. 94. An English trader, however, settling in such countries as Turkey or China, will be presumed not to intend to acquire a domicil there, so long as he continues to be a British subject: *The Indian Chief*, 3 Rob. Adm. 29; *Maltass* v. *Maltass*, 3 Curt. 234; 1 Rob. 67; *Re Tootal's Trusts*, 23 Ch. D. 532.

Temporary residence.

A series of temporary residences in different parts of a country will not be sufficient to give a domicil of choice there: *Att.-Gen.* v. *Dunn*, 6 M. & W. 511; *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Whicker* v. *Hume*, 7 H. L. C. 124; *Patience* v. *Main*, L. R. 29 Ch. D. 376; *Platt* v. *Att.-Gen.*, L. R. 3 App. 336; *Douglas* v. *Douglas*, L. R. 12 Eq. 617. And mere intention is not sufficient to change a domicil; there must be an actual change of residence: *Re Raffenel*, 3 Sw. & Tr. 49; *Forbes* v. *Forbes*, Kay, 353; *Haldane* v. *Eckford*, L. R. 8 Eq. 631; *Douglas* v. *Douglas*, L. R. 12 Eq. 617. But it was stated by Sir J. *Leach* that if a man be *in itinere*, that is a sufficient change of residence to change his domicil: *Munroe* v. *Douglas*, 5 Madd. 379.

Divided residence.

Where a person divides his residence between two different countries nearly equally, then the question as to which is the country of his domicil will be decided generally in favour of that country where he keeps up the largest permanent establishment: *Somerville* v. *Somerville*, 5 Ves. 749; and the place where he usually resides with his wife and family will, in the absence of evidence to the contrary, be assumed to be his place of domicil: *Forbes* v. *Forbes*, Kay, 34; *Aitcheson* v. *Dixon*, L. R. 10 Eq. 589; *Platt* v. *Att.-Gen.*, L. R. 3 App. 336. The fact of a man's dying, or wishing to be buried in a particular country will not be regarded as material: *Somerville* v. *Somerville*, *supra*; *Platt* v. *Att.-Gen.*, *supra*.

Continuance and revivor

It must also be borne in mind that the domicil

By what Local Law Regulated.

of domicil of origin.

of origin continues until a fresh domicil has in fact been acquired; and that even though a person quit the country of his domicil of origin and manifest every intention of abandoning it, he will not succeed in doing so until he has actually acquired another domicil: *Somerville* v. *Somerville, ubi supra; Menroe* v. *Menroe,* 7 Cl. & F. 842; *Bell* v. *Kennedy,* L. R. 1 H. L. Sc. 307. It is otherwise, however, with a domicil of choice, which may be abandoned without acquiring a fresh domicil. In such case, the domicil of origin, which is regarded as having in the meantime been only in abeyance, is revived, and becomes the actual domicil: *Udney* v. *Udney,* L. R. 1 H. L. Sc. 441; *The Indian Chief,* 3 Rob. Ad. 12; *Re Bianchi,* 3 Sw. & Tr. 16; *King* v. *Foxwell,* 3 Ch. D. 518. The expression "domicil of origin" was used in the above cited cases in opposition to "domicil of choice," and it would appear to be more correct to state that when a domicil of choice is abandoned without a fresh domicil being acquired, then the last involuntarily acquired domicil is revived. See *Paxton* v. *Macreight,* 30 Ch. D. 165. In this case the parents of an infant who was born and acquired a domicil in England, subsequently went to reside in Jersey, and they acquired a domicil of choice there, which thereupon became the domicil of the infant, who obtained a commission in the British army and joined his regiment in England. He served with the regiment in different parts of the world, and ultimately died in Canada, where his regiment then was; and *Pearson,* J., held that his domicil at the time of his death was in Jersey. See also *Re Patten,* 6 Jur. (N. S.) 151.

Stat. 24 & 25 Vict. c. 121.

The statute 24 & 25 Vict. c. 121, provides (sect. 1) that wherever her Majesty shall, by convention with any foreign state, agree that provisions to the effect of the enactments therein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty, by Order in Council, to direct that after the publication of such order in the London Gazette, no British subject resident at the time of his death in the foreign country named in such Order shall be

By what Local Law Regulated.

deemed under any circumstances to have acquired a domicil in such country unless he shall have been resident there for one year immediately preceding his decease, and shall also have deposited in a public office of such foreign country (such office to be named in the Order) a declaration in writing of his intention to become domiciled in such foreign country; and every other British subject dying resident in such foreign country shall be deemed for all purposes of succession to moveables to retain the domicil he possessed at the time of his going to reside in such foreign country. The Act does not apply to foreigners who have obtained letters of naturalization in any part of her Majesty's dominions.

# CHAPTER II.

## WHO MAY MAKE WILLS.


| | PAGE | | PAGE |
|---|---|---|---|
| *Stat.* 34 & 35 *Hen.* 8, *c.* 5 ..... | 327 | *Wills of Married Women* ..... | 335 |
| *Disabilities of Infants* ..... | 328 | *Confirmation of Void Wills*..... | 335 |
| *Wills of Idiots and Lunatics* ... | 329 | *Devises by Aliens* ..... | 336 |
| *Wills of Blind and Deaf Persons* ..... ..... ..... | 333 | *Devises and Bequests by Traitors, Felons, &c.* ..... ..... | 337 |


Stat. 34 & 35 Hen. 8, c. 5.

THE general (*a*) testamentary power over freehold real estate was originally given by the statute of 32 Hen. 8, c. 1, into the precise import of which it is now unnecessary to inquire, as it was quickly followed by the explanatory Act of 34 & 35 Hen. 8, c. 5, which, after reciting the former statute, enacted :—

Persons having an estate or interest in lands in fee enabled to devise.

"That all and singular person and persons having a sole estate or interest in fee simple, or seised in fee simple, in coparcenary, or in common in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of any rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons (except bodies politic and corporate), by his last will and testament in writing, as much as in him of right is or shall be, all his said manors, lands,

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(*a*) By certain local customs (the custom of Kent, and some other parts of England, and in North Wales) lands and tenements were always disposable by will: but this was contrary to the general rule of the common law, see Burton on Real Property, 95; and Co. Litt. 111 b., and note (1). Coke says, with reference to the operation of the statutes of 32 & 34 Hen. 8, "But these statutes take not away the custom to devise, whereof Littleton speaketh: for though lands devisable by custome be holden by knight's service, yet may the owner devise the whole land by force of the custome, and that shall staud good against the heire for the whole." And see note (4), as to the power by custom being sometimes larger than the statutory power, even since the stat. 12 Car. 2, c. 24.

Who may Make Wills.

tenements, rents and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of, or to be perceived out of the same, or out of any parcel thereof, at his own free will and pleasure."

Exception as to *femes coverts*, infants, lunatics, and idiots.

By sect. 14, it is provided, that wills or testaments made of any manors, &c., by any woman covert, or person within the age of twenty-one years, idiot, or by any person of nonsane memory, should not be taken to be good or effectual in law. This clause did not create any disability that was unknown, nor does it comprise all that were known to the common law, but seems to have been dictated by an apprehension that the general terms of the Act of 32 Hen. 8, might have had the effect of removing pre-existing disabilities, according to the construction given to the nearly contemporary Statute of Jointures, 27 Hen. 8, c. 10. Hence, all the specified disqualifications extended equally to the bequeathing of personal estate, except that infants of a certain age, namely, males of fourteen, and females of twelve, might dispose by will of personalty: *Bishop* v. *Sharpe*, 2 Vern. 469; *Whitmore* v. *Wild*, 2 Ch. Rep. 382; *Hyde* v. *Hyde*, 2 Eq. Ca. Ab. 283; Pre. Ch. 366; and such a will was valid, notwithstanding that the testator or testatrix afterwards lived to majority without confirming it: *Hinckley* v. *Simmons*, 4 Ves. 160. On the other hand, infants of every age were (as they still are) under an incompetency to aliene any portion of their property, real or personal, by deed.

Infants might under the old law bequeath personal estate.

Infants might devise by custom.

Infants might under the old law devise real estate by special custom, but it was necessary that the custom should prescribe some definite and reasonable age; for a custom, authorising the making of a will by persons too young to be capable of exercising a discretion, would be no less absurd than one which should empower lunatics or idiots to devise their property. Fourteen, it seems, would be considered a proper age: 2 Anders. 12.

Testamentary appointment of guardians

The disability of infancy was expressly taken away, in regard to the paternal appointment of testamentary guardians, by the stat. 12 Car. 2,

Who may Make Wills.

might be made by infants.

c. 24, s. 8; which enabled any father within the age of twenty-one, or of full age, who should leave any child under twenty-one, and not married, by deed or will, in the presence of two witnesses, to dispose of the custody of such child or children, during such time as he or they should continue under twenty-one, or any less time, to any person or persons other than popish recusants; and it gave to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage. *Vide ante*, Vol. I., p. 798 n.

The guardianship draws after it the custody of the land which the infancy of the father would have prevented him from devising directly: *Bedell* v. *Constable*, Vaugh. 178; see also *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 102; and it is observable, that though the power of appointing guardians does not extend to infant children who are married at the father's death, yet, if then unmarried, the guardianship is not afterwards determined by marriage: *Earl of Shaftesbury's Case*, cit. 3 Atk. 625. The statute has been held not to interfere with the lord's right to the guardianship of his infant copyhold tenant: *Clench* v. *Cudmore*, 3 Lev. 395.

And now by sect. 7 of the Wills Act, 1837, no will made by any person under the age of twenty-one years is valid. The wills of soldiers on actual military service, and of mariners at sea, are, however, exempted from this operation of the Act so far as they relate to any disposition of personalty (sect. 11).

Wills of idiots and lunatics.

The will of an idiot is of course void: Dyer, 143 b. Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power: see Swinb. 133; see also *Aysey* v. *Hill*, 2 Add. 206; *Harwood* v. *Baker*, 3 Moo. P. C. 282. And see as to the will of a person subject to epileptic fits, *Foot* v. *Stanton*, 1 Deane, 19. The validity of a lunatic's will depends on the state of his mind at the time; for, if made during a lucid interval, it will be good: *Beverley's Case*, 4 Rep. 123 b.; *Kemble* v. *Church*, 3 Hagg.

**Who may Make Wills.**

Rule on the subject of lunacy.

273. The general rule upon the subject of lunacy was thus stated in *White* v. *Wilson*, 13 Ves. 87, by Lord *Eldon* (following Lord *Thurlow's* statement in *Att.-Gen.* v. *Parnther*, 3 Br. C. C. 441): "Where the party has ever been subject to a commission, or to any restraint permitted by law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof showing sanity is thrown upon him; on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side; which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction. A deviation from that rule will produce great uncertainty."

Inquisition, how far evidence of testamentary incapacity.

Proof of a lucid interval thrown upon those seeking to establish the will.

General lunacy being established by an inquisition or other sufficient *primâ facie* evidence, the proof is thrown upon the party alleging a lucid interval; and he must establish that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to judge of the act: *Hall* v. *Warren*, 9 Ves. 605; see also *Att.-Gen.* v. *Parnther*, 3 Br. C. C. 441; *Coglan's Case*, cit. *Bootle* v. *Blundell*, 19 Ves. 508; *Cartwright* v. *Cartwright*, 1 Phil. 90; *Re Watts*, 1 Curt. 594; *Cooke* v. *Cholmondeley*, 11 Jur. 702.

Where proof of insanity is thrown upon those seeking to set aside the will.

But the other branch of the subject, where the proof of insanity as regards the will, is thrown upon the party seeking to set aside the will, that insanity not having been established generally, is that which involves the points of the greatest difficulty. Some of the cases in this branch have been cases of persons who have been in the exercise of duties requiring considerable mental activity and energy, while their insanity *quoad* the will has nevertheless been sought to be established. The legal test of unsoundness of mind would seem to be the existence of delusions, or unfounded and irrational beliefs as to facts: *Frere* v. *Peacocke*, 11 Jur. 247; see *Austen* v. *Graham*, 8 Moo. P. C. 493; *Ditchbonan* v. *Fearn*, 6 Jur. 201;

Who may Make Wills.

*Goldie* v. *Murray*, 6 Jur. 608; *Madway* v. *Croft*, 3 Curt. 671; *S. C.* 7 Jur. 979; *Grimani* v. *Draper*, 12 Jur. 925; *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398. In the case of *White* v. *Wilson*, 13 Ves. 87, where an heir-at-law failed to set aside a will on the suggestion of incompetency in the testator, the will being established upon clear evidence of capacity as to the conduct of the testator, opposed only by some circumstances of eccentricity and singularity in dress, Lord *Eldon* made the following statement of the case of Mr. *Greenwood:* "In my experience I know only one instance of a verdict of lunacy under such circumstances: which is the case of Mr. Greenwood, who was bred to the bar, and acted as chairman at the quarter sessions; but, becoming diseased, and receiving in a fever a draught from the hand of his brother, the delirium, taking its ground then, connected itself with that idea; and he considered his brother as having given him a potion, with a view to destroy him. He recovered in all other respects; but that morbid image never departed; and that idea appeared connected with the will, by which he disinherited his brother. Nevertheless, it was considered so necessary to have some precise rule, that though a verdict had been obtained in the Court of Common Pleas against the will, the judge strongly advised the jury to find the other way; and they did accordingly find in favour of the will. Farther proceedings took place afterwards, and concluded in a compromise." *Greenwood's Case* is also stated 3 Br. C. C. 444; in the speech of Mr. Erskine, on the trial of James Hadfield, 27 Howell's State Trials, 1307, *et seq.;* and in the judgment of Sir *John Nicholl* in *Dew* v. *Clark*, 3 Add. 96, 97.

*Dew* v. *Clark.*

In *Dew* v. *Clark*, 3 Add. 79; 1 Hagg. 311, the testator, Mr. Ely Stott, an eminent electrician, had conceived a strong and groundless aversion, exhibited in a series of acts of very great harshness and cruelty, towards an only child, to whom, though at the time of his death he was possessed of personal property to the amount of nearly 40,000*l.*, he left by his will a provision for life of about 100*l.* per annum; the principal stock out of which it was to

Who may Make Wills.

accrue, not to go upon her death to her issue, but to fall into the residuary estate bequeathed to his nephews. Sir *John Nicholl* (whose long and elaborate judgment, which should be perused by all inquirers into this important subject,) pronounced the will to be "null and void," as "being the very creature of morbid delusion put into act and energy;" and this sentence was affirmed by the High Court of Delegates, 1 Hagg. 311. The parties against whom the decision was pronounced, petitioned for a commission of review; the petition was referred to Lord *Lyndhurst*, C., who, it not appearing to his lordship that there was any error in law or any mistake as to fact, came to the conclusion that it was his duty to recommend his Majesty not to grant a commission of review: *Dew* v. *Clark*, 5 Russ. 163. In the course of his judgment Lord *Lyndhurst* said (at p. 166), in reference to the observations of counsel with respect to the term *partial insanity* made use of by Sir *John Nicholl*: "I have read his judgment with great attention, and I collect from it that his meaning is this: that there must be unsoundness of mind in order to invalidate a will, but that the unsoundness may be evidenced in reference to one or more subjects."

Partial unsoundness of mind.

In *Waring* v. *Waring* (6 Moo. P. C. 341; *S. C.* 12 Jur. 947), Lord *Brougham* said that it was incorrect to speak of partial insanity; his lordship's view was that the mind, though it has various faculties is one and indivisible; if any of these faculties are disordered, so as to cause delusions, the mind is wholly unsound, and testamentary incapacity is the necessary result. And this view was adopted in the case of *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398. But it may now be regarded as settled that perfect soundness of mind is not essential to testamentary capacity, and that partial unsoundness, not affecting the general faculties and not operating on the mind of the testator, in regard to testamentary disposition, is not sufficient to render him incapable of making a will: all that is required is a capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims

Who may Make Wills.

of those he is excluding : *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549. The judgment of the Court in this case, delivered by *Cockburn*, C. J., will well repay perusal.

Undue influence on a weak mind.

Proof of undue influence exercised over a weak mind may be sufficient to set aside a will, even though such weakness may not amount to unsoundness so as to cause an inquisition of lunacy to issue : *Mountain* v. *Bennett*, 1 Cox, 355. In cases of impaired mental powers caused by the approach of death or otherwise, clear evidence will be required that the testator fully understood and approved of the contents of the will : *Durnell* v. *Corfield*, 8 Jur. 915 ; *Mitchell* v. *Thomas*, 6 Moo. P. C. 137 ; *S. C.* 12 Jur. 967 ; *Tribe* v. *Tribe*, 13 Jur. 793. In such cases a will prepared by a legatee, or in favour of a medical attendant, will be regarded with suspicion : *Paske* v. *Ollatt*, 2 Phil. 293 ; *Jones* v. *Godrich*, 5 Moo. P. C. 16 ; see *Barry* v. *Butlin*, 2 Moo. P. C. 480. But where undue influence is shown, the whole will is not necessarily set aside, but only such dispositions as were improperly obtained : *Haddock* v. *Trotman*, 1 F. & F. 31 ; *Allen* v. *Macpherson*, 1 H. L. C. 191.

Persons deaf and blind.

A person who has been from his nativity blind, and deaf and dumb (the dumbness being, in fact, a necessary consequence of the deafness), is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind. Blindness or deafness alone produces no such incapacity : *Dickinson* v. *Blissett*, 1 Dick. 268 ; *Re Harper*, 6 M. & Gr. 731. Indeed, it has even been held that a will need not be read over to a blind testator, previously to its execution, provided it be shown *aliunde* that he clearly understood its contents : *Longchamp* d. *Goodfellow* v. *Fisk*, 2 B. & P. N. R. 415 ; *Edwards* v. *Fincham*, 3 Curt. 63 ; *Mitchell* v. *Thomas*, 6 Moo. P. C. 137. But it is almost superfluous to observe that in proportion as the infirmities of a testator expose him to deception, it becomes more imperatively the duty, and should be anxiously the care, of all persons engaged in the transaction, to be prepared with

**Who may Make Wills.**

unexceptionable proof that no imposition has been practised.

Wills of married women.

Before the Married Woman's Property Act, 1882, a married woman had, generally speaking, no power to make a will. This disability of coverture differed essentially from those of infancy, idiocy, and lunacy. It did not arise from natural infirmity, but was the creature of civil policy, and might be dispensed with at the pleasure of the contracting or disposing parties, so far, at least, as the *jus disponendi* is concerned; while the contrary has been decided with respect to infancy, which alone, of the other enumerated disabilities, could admit of any argument being raised on the subject: *Hearle* v. *Greenbank*, 3 Atk. 695; 2 Ves. sen. 298.

When married women could make valid wills under the old law.

A woman, however, whose husband had been banished for life by Act of Parliament, might dispose by will of her real and personal estate; for, as he was civilly defunct, she was restored to the rights and privileges of discoverture: *Countess of Portland* v. *Prodger*, 2 Vern. 104. And where a felon was transported for a definite term of years, his marital rights (and, therefore, it would seem his wife's conjugal disabilities) were suspended for that period: see *Ex parte Franks*, 1 Moo. & Sc. 11; even though a conditional pardon had been granted to him: *Re Martin*, 2 Rob. 405; *Re Coward*, 4 Sw. & Tr. 46. And see *Atlee* v. *Hook*, 23 L. J., Ch. 775. And the wife of an alien enemy was likewise regarded as a *femè sole* for testamentary purposes, as regarded property vested in her subsequently to the commencement of her husband's disability: *Dearly* v. *Mazarine*, 1 Salk. 116. A married woman who had obtained a protection order under 20 & 21 Vict. c. 85, could also make a will as if she were a *feme sole*, and the order related back to the date of desertion: *Re Elliott*, L. R. 2 P. & D. 274; and see *Mudge* v. *Adams*, 6 P. D. 54. A married woman could also make a will appointing an executor, when she herself was an executrix, for the purpose of continuing the representation of the original testator: *Scammell* v. *Wilkinson*, 2 East, 552; *Birkett* v. *Vandercrom*, 3 Hagg. 750. A married

Who may Make Wills.

woman could also effectually exercise a power of appointment by will vested in her, over either real or personal estate: *Driver* v. *Thompson*, 4 Taunt. 294; *Burnett* v. *Mann*, 1 Ves. sen. 156; *Hawksley* v. *Barrow*, L. R. 1 P. & D. 147; *Willock* v. *Noble*, L. R. 7 H. L. 580. A married woman could also dispose by will of personal estate and of the beneficial interest in real estate settled to her separate use: *Taylor* v. *Meads*, 10 Jur. (N. S.) 166, 4 D. J. & S. 597; *Hall* v. *Waterhouse*, 10 Jur. (N. S.) 361; *Pride* v. *Bubb*, L. R. 7 Ch. 64; *Charlemont* v. *Spencer*, 11 L. R. Ir. 347; and see *Mereteith* v. *Campbell*, 26 W. R. 848; *Re Tharp*, 3 P. D. 76; and see *Bestall* v. *Bunbury*, 13 Ir. Ch. 318; *Bishop* v. *Wall*, 3 Ch. D. 194. A married woman could also dispose by will of personal property not settled to her separate use, and over which she had no power of appointment, with her husband's consent: *Willock* v. *Noble*, *supra;* and whether such property was vested or contingent on her surviving her husband: *Bishop* v. *Wall*, 3 Ch. D. 394; and where the husband had, after the wife's death, assented to probate, but died before probate was granted, the will was held entitled to probate: *Re Cooper*, 6 P. D. 34. But the husband's death in the lifetime of the wife rendered the will inoperative: *Willock* v. *Noble*, *supra*, and see *Stafford* v. *Stafford*, 28 Ch. D. 709.

Married women now capable of making testamentary dispositions.

Now by the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), a woman married after the commencement of that Act may acquire and dispose by will of any real or personal property, as her separate property, in the same manner as if she were a *feme sole:* see sect. 1, sub-sect. (1), and sect. 2 And a woman married after that date may hold and dispose as aforesaid as her separate property all real and personal property her title to which has accrued after the commencement of the Act: sect. 5. As to accruer of the title of a married woman, see *ante*, Vol. I., p. 228; Vol. V., p. 72.

Subsequent confirmation of will originally void.

A will made during any personal disability of course is not validated by the fact of the testator having outlived it, unless the removal of the dis-

Who may Make Wills.

ability were followed by some act of confirmation or adoption, amounting in law to a re-execution: 2 Salk. 238; 1 Eq. Ca. Ab. 171, pl. 3 (*b*); *Willock* v. *Noble*, L. R. 7 H. L. 580. Before the Wills Act the delivery by a widow of an instrument executed during coverture to the custody of another, as the will of the depositor, was held to be a sufficient publication under the old law of a will of personal estate: *Miller* v. *Brown*, 2 Hagg. 209. But now no will originally invalid can be set up by any means short of execution and attestation.

Devises by aliens.

A devise of lands by an alien was, at common law, at least voidable (see Shep. Touchst. 404), the Crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office, the lands of an alien remained in him, having all the qualities incidental to estates of that description. On which ground it was held that an alien tenant in tail in possession might suffer a common recovery, so as to bar the issue in tail and remainders: 4 Leon. 84; and, by parity of reasoning, the will of an alien vested his defeasible title in a devisee: see Shep. Touchst. 404; though, if he died intestate, the land escheated to the Crown or other lord *pro defectu tenentis*, without any inquest of office, because an alien could have no heirs: Co. Litt. 2 b. By the Naturalization Act, 1870 (33 Vict. c. 14), sect. 1, real and personal property may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. Provided that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession or expectancy in pursuance of any disposition made before the Act, or in pursuance of any devolution by law on the death of any person dying before the Act. And by 35 & 36 Vict. c. 39, sect. 3, it is provided that nothing contained in the Naturalization Act, 1870, shall deprive

(*b*) As to republication, *vide post*, Chap. VII. pp. 412 *et seq.*

Who may Make Wills.

any married woman of any estate or interest in real or personal property to which she may have become entitled previously to the passing of the Act, or affect such estate or interest to her prejudice. The Act is not retrospective: *Sharp* v. *St. Sauveur*, L. R. 7 App. 343.

Wills by traitors and felons.

Persons attainted of high treason were formerly incompetent to devise their lands, since, by several old statutes, the real estates of the traitor were by the attainder, *ipso facto* vested in the Crown. And the lands of persons attainted for petty treason and felony formerly escheated to the king or other feudal lord, by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable only, as in the case of an alien: Shep. Touchst. 404; and such continued to be the case until 1870, as to persons not entitled to the benefit of the stat. 54 Geo. 3, c. 145, which abolished the corruption of blood in all cases of attainder, except for high treason, petty treason (which by the stat. 9 Geo. 4, c. 31, s. 2, was to be treated as murder), and murder, or for counselling, procuring, and abetting those offences. The personal estate of traitors and felons was also formerly forfeited to the Crown, on conviction, and they could therefore make no effective will of personal estate. And this incapacity extended to a *felo de se*, who could however appoint an executor by will: *Re Bailey*, 2 Sw. & Tr. 156. Now, however, the law by sect. 1 of 33 & 34 Vict. c. 23, forfeiture and escheat for treason or felony are abolished. Sect. 7 provides that where any convict shall die or be made bankrupt, or shall have suffered his punishment or been pardoned, he shall thenceforth cease to be subject to the operation of the Act: and sect. 8 provides that every convict during the time while he shall be subject to the operation of the Act, shall be incapable of alienating or charging any property, or of making any contract, save as thereinafter provided, and subsequent sections provide for the administration of the convict's property, by administrators; and sect. 18 provides that the

Who may Make Wills.

administrator is to hold the property in trust for the use and benefit of the convict and his heirs or legal personal representatives, or of such other persons as may lawfully be entitled thereto; and the property is to revest in the convict upon his ceasing to be subject to the operation of the Act, or in and to his heirs or legal personal representatives or such other persons as may be lawfully entitled thereto. A convict is now, therefore, capable of disposing of his property by will: see *ante*, sub tit. PURCHASE DEEDS, Vol. V., pp. 93 *et seq.*

# CHAPTER III.

## TO WHOM DEVISES OR BEQUESTS MAY BE MADE.


| | PAGE | | PAGE |
|---|---|---|---|
| *Devises to Corporations* | 339 | *Effect of Devise to Heir* | 343 |
| *Devises to Aliens* | 340 | *Gifts to Bastards* | 343 |
| *Gifts to Attesting Witnesses* | 341 | *Gifts to Infants, Femes Coverte, &c.* | 344 |


**Who may be Devisees, &c.**

Devises to corporations.

THE enactment in the statute of wills (34 Hen. 8, c. 5) forbade the devise of lands to bodies politic and corporate; and therefore a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void, and the lands descended to the heir, either beneficially or charged with the trust, as the case might be: *Sonley* v. *Clockmakers' Co.*, 1 Br. C. C. 81. This statute was repealed by the stat. 1 Vict. c. 26; but the disability of corporations to hold real estate was not thereby removed, for that disability was created by various earlier statutes (*a*). By the 7 & 8 Will. 3, c. 37, the Crown was empowered to grant licenses to alien or take in mortmain of whomsoever the tenements shall be holden. Previously to the Wills Act, a devise upon trust to a corporation, not licensed, or not empowered by Act of Parliament or charter, to take lands in mortmain, was void at law, and the estate descends to the heir, charged however with the trust. Since that Act, however, repealed the Act of Hen. 8, a corporation would now take the lands under such a devise, but would not be able to retain them without a license. The trust, moreover, would still be upheld, provided that it were not illegal under the 9 Geo. 2, c. 26.

(*a*) Of these the only statutes now in force are 7 Ed. 1, c. 1; 13 Ed. 1, c. 32; 18 Ed. 1 (*Quia Emptores*), c. 3; 18 of Ed. 3, st. 3, c. 3; 15 Rich. 2, c. 5 (as amended by 45 & 46 Vict. c. 50, s. 5), and 23 Hen. 8, c. 10.

Who may be Devisees, &c.

Devises to some corporations are also expressly authorised by various Acts of Parliament, for a fuller account of which see tit. MORTMAIN, *ante*, Vol. IV. p. 1 *et seq.*

Devises to aliens.

By 33 & 34 Vict. c. 14, s. 2, real and personal property of every description may be taken, acquired, held, or disposed of by an alien in the same manner in all respects as by a natural-born British subject. This Act is not retrospective (*Sharp* v. *St. Saveur*, L. R. 7 Ch. 343), and apparently does not apply to a will made before the passing of the Act, though not coming into operation till afterwards: see sect. 2, sub-sect. 3. Before the Act alienage could not, strictly speaking, be ranked among the incapacities to take by devise, as the devised hereditaments remained in the alien till office found, when they belonged to the Crown: *Duplessis* v. *Att.-Gen.*, 1 Br. P. C. Toml. ed. 415. On this principle, where lands were devised to an alien and a British subject, as joint tenants, the whole did not vest in the latter (which would be the effect if the devise to the alien were absolutely void), but in both jointly; and if the Crown did not seise the alien's moiety (as it might do after office found, *The King* v. *Boys*, Dy. 283 b.), on the decease of the alien, leaving his co-devisee surviving, the survivorship, which was incident to every joint tenancy, took place, subject, nevertheless, to be overreached by the Crown's right of seizure, after office; which would, by relation, defeat the title of the surviving joint tenant to the alien's moiety: *Forset's Case*, cit. 1 Leon. 47; 4 Leon. 82. If, however, the alien survived his co-devisee, it has been thought that the entirety would not devolve to him, as he was disabled from taking by operation of law, even for the benefit of the Crown, since the law, by its own act, never gives an estate to one whom it does not permit to retain it: see *Collingwood* v. *Pace*, 1 Vent. 417. But as each joint-tenant is seised of the entirety even during his co-tenant's life, it seems that he does not need to take anything by act of law when his co-tenant dies. Where a trust in lands was created for an

Who may be Devisees, &c.

alien, by will or otherwise, the Crown, upon office found, became entitled to the benefit of it: *Barrow* v. *Wadkin*, 24 Beav. 1; *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343. But the proceeds of sale of real estate devised on trust for sale, could be given to an alien: *Du Hourmelin* v. *Sheldon*, 1 Beav. 79; 4 My. & C. 525. The disabilities of alienage were capable of being removed either in part, by a grant of letters of denization from the Crown, or wholly, by an Act of Parliament investing the alien with the rights and privileges of a British subject.

And by 7 & 8 Vict. c. 66 (which is now repealed) the Secretary of State was empowered to grant certificates of naturalization having the same effect, and section 5 of the same Act also gave a limited power to aliens to hold land.

Devises to felons.

The incapacity of a felon to acquire property during the period of his punishment, which formerly existed has been removed by 33 & 34 Vict. c. 23, as to which see *ante*, p. 337.

Devisee or legatee an attesting witness.

Another ground of disqualification arises from the fact of the devisee or legatee being made an attesting witness of the will, the effect of which was, formerly, that in the case of a will of freeholds, the whole will was invalid. By the 25 Geo. 2, c. 6, however, it was provided that if any person should attest the execution of any will or codicil made after the 24th June, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, should be thereby given or made, such devise, legacy, &c., should, so far only as concerned such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person should be admitted as a witness to the execution of such will or codicil within the intent of the said Act. This Act has now been repealed, except as to wills made before the 1st Jan. 1838 by 1 Vict. c. 26; which provides (sect. 15) that:—

**Who may be Devisees, &c.**

Gifts to an attesting witness to be void.

"If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."

By sects. 16 and 17 it is provided that creditors and executors shall be admitted as competent witnesses.

Effect of this enactment.

The following points have been decided on the construction of this section:—

The marriage after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise: *Thorpe* v. *Bestwick*, 6 Q. B. D. 311; nor does a legatee under a will lose his legacy by attesting a codicil which confirms the will, even though he be a residuary legatee, and the codicil increases his share of residue by revoking legacies contained in the will: *Gurney* v. *Gurney*, 3 Drew. 208; *Tempest* v. *Tempest*, 2 K. & J. 642; 7 De G. M. & G. 470. And where a will containing a gift to an attesting witness is republished and incorporated in a codicil confirming the will, which is duly attested by other witnesses, the gift to the legatee is rendered valid notwithstanding his attestation of the will: *Anderson* v. *Anderson*, L. R. 16 Eq. 381. Where by a will certain legacies were given with a proviso that the representatives of legatees who might die before the period of distribution were excluded, and by a codicil, attested by one of the legatees, this proviso was abrogated, and the legacies made absolute, it was held the representatives of the legatee who attested the codicil, and who died before the period of distribution were excluded from partici-

pation: *Gaskin* v. *Rogers*, L. R. 2 Eq. 284. A witness is disqualified from taking as a legatee although he is a supernumerary: *Wigan* v. *Rowland*, 11 Hare, 157; *Roadfield* v. *Roadfield*, 32 L. J., Ch. 668. But where a will is duly signed by two witnesses and the signature of a legatee also appears at the foot of the will the Probate Division of the High Court will receive evidence to explain with what intention the signature was written, and if satisfied that there was no intention to attest the will, will order the grant of probate not to include the signature of the legatee: *In the goods of Sharman*, 1 P. D. 661.

**Who may be Devisees, &c.**

Formerly, the rule was, that where a title by descent and a title by devise met in the same individual, the heir was in by descent, and not by purchase; unless the quantity or quality of the estate, which the heir took by devise, differed from that which would have descended upon him. (See the cases cited, 1 Jarm. Wills. 75.) It is now provided by the 3rd section of the stat. 3 & 4 Will. 4, c. 106, that, when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.

**Effect of devise to heir—old and new law.**

A bastard *in esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate; and the only question that now admits of discussion, in regard to gifts to such persons, is, whether they are sufficiently designated as the objects of them: see *Gordon* v. *Gordon*, 1 Mer. 141; *Earle* v. *Wilson*, 17 Ves. 528; *Evans* v. *Massey*, 8 Pri. 22; and this depends on rules of construction of great practical importance in the preparation of wills, and which will hereafter receive examination. Whether a gift can be made to bastards not procreated, is *vexata quæstio*. The early authorities certainly lean to the negative; the reason being, that "the law does not favour such a generation, nor expect that such shall be:" *Blodwell* v. *Edwards*, Cro. El. 509; Co. Litt. 3 b. But if, as is sometimes said, the objection

**Devises and bequests to bastards.**

Who may be Devisees, &c.

arises merely from the uncertainty attaching to objects of this nature, as being *filii nullius*, until reputation has assigned to them a father, that objection might be removed by a description referring to the maternal parent only, omitting any reference to the father, as "to the future illegitimate children of Ann Wilkins." It is conceived, however, that the objection stands upon a higher principle. Every prospective provision for illegitimate children not only supposes, but indirectly holds out encouragement and sanction to incontinency, and might therefore seem to be impeachable, as having an immoral tendency; though at present no decision can be considered as actually going this length. In the case of *Wilkinson* v. *Adam*, 1 Ves. & B. 422, Lord *Eldon*, in allusion to this point, said he would leave it where he found it, without any determination. See also the observations of Lord *St. Leonards* in *Re Connor*, 2 J. & L. 459. See further as to gifts to illegitimate children, *post*, Chap. XVII.

Gifts to infants, *femes covertes*, lunatics, and idiots.

Infancy (*b*), coverture, insanity, and idiotcy, do not incapacitate from taking by devise or bequest, though these disabilities of course prevent the subjects of them from testifying their assent or acceptance; the want of which, however, is not allowed to produce any practical inconvenience, being presumed in the absence of evidence to the contrary, unless where such presumption would work injury to the devisee.

Another impediment to a person taking by devise arises from his dying before the testator, this being a necessary consequence of the ambulatory nature of wills, discussed in the next section. The subject of lapse, however, is so important a branch of testamentary law, that it has been made the subject of separate consideration in a later part of this Dissertation: see *post*, pp. 458 *et seq.*

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(*b*) A valid gift may be made by will to an unborn infant: *Burdett* v. *Hopegood*, 1 P. Wms. 486; *Mogg* v. *Mogg*, 1 Mer. 654.

# CHAPTER IV.

## WHAT MAY BE DEVISED OR BEQUEATHED.


| | PAGE | | PAGE |
|---|---|---|---|
| *Joint Estates* | 345 | *Equitable Interests, Contracts for Purchase, &c.* | 352 |
| *Executory Interests* | 347 | *After-Acquired Copyholds* | 354 |
| *Rights of Action and Entry, &c.* | 348 | *Chattel Interests* | 356 |
| *From what Date a Will Speaks* | 350 | *Estates* pur autre vie | 357 |


**Devisable Estates and Interests.**

What may be devised or bequeathed.

GENERALLY speaking, the testamentary power extends to all interests in real and personal estate, which at the decease of the testator would, if not thus disposed of, vest in his general real or personal representatives, whether the testator is the legal or beneficial owner only, or unites in himself both these characters. Tried by this rule, it is obvious that a devise by a joint tenant of real or personal estate is necessarily void in the event of the testator dying in the lifetime of the co-tenant, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator of the testator in case he had died intestate: Co. Litt. 185 a. If, on the other hand, the testator survives his companion in the tenancy, the efficiency of the devise or bequest depends on the nature of the property; if it were a freehold interest, the estate devolving by survivorship would not pass by the will, the testator not having a sole or devisable estate when he made it; and, by parity of reasoning, any divided part or share which might after the will have been allotted to the testator on a partition of the property, would not pass thereby: *Swift* d. *Neale* v. *Roberts*, 1 W. Bl. 476; 3 Burr. 1488. But this reasoning, it is obvious, does not apply to leaseholds or other personal estate; a future interest in which devolving by survivorship, or acquired by partition, would, like all other after-acquired personalty, pass by a general or residuary

Joint estates not devisable.

**Devisable Estates and Interests.**

bequest. And this is also the case with respect to real estate devised by wills made since 1837. For by sect. 3 of 1 Vict. c. 26 it is enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor (*a*), or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant-right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may

All property may be disposed of by will,

comprising customary freeholds and copyholds, without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*;

contingent interests;

(*a*) See *Ingilby* v. *Amcotts*, 21 Beav. 585.

Devisable Estates and Interests.

be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof, by deed or will; and also to all rights of entry for conditions broken, and other rights of entry, and also to such of the same estates, interests, and rights respectively, and other real and personal estate (*b*), as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

rights of entry, and property acquired after execution of the will.

The doctrine respecting joint tenancies comes under consideration in practice, most frequently in relation to trust estates, which are commonly vested jointly in a plurality of persons. The testacy or intestacy of any trustee who leaves a surviving co-trustee, it is unnecessary to inquire into; but, supposing him to have been sole trustee at his death, his will, if he left one, should be examined, in order to ascertain whether it contains a devise of trust estates, or one capable of operating on them. If the interest vested in the trustee were of a freehold nature, it was necessary in the case of wills made before 1st January, 1838, to ascertain that the trust estate had vested in him solely by survivorship, or otherwise, when he made his will. With regard to a person dying since the commencement of the Conveyancing Act, 1881, by sect. 30 of that Act such trust estates devolve on death, on his legal personal representatives, notwithstanding any devise; but not trust estates in lands of copyhold or customary tenure vested in the testator as tenant on the Court Rolls of a manor: see stat. 50 & 51 Vict. c. 73, sect. 45.

Trust estates commonly held in joint tenancy.

Tenants in common and coparceners have several estates and can accordingly dispose at pleasure of their undivided shares.

Tenants in common, &c.

An executory interest in real or personal estate was, and still is disposable by will, if, from the nature of the contingency, the interest does not cease with the life of the testator, in other words, if it be

Executory interests, when devisable.

(*b*) As to whether a bequest of a chose in action will enable the legatee to sue in his own name, see *Bishop* v. *Curtis*, 21 L. J. Q. B. 391.

Devisable Estates and Interests.

descendible or transmissible. This doctrine was recognised in regard to real estate in the case of *Goodtitle* v. *Wood*, Willes, 211, cited 3 T. R. 94, and was finally established in the case of *Roe* v. *Jones*, 1 H. Bl. 30; *S. C.* 3 T. R. 88, where an estate was devised by will (on failure of limitations to the younger sons of A.) to the only son of A. in fee, in case he should have but one son who should live to attain twenty-one. A. had an only son, B., who, in the lifetime of his father, after he had attained his majority, made a will, devising all his estate in possession or reversion, and died before his father; and the question was, whether this will operated to pass the executory use which B. had during his father's lifetime; and it was held that it did: Lord *Kenyon* distinguishing between such an interest and a mere possibility, like that which an heir has from his ancestor. *Buller*, J., observed, that if it was such an interest as was descendible, it was also devisable, as they must both be governed by the same principle. And see *Ingilby* v. *Amcotts*, 21 Beav. 585. The converse of the proposition of the learned judge is equally true; namely, that an interest which is not transmissible cannot be devised: see *Doe* v. *Tomkinson*, 2 M. & S. 165. This point, however, is now of little practical importance, as it cannot arise under a will made since 1837, it being enacted by the 3rd section of the stat. 1 Vict. c. 26, that the power conferred by it "shall extend to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested."

Right of action.

A right of action was not devisable under the old law. Thus a reversion in fee expectant on an estate tail, which had been discontinued by the act of the tenant in tail, could not be devised: *Baker* v. *Hacking*, Cro. Car. 387, 408. And see *Doe* v. *Finch*, 1 N. & M. 130. But questions of this nature cannot now arise since the abolition of real actions by the stat. 3 & 4 Will. 4, c. 27, sect. 36.

Right of entry.

And the same doctrine was applicable to rights of

Devisable Estates and Interests.

entry. The point was much discussed in the case of *Goodright* v. *Forrester*, 8 East, 564; 1 Taunt. 587, where A. being tenant for life, with reversion to B. in fee, A. levied a fine *come ceo*, &c.; after which B. devised his reversion, and the validity of the devise of course depended on the doctrine in question. The case was eventually decided on another point, after an energetic protest from *Mansfield*, C. J., against the doctrine affirming the invalidity of the devise; but which seems, by the better opinion, to be sound law. Such, it is evident, was the opinion of *Eyre*, C. J., in the case of *Cave* v. *Holford*, 3 Ves. 669; of Lord *Eldon*, in *Att.-Gen.* v. *Vigor*, 8 Ves. 282; and of the Court of King's Bench, in the cases of *Doe* v. *Hale*, 2 D. & Ry. 38, and *Culley* v. *Taylerson*, 11 A. & E. 1020: and Lord *Eldon*, moreover, intimated an opinion, that a will made during disseisin was invalid, though the testator died seised, which certainly appears to be more consistent with principle than the contrary doctrine advanced in *Bunker* v. *Cooke*, Salk. 237, on the ground that a disseisee, after re-entry, is by relation seised *ab initio*.

In the case of wills coming into operation since the Wills Act, however, all questions of this nature are precluded by the above-stated section of that Act, which expressly enables all such interests to be disposed of by will.

A person who has sold an estate under circumstances which entitle him to have the sale set aside had, even before the Wills Act, a devisable interest in the property: *Gresley* v. *Moulsey*, 4 De G. & J. 78; see also *Uppington* v. *Bullen*, 2 D. & W. 184; *Stamp* v. *Gaby*, 2 De G. M. & G. 623. So also a person in possession of land without any other title has a devisable interest: *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

The effect of a settlement limiting property to the executors or administrators of the settlor is to make such property subject to his testamentary disposition, or, in default thereof, to be dealt with under the Statute of Distributions: *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559.

After-acquired freehold interests not

A will, disposing of any interest in real estate, operated under the old law in the nature of a

**Devisable Estates and Interests.**

devisable under the old law.

conveyance, and consequently extended only to hereditaments belonging to the testator when he made the devise. This rule was early established, in relation as well to devises by custom as to devises under the statutes of Henry VIII., which shews that it did not arise from the penning of those statutes, but resulted from principles common to both species of devises. As equity follows the law, the doctrine extended no less to equitable than to legal interests. If, therefore, a testator, before the 1st of January, 1838, devised all the real estate of which he should be seised at the time of his decease, and after the making of his will he purchased lands in fee, such lands, whether they were conveyed to the testator himself, or to a trustee for him, did not pass by the will; but the legal inheritance in the former case, and the equitable inheritance in the latter, descended to the heir at law: *Bunker* v. *Cooke*, 1 Salk. 237; *S. C.* in Dom. Proc. 3 Br. P. C. Toml. ed. 19; *Langford* v. *Pitt*, 2 P. Wms. 629; *Harwood* v. *Goodright*, Cowp. 90. In regard to wills made before the year 1838, wherever a testator refers to an actually existing state of things, his language is construed to refer to the date of the will, and not to his death.

Stat. 7 Will. 4 & 1 Vict. c. 26, s. 24. Will to speak from the death, unless a contrary intention appear.

By the 24th section of the statute 1 Vict. c. 26, it is enacted, "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

In the case of *Cole* v. *Scott*, 1 Mac. & G. 518, a devise (dated 8th April, 1843), of all freehold estates "whereof *I am now seised*," was held by Lord *Cottenham*, C., affirming the decision of *Shadwell*, V.-C. (*S. C.* 16 Sim. 259), on the construction of the whole will, not to pass after-purchased real estate. But in *Wagstaffe* v. *Wagstaffe*, L. R. 8 Eq. 229, where a testator gave "all ready money, bank and other shares, freehold property, plate, pictures, and other property that I may now possess," Lord *Romilly*, M. R., held that property acquired subsequently to the date of the will passed by the gift.

Devisable Estates and Interests.

And it may be regarded as an established rule at the present time that some farther expression of intention than the mere use of the word "now" is necessary to prevent after-acquired property from passing by a testamentary gift: see *Hepburn* v. *Skirving*, 4 Jur. (N. S.) 651; *Re Midland Rail. Co.*, 34 Beav. 525; *Re Ord*, 9 Ch. D. 667. *A fortiori*, general devises or bequests "of which I am seised or possessed" without expressly referring to the present time will not be construed as indicating "contrary intention:" see *Doe* v. *Waller*, 12 M. & W. 591; *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Lord Lilford* v. *Kirk*, 30 Beav. 300. See also the observations of *Cotton*, L. J., in *Everett* v. *Everett*, 7 Ch. D. 428.

Devises by persons having equitable freehold.

Where a testator had only the equitable interest in the devised land when he made his will, and subsequently acquired the legal estate, the estate so acquired descended to the heir, and the equitable interest passed to the devisee, for whom the heir was a trustee. If, on the other hand, the testator were seised only of the legal estate at the time of the execution of his will, and afterwards acquired the equitable interest (as where, being a mortgagee in fee, he purchased the equity of redemption), the devisee was a trustee of the legal estate, which he derived through the will, for the heir-at-law, to whom the equitable inheritance descended: *Strode* v. *Lady Falkland*, 3 Ch. Rep. 188. Cases of the former description frequently occurred where a man contracted to purchase hereditaments in fee, then devised them, and, subsequently to the execution of his will, took a conveyance of the legal estate, and then died without republishing his will: see *Greenhill* v. *Greenhill*, Pre. Ch. 320; *Green* v. *Smith*, 1 Atk. 572; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 494; *Foley* v. *Percival*, 4 Br. C. C. 420; *Capel* v. *Girdler*, 9 Ves. 509; *Holmes* v. *Barker*, 2 Mad. 462; and, as to copyholds, *Seaman* v. *Woods*, 24 Beav. 372 (see *post*, p. 355). The testator being equitable owner under the contract, his interest passed by the will to the devisee, whose equitable title the heir was bound to clothe with the legal estate. As to

**Devisable Estates and Interests.**

wills made subsequently to the Wills Act, however, the testamentary power is extended to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Effect where the testator dies pending a contract for purchase.

If the testator dies pending the completion of the contract, the devisee of the purchased land (or the heir if it is undevised) is entitled to call upon the executor or administrator to pay the purchase-money (if unpaid) out of the personal estate. The personal representative might repel this demand, by showing that, from the defective state of the title or other circumstances, the contract was not obligatory on the deceased purchaser at the time of his death. If such were the fact, of course there would be no conversion, as between the real and personal representatives; and it would be begging the question to say, that the devisee or heir might elect to accept the title with its defects; for, unless the deceased purchaser was bound, his heir or devisee has derived from him no interest entitling him to any voice in the matter. It is equally clear, that the heir or devisee is not entitled to have the money laid out in the purchase of another estate: *Broome* v. *Monck*, 10 Ves. 597; see also *Att.-Gen.* v. *Day*, 1 Ves. sen. 218. But where a contract was abandoned, from circumstances arising subsequently to the purchaser's decease, as from his estate not affording the means of paying the purchase-money in time to hold the vendor to the contract, it was held by *Arden*, M. R., the devisee was entitled to the money: *Whittaker* v. *Whittaker*, 4 Br. C. C. 30. Of this case Lord *Eldon*, in *Broome* v. *Monck*, 10 Ves. 607, observed that the decree "decided only, first, that an individual shall not be held bound for an unreasonable time; and, secondly, if the party with whom he contracted died with the interest in equity in him, the effect of that decision should make no difference between his representatives real and personal; for he was vested with a complete demand, provided a good title could be made." And "as between the heir and the personal representatives,

Devisable Estates and Interests.

*Lacon* v. *Mertins*, 3 Atk. 1 ; *Buckmaster* v. *Harrop*, 7 Ves. 341, and other cases, establish the general principle, that whatever is the state of liability of the party himself to take at his death, must be the state of liability to be considered upon questions between those representing him after his death ; and if at his death he could not be compelled to take, clearly the heir could not say to the executor, 'I will have the estate, and you shall pay for it.'" His lordship also observed (10 Ves. 619), that it was "very difficult to maintain the doctrine in *Whittaker* v. *Whittaker*, which went beyond what was necessary for the decision." See also *Ingle* v. *Richards*, 28 Beav. 365 ; *Haynes* v. *Haynes*, 1 Dr. & Sm. 451 ; *Hudson* v. *Cook*, L. R. 13 Eq. 417 ; *Lysaght* v. *Edwards*, 2 Ch. D. 516. As to what evidence of intention by devisor to accept the title may be necessary, and as to the question, where the deceased purchaser was bound, but the vendor was not, see 1 Jarm. Wills, 54 *et seq.* ; and see *Drant* v. *Vause*, 1 Y. & C. C. C. 580 ; *Emms* v. *Smith*, 2 De G. & S. 722. To prevent all questions of this nature, it would be well if a clause were always appended to a devise of lands contracted to be purchased, disposing of the money in the event of the contract not being carried into effect. It seldom happens that the testator intends his bounty to depend on any such contingency ; consequently, the rule which makes the efficiency of the contract necessary to the validity of the devise defeats the intention.

Equitable interest under covenants to invest money in the purchase of real estate.

An equitable interest in real estate may be acquired not only under a covenant for the purchase of particular lands, but under a covenant to invest money in the purchase of lands (without particularising any) to be settled to uses. In such a case, any person who is to take a devisable estate under the limitations of the purchased lands, may devise the benefit of such covenant ; and if he makes an express gift thereof, or devises generally all his lands, tenements, and hereditaments, or his real estate (which has been held to be sufficient), and a purchase is afterwards made pursuant to the covenant, the estate so acquired will be bound in

Devisable Estates and Interests.

equity by the devise: *Lingen* v. *Souray*, Pr. Ch. 400; 1 P. Wms. 172; *Guidot* v. *Guidot*, 3 Atk. 254; *Rashleigh* v. *Masters*, 3 B. C. C. 99; *Hickman* v. *Bacon*, 4 Id. 333; *Green* v. *Stephens*, 12 Ves. 419; *S. C.* 17 Ves. 64.

As to devises of after-acquired copyholds.

Copyholds, equally with freeholds, were subject to the rule which restricted the operation of a devise to lands of which the testator was seised when he made his will: *Harris* v. *Cutler*, cit. 1 T. R. 438, n.; *Spring* v. *Biles*, Id. 435, n. A devise, therefore, of copyholds, however comprehensive in its terms, did not pass an after-acquired copyhold estate, except so far as its operation might happen to be enlarged by a subsequent surrender to the use of the will, which would have the effect of extending a general devise of copyholds to lands intermediately acquired: *Heylyn* v. *Heylyn*, Cowp. 130; *Att.-Gen.* v. *Vigor*, 8 Ves. 288. And it has been decided that a surrender to such uses as the testator "*shall*" by will appoint, applied to a will antecedently executed, it being considered that the surrenderor referred to that will which should be in existence at his death: *Spring* v. *Biles*, 1 T. R. 435, n.; overruling *Warde* v. *Warde*, Amb. 299. The statute of 55 Geo. 3, c. 192, rendered surrenders to the use of the will generally unnecessary to the validity of devises of copyholds, and by the stat. 1 Vict. c. 26, s. 3, *ante*, p. 346, the testamentary power is to extend to all copyholds, notwithstanding that the testator may not have surrendered the same to the use of his will.

After-acquired copyholds pass as part of a manor.

And here it may be observed, that, as every copyhold is parcel of the manor to which it belongs, a devise of the manor passed such copyholds, though acquired by the lord after the making of his will: *Roe* d. *Hale* v. *Wegg*, 6 T. R. 708. Freeholds held of the manor coming to the lord by escheat or descent also passed by a previously executed devise of the manor; but not if he acquired them by purchase, for in that case they did not become parcel of the manor: *Delacherois* v. *Delacherois*, 11 H. L. C. 62. Upon a principle somewhat analogous, it is clear that if a person having a remainder or rever-

Devisable Estates and Interests.

sion in fee, expectant on an estate for life, devised that remainder or reversion, and then by any means acquired, and by such acquisition extinguished, the estate for life, the devise carried the estate thus acquired, the merger of which merely had the effect of accelerating the ulterior estate.

Devise of the equitable interest in copyholds.

A person who has acquired an equitable interest in a copyhold estate by a contract for purchase, might of course devise that interest in the same manner as in the instance of freeholds: *Davie* v. *Beversham*, 3 Ch. Rep. 4; *Phillips* v. *Phillips*, 1 My. & K. 649; *Greenhill* v. *Greenhill*, Pre. Ch. 320; *Earl of Bath* v. *Harvey*, Finch, 201; *Leaman* v. *Woods*, 24 Beav. 372; *Lewis* v. *Lane*, 2 My. & K. 449; customary freeholds if transferable by surrender and admittance, were devisable in the same manner as copyholds: *Doe* v. *Thompson*, 7 Q. B. 897.

Devise by devisee or surrenderee of copyholds before admittance, void under the old law.

Under the old law, a devisee or surrenderee of copyholds before admittance could not devise: *Wainwright* v. *Elwell*, 1 Madd. 627; *Phillips* v. *Phillips*, 1 My. & K. 664; *Matthew* v. *Osborne*, 17 Jur. 696.

The same rule was formerly considered to apply to an heir; and it was supposed that the case of *Smith* v. *Triggs*, 1 Stra. 487, had established the invalidity of a devise by an unadmitted heir; but that case, rightly understood, seems not to have warranted any such proposition; nevertheless, several judges had adverted to the case as an authority on this point. (See Sir *T. Plumer's* judgment in *Wainwright* v. *Elwell*, 1 Mad. 632; and Sir *L. Shadwell's* judgment in *King* v. *Turner*, 2 Sim. 548, reversed 1 My. & K. 456.)

Devise by an unadmitted heir held to be good.

But the doctrine, notwithstanding this repeated recognition, was overruled by the case of *Right* d. *Taylor* v. *Banks*, 3 B. & Ad. 664, the facts of which were as follow:—On the 13th of February, 1781, John Taylor was admitted to the copyholds in question, which he afterwards surrendered to the use of his will, and then by his will devised part to his son Samuel (who was his heir-at-law) in fee, and part to his daughter Mary in fee: Mary Taylor, on the death of the testator, entered,

Devisable Estates and Interests.

but was never admitted; she died, leaving her brother Samuel her heir-at-law; Samuel Taylor, who, as heir-at-law of his father and sister, was entitled to the whole (for the devise to him by the former did not break the descent), entered, but was never admitted. By his will he devised the copyholds in question, the validity of which devise was the point at issue. The Court held that the devise was good, relying much on the doctrine in Coke's Copyholder, sect. 41, that the heir is tenant immediately after the death of his ancestor, and may, before admittance, surrender into the hands of the lord; and also on *Brown's Case*, 4 Rep. 22 b; *Brown* v. *Dyer*, 11 Mod. 73; *Morse* v. *Faulkener*, 1 Anst. 13; *Doe* v. *Tofield*, 11 East, 251; *Wilson* v. *Weddell*, Yelv. 145; which severally support the same doctrine, and were considered by Lord *Tenterden* and the rest of the Court to outweigh the recent dicta to the contrary, which were all founded on a mistaken view of the case of *Smith* v. *Triggs*. The decision in *Right* d. *Taylor* v. *Banks* was confirmed by Lord *Brougham*, C., in *King* v. *Turner*, 1 My. & K. 456. And the point was again similarly determined in *Doe* v. *Wilson*, 5 A. & E. 321. By the stat. 1 Vict. c. 26, s. 3, testamentary power is made to extend to an unadmitted heir, devisee, or surrenderee. The effect of this section is that the testator has the same power of devising copyholds as if he had surrendered them to the use of his will, and as if he had been admitted thereto, and consequently a devise by a testator, of copyholds which have not been surrendered to the use of the will, is effectual to bar the widow's right to freebench: *Lacy* v. *Hill*, L. R. 19 Eq. 346.

Bequests of chattel interests in lands.

Bequests of chattel interests in hereditaments are governed by principles wholly different from those which have been just observed upon. They do not, like freehold interests, pass directly to the legatee as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, subject to the obligation of giving effect to any bequest in the will, specific or residuary, comprising the property in

Devisable Estates and Interests.

question : and the inquiry whether the testator was, at the time of making the will, possessed of a term of years, which he has bequeathed, would be no less unnecessary for the purpose of establishing the disposing power of the testator over the property, than the inquiry whether he was possessed of a horse or other personal chattel, which by his will he has professed to give : *Wind* v. *Jekyl*, 1 P. Wms. 575 ; see also *James* v. *Dean*, 11 Ves. 388.

Freeholds *pur autre vie.*

A freehold *pur autre vie*, unlike all other estates, may be rendered transmissible either to real or personal representatives, according to the quality impressed upon it by the instrument creating the estate, or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law ; for it now seems to be admitted that the devolution of the estate is governed by the words of limitation contained in the last conveyance, without regard to the terms of its original creation. Estates *pur autre vie* are devisable by the express terms of the Statute of Frauds, 29 Car. 2, c. 3, s. 12 ; the statute of the 32 Hen. 8 being confined, according to the prevalent and probably the better opinion, to estates of inheritance : *Anon.*, Cart. 211. Though the Statute of Frauds required three witnesses for the devise of an estate *pur autre vie*, yet it has been long settled, that where the property is limited otherwise than to the heirs of the owner, it is distributable as part of his personal estate, whether he died testate or intestate, an executor being held a trustee for those to whom the testator had given the personal estate by a will sufficient to pass personal estate : *Ripley* v. *Waterworth*, 7 Ves. 425. The 3rd section of the stat. 1 Vict. c. 26, does not in terms, nor, it is conceived, in construction, extend to estates *pur autre vie*, descendible to the heir special ; for though the words "special occupant," standing unexplained, would include an occupant *quasi* in tail, their meaning is qualified by the general enactment at the commencement of the section.

Devise by *quasi* tenant

The question has been discussed, but never entirely settled in regard to the devising power over

**Devisable Estates and Interests.**

in tail of estates *pur autre vie.*

estates of this description, whether, where they were limited to the tenant *pur autre vie, and the heirs of his body*, they could be devised without some act on his part to bar the entail. It was admitted on all hands that an alienation by deed was an effectual bar; but the doubt was, whether the estate was devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory, the opinion to which Lord *Kenyon* inclined in *Doe* v. *Luxton*, 6 T. R. 293, in favour of the devise, being in direct opposition to that of Lord *Redesdale* in the case of *Campbell* v. *Sandys*, 1 Sch. & L. 294; and the decision of the Court of Queen's Bench in Ireland, in the case of *Hopkins* v. *Ramage*, Batty, 365, who held that a *quasi* tenant in tail of an estate *pur autre vie* could not by devise exclude the title of the remainderman. In a former publication (1 Pow. Dev. 41), the editor treated the point as settled by the latter class of authorities, and such was evidently the impression of Sir *T. Plumer*, in the case of *Blake* v. *Luxton*, Coop. 185; and of Lord *St. Leonards* in *Allen* v. *Allen*, 2 Dr. & W. at p. 326.

Testamentary powers of appointment.

Property may be so expressly limited to a person as to deprive him of the right to dispose of it by will; though he may do so by deed. Thus a power to appoint may be limited to an appointment by deed; but if not expressly so limited it will be held exercisable by will: *Buckell* v. *Blenkhorn*, 5 Hare, 131; *Taylor* v. *Meads*, 13 W. R. 394; *Orange* v. *Pickford*, 4 Drew. 363; *Smith* v. *Adkins*, L. R. 14 Eq. 402. Where there was a gift to A. for life, with power to dispose of the property for her own use, with a gift over in the event of her decease, "should there be anything then remaining," it was held that A. had no power to dispose of the property by will: *Herring* v. *Barrow*, 14 Ch. D. 263.

Before the Wills Act it appears to have been held that a general power to appoint property, given to the survivor of two persons, could not be exercised before the survivor was ascertained: *Doe* v. *Tomkinson*, 2 M. & S. 165. The *ratio decidendi* of this

Devisable Estates and Interests.

case is not very clear, but the decision appears to have been grounded on the fact that the testator had not an estate, but only a power which could not be exercised until the donee actually answered the description under which the power was given to him. This would appear to be inconsistent with *Thomas* v. *Jones*, 1 De G. J. & S. 78, where Lord *Westbury*, C., expressed an opinion that a general power of appointment over an equitable estate given to the survivor of two persons, to be executed by deed or will would be well exercised by a will made during the lives of both the persons by that individual who afterwards proved to be the survivor.

# CHAPTER V.

## EXECUTION AND ATTESTATION.


| | PAGE | | PAGE |
|---|---|---|---|
| *As to Wills made before* 1838 ... | 360 | *What is Sufficient Signature*..... | 365 |
| *Freeholds under* 29 *Car.* 2, *c.* 3... | 360 | *What is Sufficient Acknowledgment* ..... | 370 |
| *Old Law as to Personalty and Copyholds*..... | 361 | *Meaning of word "Present"* ... | 371 |
| *As to Wills made since* 1837..... | 363 | *Attestation and Subscription*..... | 373 |
| | | *Attestation Clause* ..... | 374 |


**As to Freeholds of Inheritance.**

Execution, &c., before 1838.

*As to Wills made before the year* 1838.]—Before the Wills Act, 1837 (1 Vict. c. 26), the execution and attestation of wills disposing of freeholds was regulated by the fifth section of the Statute of Frauds (29 Car. 2, c. 3), which enacted that :—

Wills of lands to be signed and attested by three witnesses.

"All devises and bequests of any lands or hereditaments, devisable either by force of the Statute of Wills (*a*), or by that statute (Statute of Frauds), or by force of the custom of Kent, or the custom of any borough, or any other particular custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and should be attested and subscribed in the presence of the said devisor by *three* or more credible witnesses, or else they should be utterly void and of none effect."

The requirements as regards the execution and attestation of a will devising freeholds are now different in several particulars : see *post*, p. 363 ;

(*a*) The Statute of Wills (32 Hen. 8, c. 1) enables socage tenants to devise their lands in fee by their wills *in writing*, and tenants by Knight's service in like manner to devise two-thirds of their lands. By the stat. 12 Car. 2, c. 24, socage tenure was made universal, and all lands thus became devisable by mere writing. The object of the enactment in the text was to qualify and limit this power.

Execution and Attestation.

and as questions as to the due execution of wills made previously to 1837, can now seldom occur in practice, it is not proposed in this place to consider points which would only arise under the old law. Some such points will, however, be incidentally and briefly treated in the following pages in considering the formalities as regards execution, &c., required by the Wills Act. For further information as to the former state of the law on the subject, see 1 Jarm. Wills, Chap. VI., pp. 77 *et seq.*; and see sub tit. WILLS, in the 3rd edition of this work, Vol. XI., pp. 50 *et seq.*

As to personalty and copyholds before 1838.

Personal property was in ancient times regarded as of so little account that it would pass without any writing by a verbal expression of the testator's will before a sufficient number of witnesses, which was termed a "nuncupative will": Swinb. Pt. I., s. 12, pl. 1; Godolph. Pt. I., c. 4, s. 6; Wms. Exors. Pt. I., bk. 2, c. 2, s. 6. All that the Statute of Frauds required to the validity of wills of personalty and copyholds was contained in the clauses regulating nuncupative wills. These clauses, while not forbidding such wills, practically abolished them by requiring them to be proved under numerous and inconvenient requirements: see sects. 19, 20, and 21 of that Act. By sect. 23, however, it was provided that any soldier, being in actual military service, or any mariner or seaman, being at sea, might dispose of his moveables, wages, and personal estate as before the Act. This exception has been continued by sect. 11 of the Wills Act (by which all other nuncupative wills are abolished), and its extent and operation will be considered later: see *post*, pp. 363, 364.

With regard, therefore, to written wills of personal estate made before 1838, no attestation was necessary, nor even signature by the testator or by any other person on his behalf: see *Carey* v. *Askew*, 2 Bro. C. C. 58; *Re Taylor*, 1 Hagg. 641; *Allen* v. *Manning*, 2 Hagg. 490. A written will, however, could not be revoked or altered except by a subsequent written will read over to the testator and allowed by him, and proved to have been so read

**Execution and Attestation.**

and allowed by at least three witnesses : see sect. 22 of the Statute of Frauds.

What a good will of personalty.

In two instances only did any attempt seem to have been made to subject wills of personal estate to a more formal mode of execution than was required by the enactment in question, that is to say, in regard to estates *pur autre vie* (which, when limited otherwise than to the heirs of the deceased owner, or not limited at all, are personal estate), to the devise of which the Statute of Frauds required three witnesses ; and stock in the public funds, which it was provided by certain Acts of Parliament should pass only by wills attested by two witnesses. But these exceptions to the general rule were rendered, in a great measure, practically nugatory, by the doctrine established by the case of *Ripley* v. *Waterworth*, 7 Ves. 425, that an executor taking freeholds *pur autre vie* as special occupant, or even in the absence of special occupancy, was bound to deal with them as part of the general personal estate of the deceased owner. The same principle would clearly apply to stock in the public funds, and, probably, would extend to estates *pur autre vie* and stock specifically bequeathed, which an executor would surely not have been allowed to hold in opposition to a specific legatee claiming under an unattested will. Such a question cannot arise under a will subject to the present law, which has abolished all distinctions between different kinds of property in regard to the mode of execution.

Copyholds not within the Statute of Frauds.

The exclusion of copyholds from the devising clause of the Statute of Frauds was the result of the narrow construction which that clause received from the Courts of Judicature, rather than of any restrictive terms in the enactment itself, the language of which, in the opinion of some eminent judges, was sufficiently comprehensive to have warranted its application to copyholds. (See 2 P. Wms. 258 ; 1 Ves. sen. 227 ; 7 East, 322.) It seems to have been thought, however, that, as copyholds passed by the surrender and will taken together, and not by the will alone (the effect being the same as if the devisee's name had been inserted in the

Execution and Attestation.

surrender), a will of copyholds was not a devise or bequest of lands or tenements within the 5th and 6th sections of the Act. (See 7 East, 322.)

What constitutes a will of personalty and copyholds.

The decisions, therefore, antecedent to the Statute of Frauds were still applicable. According to those decisions not only did an unattested paper writing, signed by the testator, operate as an effectual devise of copyholds, but testamentary papers, neither authenticated by the signature nor even in the handwriting of the testator, were held to be sufficient, the same having been, during the life of the testator, put into writing by his direction. And, though the ground upon which copyholds were held, originally, not to be within the statute—namely, that the estate passed by the combined operation of the surrender and will—did not apply to equitable interests, which never could be the subject of a surrender, yet the well-known maxim, *equitas sequitur legem*, required that they should be governed by the same rule: *Tuffnell* v. *Page*, 2 Atk. 37; 2 P. W. 261, n.; *Carey* v. *Askew*, 1 Cox, 243 (*b*).

*As to Wills made since the year* 1837.]—By the Wills Act, 1837 (1 Vict. c. 26), which governs all wills made or re-executed, republished, or revived on or after the 1st of January, 1838, it is enacted as follows:—

Sect. 9. "No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Wills must be in writing, except in the case of soldiers and mariners.

Thus, nuncupative wills are rendered invalid, except so far as the provision in the 11th section

(*b*) For further information as to the execution, &c., of wills of personalty and copyholds made before 1838, see Byth. & Jarm. Conv. (3rd ed.), Vol. XI., pp. 65 *et seq.*

Execution and Attestation.

extends, by which it is enacted "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." A purser or surgeon of a man-of-war comes within the description "mariner or seaman:" *Re Hayes*, 2 Curt. 338; *Re Saunders*, L. R. 1 P. & D. 16; and it should seem that the term "mariner or seaman" includes every person in her Majesty's navy, as well the admiral or commander-in-chief as a common seaman, *being at sea*, within the exception contained in the Act: *Earl of Euston* v. *Lord Henry Seymour*, 2 Curt. 339. The exception in the 23rd section of the Statute of Frauds, as to "any mariner or seaman being at sea," has been held to apply to *merchant* seamen: *Morrell* v. *Morrell*, 1 Hagg. 51. It has also been held, on the construction of the words "any soldier being in *actual military service*," that the privilege is confined to those who are *on an expedition: Drummond* v. *Parish*, 3 Curt. 522. It will, therefore, not extend to an officer or soldier quartered in barracks at home or abroad: *White* v. *Repton*, 3 Curt. 818; or to an officer on a tour of inspection of troops in his district: *In the goods of Hill*, 1 Rob. 276. But the will of an officer or soldier on his way to join his regiment on active service is within the exception: *Herbert* v. *Herbert*, D. & Sw. 10; *Re Thorne*, 29 Jur. 569.

Publication not requisite (*c*).

Any doubt that may have existed as to what might amount to a sufficient publication of a will is now removed by the 13th section, which declares "that every will executed in manner hereinbefore required shall be valid without any other publication thereof."

Interpretation of terms.

It will be observed that this Act extends to all wills, whatever may be the nature or tenure of the property disposed of. Although by this Act the formalities requisite for the due execution and at-

(*c*) Lord *Hardwicke*, in *Ross* v. *Ewen*, 3 Atk. 156, insisted on the necessity of publication; but *Gibbs*, C. J., in *Moodie* v. *Reid*, 7 Taunt. 361, expressed a decided opinion to the contrary.

Execution and Attestation.

testation of wills of freeholds are materially altered in some respects, many of the expressions used are also to be found in sect. 5 of the Statute of Frauds (*ante*, p. 360), *e.g.*, the expressions "signature," "other person," "presence," "direction," "attested," and "subscribed." The decisions under the old law may, accordingly, be often usefully referred to with regard to the interpretation of such expressions, being common to both Acts.

Mark, a sufficient signing.

Examining the words in their order, the first question is, what is a "signature" by the testator? It has been decided that a mark was a sufficient signing, and that although the testator was able to write: *Taylor* v. *Dening*, 3 Nev. & Per. 228; *S. C.*, nom. *Baker* v. *Dening*, 8 A. & E. 94. And where a testatrix signed her will with a mark, her name not appearing, on the affidavit of the two attesting witnesses the will was admitted to probate: *Re Bryce*, 2 Curt. 325. The testator's initials have been held a sufficient signature: *Re Savory*, 15 Jur. 1043; and so has signature in an assumed name: *Re Glover*, 11 Jur. 1022; *Re Redding*, 2 Rob. 339; 14 Jur. 1052; *Re Clarke*, 1 Sw. & Tr. 223; *Re Douce*, 2 Sw. & Tr. 593. The making a mark by a witness has been held to be a sufficient signature for the purpose of attestation: *Re Clark*, 2 Curt. 329; *Re Ashmore*, 3 Curt. 756.

Sealing not sufficient.

At one time, it appears to have been thought that even sealing alone, without signing, would suffice; see *Lemayne* v. *Stanley*, 3 Lev. 1; but the contrary is now clear, not indeed by the effect of any positive decision, but by the unanimous opinion of every judge who has referred to the point, from *Parker*, C.B., and his coadjutors, in the case of *Smith* v. *Evans*, 1 Wils. 313 (though the learned C. B., on another occasion, in *Ellis* v. *Smith*, 1 Ves. jun. 12, erroneously supposed it to have been decided the other way), down to Lord *Eldon* in the case of *Wright* v. *Wakeford*, 17 Ves. 458; these learned judges probably concurring in the conclusion drawn by Lord *Hardwicke* in the case of *Grayson* v. *Atkinson*, 2 Ves. sen. 458, that the statute in requiring a will to be signed, meant some evidence to arise from the handwriting.

Execution and Attestation.

See, however, *Re Emerson*, 9 L. R. Ir. 443; where a seal bearing the testator's initials, and *Jenkins* v. *Gaisford*, 3 Sw. & Tr. 93; 11 W. R. 854; where a stamped name, were held sufficient.

Signature by another person.

Both the Statute of Frauds and the Wills Act permit the signature to be made by another person, "in the testator's presence and by his direction;" such other person may be one of the attesting witnesses: *Re Bailey*, 1 Curt. 914; *Smith* v. *Harris*, 1 Rob. 262; and the fact that he signed his own name instead of that of testator was held to be immaterial: *Re Clark*, 2 Curt. 329; and see *Re Blair*, 6 No. Cas. 528; *Jenkins* v. *Gaisford*, 3 Sw. & Tr. 93; 32 L. J. Prob. 122. Where, however, two sisters made mutual wills in favour of each other in similar terms except as regards certain charitable legacies, and by mistake each sister executed the will prepared for the other, the Court refused probate: *Re Hart*, L. R. 3 P. & D. 250.

Practical suggestions as to signing by mark, or by some other person for a testator.

Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons; for in regard to this and all other particulars the prudent course is, to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should be in the name of the testator, and not in that of the amanuensis, who should merely be designated in the memorandum of attestation; where it would be proper (though not necessary) that the peculiar mode of execution should be stated. If, however (as sometimes occurs), the amanuensis inaccurately signs the will in his own name, the execution is nevertheless good, as the statute has not exacted correctness in this particular, its requisition being merely that the will be signed *by* the testator, &c. (not that it be signed *in the name of the testator*); and any signature intended to authenticate the instrument would unquestionably be sufficient for this purpose: *Re Clark*, 2 Curt. 329.

Execution and Attestation.

One signature sufficient.

One signature is of course sufficient, though the will be contained in several sheets of paper; and even where the testimonium at the end referred to the preceding sheets as subscribed by the testator, the fact of those sheets being omitted to be signed did not affect the validity of the will, as the testator evidently intended the signing of the last sheet to apply to the whole: *Winsor* v. *Pratt*, 5 Moo. 484; *S. C.*, 2 Br. & B. 650. And where a will consists of several sheets of paper, the legal presumption is that the sheets bound together and constituting the will as found at the time of the testator's death, were so bound together at the time of execution: *Gregory* v. *H. M's. Proctor*, 4 No. Cas. 620; *Marsh* v. *Marsh*, 1 Sw. & Tr. 528; *Rees* v. *Rees*, L. R. 3 P. & D. 84; *Re Horsford*, *ib.* 211; *Re West*, 32 L. J. Prob. 182.

The signature must be at the foot or end.

The will must now be "*signed at the foot or end thereof*," the Statute of Frauds merely requiring that the will should be "signed" (*d*). There have been several cases in which questions have arisen, whether or not the signature of the deceased could be considered to be at the foot or end. The Ecclesiastical Courts took a very strict view as to the construction of these words, and held, unless the signature was written or placed immediately under the disposing part of the will in such manner as to leave no intervening space in which additional words could be written, the will could not be regarded as properly executed: see *Ayres* v. *Ayres*, 11 Jur. 417; *Willis* v. *Lowe*, *ib.* 807; *Smee* v. *Brye*, 12 Jur. 103.

In order to put an end to the inconvenience

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(*d*) It was immaterial, under the Statute of Frauds, in what part of the will the testator's name was written; and where a will in the testator's handwriting commenced, "I, A. B., do make this my will," &c., this was held to be a sufficient signature: see *Coles* v. *Trecothick*, 9 Ves. 249. But the signature, whatever its local position, must have been made with the design of authenticating the instrument, for it would seem, that if the testator contemplated a further signature, which he never made, the will would have been considered to be unsigned: see *Right* v. *Price*, Doug. 241.

**Execution and Attestation.**

arising from such decisions, it was enacted by the stat. 15 & 16 Vict. c. 24, sect. 1 :—

When wills shall be deemed valid as regards the position of the testator's signature.

"That where by an Act (1 Vict. c. 26) it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature, to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or the clause of attestation, or shall follow, or be after, or under the clause of attestation either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature: and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the above Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

By sect. 2 of the Act, these provisions are rendered retrospective with certain exceptions, which need not be noticed here.

Decided cases as to position of testator's signature.

The following points with regard to the position of the testator's signature may be referred to:—As to what is a signature placed beside or opposite to the end of the will, see *Re Jones*, 34 L. J., Prob.

Execution and Attestation.

& A. 41; *Re Wright*, Ibid. 104; *Re Williams*, L. R. 1 P. & D. 4; *Re Ainsworth*, L. R. 2 P. & D. 151. Parol evidence is admissible as to the intention of the testator in signing his will: *Dunn* v. *Dunn*, L. R. 1 P. & D. 277; see also *Re Hammond*, 3 Sw. & Tr. 90. In *Page* v. *Donovan*, 3 Jur. (N. S.) 220, a testator's signature following a notarial act relating to the will was held good. In *Re Woodington*, 2 Curt. 324, probate was allowed of a will concluding, "signed and sealed as and for the will of me, C. E. T. Woodington, in the presence of us, Thomas Hughes, Ellen Hughes": see *Trott* v. *Trott*, 6 Jur. (N. S.), 760; *Re Dinmore*, 2 Rob. 641; *Re Walker*, 2 Sw. & Tr. 354; *Re Hackvale*, L. R. 1 P. & D. 375; *Re Casemore*, Ibid. 653; *Re Pearse*, 1 P. D. 70. For cases in which a signature has been held a good execution of what preceded it, but not of any disposition or direction written underneath, see *Keating* v. *Keating*, 4 No. Cas. 261; *Re Howell*, 2 Curt. 342; *Re Davies*, 3 Curt. 748; *Re Dallow*, L. R. 1 P. & D. 189; *Re Woods*, Ibid. 556. In *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6, where all the sheets except the last were signed by the testator, no part of the will was admitted to probate: see also *Re Dilke*, L. R. 3 P. & D. 164. For cases in which the Court has held dispositions, &c., actually written underneath or following the testator's signature to be constructively part of the preceding dispositions: see *Re Coombes*, L. R. 1 P. & D. 302; *Re Birt*, L. R. 2 P. & D. 214; *Re Wotton*, L. R. 3 P. & D. 159. But in such cases it must be proved that the dispositions in question were written before the testator signed the will: see *Re White*, 30 L. J., Prob. 55. Where a testator after signing his will inserted above and beside his signature an additional clause, the will was admitted to probate without the clause: *Re Arthur*, L. R. 2 P. & D. 273.

It is now provided by sect. 9 of the Wills Act, that it must be either made or acknowledged in the presence of all the witnesses. Formerly the will itself was the subject of acknowledgment, and the rule was established that such acknowledgment

Execution and Attestation.

would suffice if made before each witness separately, and that it need not take place in the simultaneous presence of all; and it was not necessary that any of the witnesses should have seen the testator sign. For decisions relating to the old law on this subject, see Byth. & Jarm. Conv. (3rd. ed.), Vol. XI., p. 52 *et seq.*

What a sufficient acknowledgment.

Under the present law, the signature to be acknowledged may be made either by the testator, or by some other person for him, and by his direction. In *Re Regan*, 1 Curt. 908, the testator signed his will in the presence of one witness, and afterwards acknowledged his signature in the presence of three witnesses present at the same time who attested it in his presence. Sir *Herbert Jenner* said, "It has been suggested that the word 'acknowledged' ('such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time') refers only to a signature when made for the testator by another person; but I am of opinion, that the acknowledgment by the testator of his own signature, or the signature made by some other person in his presence and by his direction, is sufficient, if attested as required by the Act." Administration with will annexed was granted. In those cases, then, where the signature is made by the testator, but not in the presence of the attesting witnesses, a question of some difficulty often arises as to what shall be a sufficient acknowledgment of it by him in their presence. On this point the following cases may be usefully referred to: *Re Warden*, 2 Curt. 334; *Gaze* v. *Gaze*, 3 Curt. 451; *Blake* v. *Knight*, 3 Curt. 547; *Keigwin* v. *Keigwin*, 3 Curt. 607; *Re Ashmore*, 3 Curt. 756; *Gwillim* v. *Gwillim*, 2 Sw. & Tr. 200; *Faulds* v. *Jackson*, 6 No. Cas. Sup., p. 12; *Leach* v. *Bates*, 6 No. Cas. 704; *Inglesant* v. *Inglesant*, L. R. 3 P. & D. 172; in all which there was held to be a sufficient acknowledgment. In the following cases the Court has not been satisfied that there was such an acknowledgment as the statute requires: *Re Rawlings*, 2 Curt. 326; *Re Harrison*, 2 Curt. 863; *Ilott* v. *Genge*, 3 Curt. 160; *Hudson* v. *Parker*,

Cases in which acknowledgment held insufficient.

Execution and Attestation.

1 Rob. 14; and see *Re Ashton*, 5 No. Cas. 548; *Re Hammond*, 3 Sw. & Tr. 90; *Re Pearson*, 33 L. T., Prob. 177; *Re Swinford*, L. R. 1 P. & D. 630; *Pearson* v. *Pearson*, L. R. 2 P. & D. 459; *Fischer* v. *Popham*, L. R. 3 P. & D. 246. In *Blake* v. *Blake*, L. R. 7 P. D. 18, it was decided that in order to constitute a sufficient acknowledgment, the witnesses must see, or have the opportunity of seeing the signature of the testator; and see *Wright* v. *Sanderson*, 9 P. D. 149. *Beckwith* v. *Howe*, L. R. 2 P. & D. 1, is now overruled. It is also a sufficient acknowledgment if made by a third person in the testator's presence, and he acquiesces in it: *Faulds* v. *Jackson*, 6 No. Cas. Sup. 12; *Inglesant* v. *Inglesant*, L. R. 3 P. & D. 172; *Re Bishop*, 30 W. R. 567. A testator may acknowledge his signature by gestures: *Re Davies*, 2 Rob. 337.

Acknowledgment by witness not sufficient.

It has been held that the power of acknowledging his signature, given by the Act to the testator, does not extend to the witnesses: *Moore* v. *King*, 3 Curt. 243.

Testator must sign *before* the witnesses.

It has also been decided in several cases that the signature of the testator must be made or acknowledged *before* the witnesses sign, and that if the will is signed by the testator *after* the witnesses have signed, it is not well executed: *Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117; *Cooper* v. *Beckett*, 3 Curt. 648.

Meaning of the word "present."

In the case of *Hudson* v. *Parker*, 1 Rob. 14, Dr. Lushington objected that the signature of the testator "was not made in the *mental* presence of the witnesses." The meaning of the word "mental" here is explained by the following passage of his judgment: "As to the plain meaning of these words, 'that the signature of the testator shall be made in the presence of two witnesses,' will the statute be satisfied, if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, under such circumstances, that the statute is not complied with. It is obvious, that the solution of this question must mainly depend on the meaning which the Legislature intended to convey by the use of the word '*presence*,' in this and in the other

Execution and Attestation.

clauses of the statute. What could possibly be the object of the Legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence: if the witnesses are not to be mentally, as well as bodily, present, they might be asleep, or intoxicated, or of unsound mind." In *Newton* v. *Clarke*, 2 Curt. 320, the testator signed a codicil while lying in bed, the two witnesses who attested the codicil being in the room; the curtains, though open on both sides, being closed at the foot of the bed, one of the witnesses, as he was standing by the fire, could not actually see the testator sign his name; and that witness signing upon a small table placed between the foot of the bed and the fire where the curtains were still closed, the testator might not have seen him sign. It was held that the testator and the witness signed their names in the presence of each other, as required by the stat. 1 Vict. c. 26, s. 9. But if the signature be made in another room, the position of the parties must be such as to render them visible to each other. Thus, in *Re Ellis*, 2 Curt. 395, motion for probate of a will signed by the testator in the presence of two witnesses, present at the same time, who admitted that they attested the paper in another room, separated from the deceased's bedroom by a passage, both doors being open, so that they could hear him breathe, but could not have been seen by and could not see him, was rejected: see also *Re Colman*, 3 Curt. 118. In *Re Piercy*, 1 Rob. 278, the Court held, that in the case of a testatrix totally blind but in full possession of her mental faculties, it must appear that, though she was blind, she could, had she had her eyesight, have seen the witnesses sign. See also *Tribe* v. *Tribe*, 1 Rob. 775, where the testator was unable to move without assistance.

Simultaneous presence of the witnesses.

In *Re Allen*, 2 Curt. 331, the deceased signed her will by a mark, in the presence of one witness, who subscribed the will as attesting it, and on a subsequent day she acknowledged her signature in the presence of that witness and of another, who also subscribed the will, but the former witness did not again subscribe the will; probate was refused, Sir

Execution and Attestation.

*H. Jenner* observing, "The natural construction of the words of the Act, which are in the future tense, seems to be, that when the signature is made or acknowledged, the witnesses shall then attest it; not one at one time, and one at another." See also *Re Simmonds*, 3 Curt. 79; *Moore* v. *King*, 3 Curt. 243.

Attestation by witnesses' mark sufficient.

The next requisition is, that the will be "attested and subscribed" by the witnesses (*e*). A mark was decided to be a sufficient subscription: *Harrison* v. *Harrison*, 8 Ves. 185; *Addy* v. *Grix*, Id. 504; *Re Amiss*, 2 Rob. 116; *Re Ashmore*, 3 Curt. 756; and so are initials: *Re Christian*, 2 Rob. 110; 7 Notes of Ca. 265; and see *Hindmarsh* v. *Charlton*, 8 H. L. Cas. 160, 167; *Re Blewett*, L. R. 5 P. D. 116. But if placed merely to attest an alteration in the will they would not serve as an attestation to the will: *Re Martin*, 1 Rob. 712; 6 No. Cas. 694; and a witness may sign an assumed name if he intend thereby to identify himself as a witness: *Re Olliver*, 2 Spinks. 57; *Re Sperling*, 33 L. J. Prob. 25; *Pryor* v. *Pryor*, 29 L. J. Prob. 114. Sealing is not a sufficient attestation: *Re Byrd*, 3 Curt. 117. One witness cannot sign for another: *Re White*, 7 Jur. 1045; but the witness's hand may be guided by another person: *Harrison* v. *Elvin*, 3 Q. B. 117; *Re Frith*, 40 Jur. (N. S.) 288; 1 Sw. & Tr. 8; *Re Lewis*, 31 L. J. Prob. 153. But if the witness can write without, *semble* not: *Re Kileher*, 6 No. Cas. 15. It is never advisable where it can be avoided, and now that the art of writing is so common seldom necessary, to employ marksmen as witnesses.

It is not sufficient for a witness to trace over his name with a dry pen: *Casement* v. *Fulton*, 5 Moo. P. C. 130; *Playne* v. *Scriven*, 1 Rob. 772; *Re Cunningham*, 1 Searle & S. 132; *Re Maddock*, L. R. 3 P. & D. 169; *Re Trevanion*, 2 Rob. 311; *Charlton* v. *Hindmarsh*, 8 H. L. C. 160. The signature of the witness may be placed in any part of the will: *Roberts* v. *Phillips*, 4 E. & B.

(*e*) This requirement is also contained in the 5th sect. of the Statute of Frauds: see *ante*, p. 360.

Execution and Attestation.

480; 24 L. J. Q. B. 171; *Re Chamney*, 1 Rob. 757; 7 No. Cas. 70; *Re Braddock*, L. R. 1 P. D. 433. But it must appear that the signature is intended as an attestation of the operative signature of the testator: *Re Wilson*, 1 P. & D. 269; *Re Pearse*, Ib. 382; *Re Hatton*, 6 P. D. 284. And see *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300.

In *Re Mead*, 1 No. Cas. 456, where an attesting witness to a will being unable to write, the other attesting witness (since deceased) wrote her name for her, it was held that as both the witnesses had not "subscribed," the requisites of the Act had not been complied with. See to the same effect, *Re White*, 2 No. Cas. 461, where a man subscribed both his own name and his wife's as witnesses. In *Hooley* v. *Jones*, 2 No. Cas. 59, where a testator signed his will by a mark in the presence of two witnesses, one of whom then signed the will as a witness, and the other witness did not then sign, but had signed previously to execution in the following manner, not, as appeared upon the evidence, as an attesting witness, but to shew that he was the writer of the will, "this was wrote by Wm. Pritchard, shopkeeper," Sir *H. J. Fust* held "that the evidence was not sufficient to support the will." See further as to the meaning of the words "attest and subscribe," the judgment of Dr. *Lushington* in *Hudson* v. *Parker*, 1 Rob. 14, and the cases there cited.

Attestation clause.

In regard to the concluding words of the 9th section, "no *form* of attestation shall be necessary" (*f*), as many persons, thence inferring that an attestation clause was unnecessary altogether, have in writing a will entirely omitted it, it may be proper to state that where the attestation clause is not sufficiently full to show that the requisites of the Act have been complied with, an affidavit will be required from the attesting witnesses or one of them, in which the circumstances of execution must be set forth; if these circumstances are in compliance with the directions of the statute, probate

(*f*) No particular form of words was under the old law necessary to constitute an attestation.

Execution and Attestation.

passes in common form: *Croft* v. *Pawlet*, 2 Str. 1109; *Brine* v. *Smith*, Willes, 1; *Lord Rancliff* v. *Lady Parkins*, 6 Dow. 202. Where there is no attestation clause or a defective one, and evidence that the requisites of the statute have been complied with cannot be procured, the presumption of law will come in: *Burgoyne* v. *Showler*, 1 Rob. 5. See also *Gove* v. *Gawen*, 3 Curt. 151; *Pennant* v. *Kingscote*, 3 Curt. 642; *Re Ayling*, 1 Curt. 913; *Re Noyes*, 4 No. Cas. 284; *Re Luffman*, 5 No. Cas. 183; *Re Dickson*, 6 No. Cas. 278; *Re Puddephatt*, L. R. 2 P. & D. 97.

Whether the omission of "credible" in the statute qualifies lunatics or other persons mentally incapable.

From the circumstance that the word used in the Act is merely "witnesses," not "credible witnesses" (*g*), taken together with the express provision of the 14th section, that if any person who shall attest the execution of a will shall, at the time of the execution thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid, it has been supposed that the Act not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses, but also lunatics, idiots, or persons mentally incapable from intoxication or otherwise. Any conclusion, however, grounded upon such a supposition appears to be clearly fallacious, on the ground of the distinction taken by Dr. *Lushington*, in the case of *Hudson* v. *Parker*, 1 Rob. 14 (see *ante*, p. 371), between mere bodily presence and mental presence, the statute (upon this construction) requiring the witnesses to be *mentally* present, which persons suffering under mental aberration cannot possibly be.

(*g*) The Statute of Frauds required the attestation to be by "credible" witnesses, which was held to mean persons not disqualified by imbecility or crime, as well as witnesses who took an interest under the will; as to which last disqualification, see *ante*, p. 341.

# CHAPTER VI

## REVOCATION.


| | PAGE | | PAGE |
|---|---|---|---|
| *By Marriage* | 376 | *By Alienation of Estate* | 385 |
| *By Burning, Cancelling, Tearing, or Obliterating* | 377 | *By Void Conveyance* | 394 |
| | | *By Subsequent Will or Codicil* | 396 |


**Revocation.**

*By Marriage.*

1 Vict. c. 26, ss. 18, 19.

*By Marriage.*]—By sect. 18 of the Wills Act (1 Vict. c. 26), it is provided that "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, where the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions);" and sect. 19 provides that "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances" (*a*).

(*a*) Under the law which existed prior to this Act, and which still applies to wills made before 1838, the marriage of a *feme sole* revoked a previous will; *Ford and Hembling's Case*, 4 Rep. 61, Und. 1; *Colter* v. *Sayer*, 2 P. Wms. 624; *Dore* v. *Staple*, 2 T. R. 695; unless made in exercise of a power of appointment: *Logan* v. *Bell*, 1 C. B. 872. The marriage of a man, however, did not revoke a previous will: *Doe* v. *Barford*, 4 M. & S. 10. But his marriage and the birth of a child did, generally speaking, operate to revoke a previous will: *Christopher* v. *Christopher*, Dick. 445; *Spragge* v. *Stone*, Amb. 721; though this was not the case where provision was made in the will itself for the wife and children of the marriage: *Kenebel* v. *Scrapton*, 2 East, 530. Nor, *semble*, where it disposed only of a part of testator's estates: *Marston* v. *Roe* d. *Fox*, 8 A. & E. 57; *Brady* v. *Cubit*, Dougl. 31; *Kenebel* v. *Scrapton*, *supra*, at p. 541. Nor where the effect of revocation would not be to let in the after born child or children: *Sheath* v. *York*, 1 Ves. & B. 390. If, however, the birth of the child had the effect of revoking the will under the above rules, its subsequent death did not prevent the revocation: *Emerson* v. *Boville*, 1

Revocation.

*By Marriage.*

Effect of these sections.

The effect of these enactments is that marriage alone will generally effect an absolute and complete revocation of a will both as to real and personal estate, and that no declaration by a testator of his intention that a will made before marriage should continue in force thereafter, nor any evidence of such admission is admissible to prevent the revocation; also that a will is not revoked by birth of issue: see Jarm. Wills, Vol. I., p. 128.

Exception as to testamentary appointments.

The exception in the 28th section, of wills made in exercise of a power of appointment, where the property would not in default of appointment pass to the testator's heir, executor, &c., extends to the case of an appointment under a power, where the heir, executor or administrator, or statutory next of kin, would not take as such. Thus, where property was limited in default of appointment to testator's children, who were his statutory next of kin, it was held that a will made by him in exercise of the power was not revoked by subsequent marriage: *Re Fitzroy*, 1 Sw. & Tr. 133; *Re Fenwick*, L. R. 1 P. & D. 319; and as the words "next of kin" alone have a different meaning to "next of kin under the Statute of Distribution," a will under a power is not revoked by subsequent marriage where the gift in default of appointment is to the testator's "next of kin:" *Re McVicar*, L. R. 1 P. & D. 671. Where real estate is limited in default of appointment to the donee, his heirs or assigns, marriage will operate to revoke the will: *Vaughan* v. *Vanderstegen*, 2 Drew. 165.

*By Burning, Cancelling, Tearing or Obliterating.*]—By the Wills Act it is enacted that—

No will to be revoked but by another will, or by a writing executed like a will, or by destruction.

Sect. 20. "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [*i.e.*, by marriage], or by another will or codicil executed in manner thereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to

Phil. 342. Nor could a provision in the will for the wife alone prevent its being revoked by marriage and birth of issue: *Israel* v. *Rodin*, 2 Moo. P. C. C. 51.

**Revocation.**

*By Burning, &c.*

be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

No alteration in a will shall have any effect unless executed as a will.

Sect. 21. "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will."

Revival of revoked wills.

Sect. 22. "No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and where any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Cancellation revokes a will, when.

The general rule seems to be that if a will is found burnt, torn, or otherwise destroyed, or if, having been proved to have been in the testator's possession, it cannot be found at his death, the presumption is that the testator intended to revoke his will: *Lambell* v. *Lambell*, 3 Hagg. 568; *Williams* v. *Jones*, 7 No. Cas. 106; *Re Lewis*, 1 Sw. & Tr. 31; and, as to lost wills, see *Brown* v. *Brown*, 8 E. & B. 876; *Re Shaw*, 1 Sw. & Tr. 62; *Finch* v. *Finch*, L. R. 1 P. & D. 371. But this presumption is liable to be rebutted. In every case the question is *quo animo* the act of destruction was done, which is a conclusion to be drawn by a court or jury from all the circumstances. The mere physical act is itself equivocal, and may be deprived of all revoking effect by explanatory evidence. Evidence will be admitted to show that a will was torn by mistake or from any other cause without intention to revoke it: *Giles* v. *Warren*, L. R. 2 P. D. 401; see also *Biggs* v. *Biggs*,

Revocation.

*By Burning, &c.*

9 Jur. 192; *Clarke* v. *Cripps*, 16 Jur. 783. Thus, if a testator unintentionally throws ink upon his will instead of sand, or obliterates it during a fit of insanity (*Scruby* v. *Fordham*, 1 Add. 74; *Borlase* v. *Borlase*, 4 No. Cas. 106; *Brunt* v. *Brunt*, L. R. 3 P. & D. 37), it will remain in full force, notwithstanding this accidental or involuntary obliteration; and if a testator becomes insane having possession of his will, and he revoke it, it cannot be assumed that he did so while sane, but the fact must be proved. "If it is once proved that a will has been duly executed I hold that it is entitled to probate, unless it can be shown that it has been revoked by one of the several modes pointed out by the statute. I am of opinion that the burden of showing that it has been so revoked lies upon the party who sets up the revocation:" per *Cresswell*, J., in *Harris* v. *Burrell*, 1 Sw. & Tr. 153. See also *Sprigge* v. *Sprigge*, L. R. 1 P. & D. 608; *Benson* v. *Benson*, L. R. 2 P. D. 172; while, on the other hand, if he casts the will into the fire, with the intention of destroying it, but it is preserved without his knowledge by a third person, the revocation is nevertheless complete: *Bibb* v. *Thomas*, 2 W. Bl. 1043; but see *Doe* v. *Harris*, 6 A. & E. 209; as to the admissibility of declarations of the testator to adhere to a lost will: see also *Sugden* v. *Lord St. Leonards*, 1 P. D. 154. So, the destruction of the will by a third person, in the lifetime but without the knowledge of the testator, would not affect its validity; *à fortiori* if effected after his decease: *Haines* v. *Haines*, 2 Vern. 241.

Destruction must be in the presence of the testator.

Both the Statute of Frauds and the Wills Act require that the destruction should be made in the presence and by the direction of the testator. If, therefore, a testator desires a third person, having the custody of his will, to destroy it, which is accordingly done, after the testator's death, or in his lifetime, but not in his presence, such destruction will not amount to a revocation: *Stockwell* v. *Ritherden*, 6 No. Cas. 414; and in such a case evidence of the contents of the destroyed will is admissible: *Re North*, 6 Jur. 564.

**Revocation.**

*By Burning, &c.*

*Hobbs* v. *Knight.*

In *Hobbs* v. *Knight*, 1 Curt. 768, where a testator duly executed a will, and subsequently cut therefrom his signature, it was held, that the cutting out of the signature amounted to a revocation of the will, under the words, in the 20th section, "tearing or otherwise destroying the same." See *Longford* v. *Little*, 2 J. & L. 633; *Re Cooke*, 5 No. Cas. 390.

The cutting out of a particular clause, or of the name of a legatee is a revocation *pro tanto* only: *Re Lambart*, 1 No. Cas. 131: *Re Woodward*, L. R. 2 P. & D. 206. As to tearing or cutting off the names of the witnesses, see *Birkhead* v. *Bowdoin*, 2 No. Cas. 66; *Re James*, 7 Jur. N. S. 52.

Effect of the omission of the word "cancelling" from the late act: not a revocation under the words "otherwise destroying."

In *Stephens* v. *Taprell*, 2 Curt. 458, the body of a will was struck through with a pen, the name of the testator was crossed out, the attestation clause and the names of the witnesses were likewise run through with a pen; and the question was, whether this will was destroyed, within the meaning of the 20th section: it was held, that "the Legislature, having advisedly omitted cancelling amongst the modes of revocation, and substituted words of more equivocal meaning, cannot have intended that striking through with a pen should be a mode of revocation." See also *Re Rose*, 4 No. Cas. 101; *Re Fary*, 15 Jur. 1114; *Re Brewster*, 6 Jur. N. S. 56.

But in *Re Tozer*, 2 No. Cas. 11, where a paper was executed in the presence of two witnesses present at the same time, who subscribed according to the act, but the name of one of the witnesses having been badly written, such signature was cut off, with the knowledge and in the presence of the testator, and the name of such witness was written by another person, but not in his presence; the document was admitted to probate, there being no proof of intention to revoke: see also *Re Hannam*, 14 Jur. 558; *Clarke* v. *Cripps*, 16 Jur. 783.

Effect of partial cancellation, or

Where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and afterwards, being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury was done, it was held that the will remained unrevoked: *Doe* v. *Perks*,

Revocation.

*By Burning, &c.*

3 B. & Al. 489. And see *Re Colberg*, 1 No. Cas. 96; *Elms* v. *Elms*, 1 Sw. & Tr. 155. In another case, the Prerogative Court decided in favour of a will, without any distinct evidence of its existence after the death of the testator, or of its destruction in his lifetime, there being strong reason, under all the circumstances, for supposing that the testator had unintentionally destroyed it, or at all events that its destruction, whenever effected, was without his concurrence: *Davis* v. *Davis*, 2 Add. 223. The rule in that Court seems to be, that, if a will is traced into the testator's possession, and cannot afterwards be found, it is to be presumed that he destroyed it *animo revocandi:* see *ante*, p. 378; but that, if the will is traced out of the deceased's custody, it is incumbent on the party asserting the revocation, to prove that the will came again into such custody or was destroyed by his directions: *Colvin* v. *Fraser*, 2 Hagg. 327.

—destruction of *one* part only of duplicate will.

Where a will is executed in duplicate, one of which only is retained by the testator, the other being given into the custody of another person, and the testator cancels the one in his possession, the presumption in general is, that he intends to destroy the effect of both: *Sir E. Seymour's Case*, cit. 1 P. Wms. 346; 2 Vern. 742; *Burtenshaw* v. *Gilbert*, Cowp. 49; but the strength of such presumption depends upon circumstances. If the uncancelled part was in the possession of a third person (Cowp. 49), the *animus revocandi* is clear beyond question, since the testator has cancelled all that was within his reach: *Boughey* v. *Moreton*, 3 Hagg. 191, n.; if both parts were in the testator's possession, and but one is found uncancelled, the act is more equivocal; and if, in addition to this, it appears that the uncancelled will was first altered by the testator, and then cancelled, together with the alterations, it is rather to be presumed that the testator, being dissatisfied with those alterations, had designedly cancelled the part of the will which contained them, and had preserved the unaltered duplicate, with the view of recurring to his original intention: *Pemberton* v. *Pemberton*, 13 Ves. 310. And the

Revocation.

*By Burning, &c.*

presumption, it seems, would be in favour of the will, where one part was found *partly* mutilated, and the other carefully preserved, both being in the testator's own possession: *Roberts* v. *Round*, 3 Hagg. 548.

The revocation does not apparently extend to a codicil, even though the latter expressly refer to the revoked will and be founded on it. It must be admitted to probate, the question of its effect being left to be decided by a Court of construction: *Re Dutton*, 3 Sw. & Tr. 66; *Black* v. *Jobbing*, L. R. 1 P. & D. 685; *Re Savages*, L. R. 2 P. & D. 78; *Re Turner*, Ib. 403; *Gardiner* v. *Courthope*, L. R. 12 P. D. 14 (*b*). But see *Sugden* v. *Lord St. Leonards*, 1 P. D. at p. 206.

Where, however, B., having executed a codicil at the foot of his will, cut off the signature to his will, and it was proved that he intended thereby also to revoke the codicil, the Court held that the codicil was revoked, and refused probate: *Re Buckley*, L. R. 8 P. D. 169. A codicil revoking a will does not necessarily revoke a prior codicil: *Farrer* v. *St. Catherine's College*, L. R. 16 Eq. 19.

Where the act of cancellation or destruction is done with reference to another act meant to be an effectual disposition, it will be a revocation or not according as the relative act is efficacious or not: *Hyde* v. *Hyde*, 1 Eq. Ca. Ab. 409; *Onions* v. *Tyrer*, 2 Vern. 742; 1 P. Wms. 343; *Ex parte Ilchester*, 7 Ves. 348, 380; *Clarkson* v. *Clarkson*, 3 Sw. & Tr. 497; *Perrott* v. *Perrott*, 14 East, 423; *Dancer* v. *Crabb*, L. R. 2 P. & D. 98.

And on the same principle, if the destruction or cancellation is made under the erroneous impression that the will is invalid, or that it has previously been revoked and become useless, it will be in-

(*b*) Before the Wills Act the law was different, and the revocation of will extended to a codicil, the contents of which were founded on and connected with the will, so as to render it incapable of an independent operation: *Usticke* v. *Bawden*, 2 Add. 166; *secus*, if it was capable of an independent operation, even though it expressly referred to the will: *Tagart* v. *Hooper*, 1 Curt. 289.

Revocation.
*By Burning, &c.*

effectual to revoke the will: *Scott* v. *Scott*, 1 Sw. & Tr. 258; *Re Middleton*, 3 Sw. & Tr. 583; 10 Jur. (N. S.) 1109; *Giles* v. *Warren*, L. R. 2 P. & D. 401. And where a testator, having executed a will in 1864 revoking all former wills, subsequently destroyed this will, with the intention, expressed at the time, that he wished to substitute for it a will of 1862, the Court held that the act of destruction by the testator was referable solely to his intention to validate the will of 1862, and as he had failed to do so (in consequence of the enactment contained in sect. 22 of the Wills Act, hereafter noticed), there was no revocation of the will of 1864: *Powell* v. *Powell*, L. R. 1 P. & D. 209.

And the same principle applies to partial alterations; so that, where a testator strikes out the name of one devisee, at the same time interlining that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative, as it now necessarily is in regard to every kind of property, if unattested, the obliteration will also fail of effect; and if the words are so erased as not to be apparent, the Court may order glasses to be used: *Re Ibbetson*, 2 Curt. 337; or may receive evidence (*c*) to show what the original words were: *Locke* v. *James*, 11 M. & W. 901; *Brooke* v. *Kent*, 3 Moo. P. C. 334; *Soar* v. *Dolman*, 3 Curt. 121; *Re McCabe*, L. R. 3 P. & D. 94; *Re Horsford*, Ib. 211; *Sturton* v. *Whellock*, 31 W. R. 382; *Re Parr*, 29 L. J. Prob. 70; *Re Harris*, 1 Sw. & Tr. 530. As to interlineations, see *Re Mills*, 11 Jur. 1070. As to the erasure of the name of a legatee or executor, see *Short* v. *Smith*, 4 East, 419; *Re Parr*, 1 Sw. & Tr. 56; *Re Harris*, 1 Sw. & Tr. 536. But the mere intention to make at some future indefinite time a new will is not enough to

(*c*) Evidence will not, however, be admissible where the intention was absolutely to revoke a gift and not merely to alter it: *Townley* v. *Watson*, 3 Curt. 76; 3 No. Cas. 17. In that case where a testatrix obliterated *animo revocandi* several passages of her will so as to render them illegible, probate of the will was granted without the obliterated passages.

**Revocation.**

*By Burning, &c.*

prevent revocation, nor will a subsequent ineffectual disposition set up an original will which has been revoked, unless the act of revocation and the subsequent ineffectual disposition are parts of one and the same proceeding: *Williams* v. *Tyley*, 5 Jur. (N. S.) 35; *Re Mitcheson*, 32 L. J. Prob. 202; *Re Weston*, L. R. 1 P. & D. 633; *Re Gentry*, L. R. 3 P. & D. 80. "If the testator's act can be construed thus: 'Whatever else I may do I intend to cancel this as my will from this time forth,' the will is revoked; but if his meaning is, 'As I have made a fresh will my old one may now be destroyed,' the old will is not revoked if the new one be not in fact made." *Per* Sir *J. Hannen*, in *Dancer* v. *Crabb*, L. R. 3 P. & D. at p. 104; see *Kirke* v. *Kirke*, 4 Russ. 435.

Presumption as to time when alterations made.

In the absence of all evidence (*d*) the inference of law is, that obliterations or alterations appearing on the face of a will were made after the execution of the will: *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Burgoyne* v. *Showler*, 1 Rob. 5. And where a subsequent codicil takes no notice of them, it is presumed that they were made after the date of the codicil: *Lushington* v. *Onslow*, 6 No. Cas. 183; 12 Jur. 465; *Rowley* v. *Merlin*, 6 Jur. (N. S.) 1165. But the presumption that alterations or obliterations were made after execution will not be acted on if the effect would be to revoke the will: *Benson* v. *Benson*, L. R. 2 P. & D. 172. Where a will contained several unattested interlineations necessary to complete the sense of the sentences in which they occurred, and apparently written in the same ink as the rest of the will, it was held that the Court was not bound by the presumption, and probate was granted of the will with the interlineations: *Re Cadge*, L. R. 1 P. & D. 543. See also *Birch* v. *Birch*, 6 No. Cas. 581.

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(*d*) As to what evidence is admissible, see *Keigwin* v. *Keigwin*, 7 Jur. 840; *Re Jacob*, 1 No. Cas. 401; *Re Hindmarsh*, L. R. 1 P. & D. 307; *Re Treeby*, L. R. 3 P. & D. 242. Declarations of the testator are admissible if made at or before the time of the execution of the will: *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747; *Re Sykes*, L. R. 3 P. & D. 26; *Dench* v. *Dench*, 3 P. D. 60; but not if made afterwards, see *Re Adamson*, L. R. 3 P. & D. 253.

Revocation.

*By Burning, &c.*

The old rule that the revocation of a subsequent will would operate as a revivor of a prior will is abolished by sect. 22 of the Wills Act: see *ante*, p. 378. See also *Brown* v. *Brown*, 8 E. & B. 876; *Hale* v. *Tokelove*, 2 Rob. 218; *Boulcott* v. *Boulcott*, 2 Drew. 25. And parol evidence of intention to effect such revivor is not admissible: *Major* v. *Williams*, 3 Curt. 432. The gumming of a testator's signature in the original place from which it has been removed *animo revocandi* is not sufficient to revive a will: *Bell* v. *Fothergill*, L. R. 2 P. & D. 148. Nor is the mere annexation of a codicil to a revoked will unless the codicil expressly refers to such will: *Marsh* v. *Marsh*, 1 Sw. & Tr. 528.

Revocation by alienation.

*Revocation by an Alienation or Interruption of the Testator's Estate.*]—The two species of revocation treated of under the former sections affect the entire will. The present embraces specific gifts only.

Under the old law.

Under the old law it was essential to the validity of a devise of freehold lands, not only that the testator should be seised at the time of the execution of the will, but that he should continue so seised without interruption until his decease.

Absolute sale.

The most obvious instance of revocation by parting with the estate was where a testator absolutely sold and conveyed it in his lifetime, the effect of which, of course, was to revoke the devise: and if, by the will, the estate had been given to trustees for sale, with a direction to divide the produce among certain persons, such legatees would have had no claim to the monies arising from the testator's sale: *Arnald* v. *Arnald*, 1 Br. C. C. 401.

Renewal of lease.

Another familiar case of revocation occurred where property held by leases for lives was surrendered by the testator after the making of the will, in consideration of a new lease being granted; which renewal, by conferring on the testator a different estate from that which existed at the execution of the will, necessarily revoked the devise: see *Marwood* v. *Turner*, 3 P. Wms. 163; *Abney* v. *Miller*, 2 Atk. 593; *Rudstone* v. *Anderson*,

Revocation.

*By Alteration of Estate.*

2 Ves. sen. 418; *Howe* v. *Medcraft*, 1 Br. C. C. 261; *Coppin* v. *Ferryhough*, 2 Br. C. C. 291.

Revocation by conveyance, under which the property was re-vested in the testator.

A devise of real estate was revoked by a conveyance made subsequently to the will, though by the limitations or effect of such conveyance, the property was instantly revested in the testator. Thus, if A., being seised in fee of Whiteacre, devised such land by name, or all his lands generally, to B., in fee, and afterwards, by lease and release, bargain and sale, or any other assurance, conveyed Whiteacre to the use of himself for life, remainder to his wife for life, remainder to his own right heirs, the devise of Whiteacre was revoked: *Burgoine* v. *Fox*, 1 Atk. 575.

Revocation by a common recovery.

So, where the testator, being seised for life of lands, with remainder to trustees to preserve, with remainder to his first and other sons in tail, with remainder to himself in fee, suffered a common recovery, the use whereof was declared to be to himself in fee, such recovery was held to have revoked a previous will of the recoveree devising the lands in question: *Darley* v. *Darley*, 3 Wils. 6; Amb. 653; *S. C.*, nom. *Darley* v. *Langworthy*, 3 Br. P. C. Toml. ed. 359; *Bennett* v. *Wade*, 2 Atk. 325; *Harmood* v. *Oglander*, 8 Ves. 106.

Principle of the cases.

It will be perceived, that, in both the preceding examples, the testator, under the limitations of the conveyance, was *in* of his old estate; hence it is obvious that the revocation was not produced by any change which it effected in the nature of the testator's estate, but was simply consequential on the momentary interruption of the testator's seisin. (See also *Sparrow* v. *Hardcastle*, 3 Atk. 799; 7 T. R. 416, n.; *Langford* v. *Little*, 2 J. & Lat. 632.)

Disseisin did not revoke, when.

But, where such interruption took place, not by the act of the testator himself, but by the tortious act of a stranger, the devise was not affected. As, where a testator was disseised subsequently to the making of his will and re-entered, the entry restored the original seisin; and, by relation, the disseisee was considered to have been seised *ab initio*, so that his devise remained unrevoked: *Bunter* v. *Coke*, 1 Salk. 237; *Att.-Gen.* v. *Vigor*, 8 Ves. 282.

Revocation.

*By Alteration of Estate.*

But, if the disseisee was out of possession at the time of the making of the will or at the death, the devise was inoperative.

Exchange.

So, where a man made his will, devising lands, and then exchanged those lands for others and died, if the exchange was vacated subsequently to the testator's death, in consequence of a defect in the title, or in the aliening capacity of the other party, this did not restore the operation of the devise: *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

Doctrine in relation to equitable interests.

As equity follows the law, the devise of an equitable interest was held to be revoked by a conveyance similar to that which would have revoked a devise at law. And, therefore, where a testator, who had the equity of redemption in certain lands, devised them, and afterwards, in contemplation of marriage, conveyed the devised lands to the use of himself and his heirs until the intended marriage, and, after such marriage, to other uses, though the marriage never took effect, yet the devise was held to be revoked: *Earl of Lincoln's Case*, Show. Parl. Ca. 154; 1 Eq. Ca. Ab. 411, pl. 11. See also *Locke* v. *Foote*, 5 Sim. 618.

Effect of conveyance for a partial purpose.

And the same doctrine extended (though certainly with some rather considerable exceptions) to conveyances for partial purposes. Thus, if a testator, in order to secure a jointure rent to an intended wife, limited the devised lands to trustees for a term, and then went on to limit the fee to himself, the latter limitation (or rather the conveyance in fee which contained it), though altogether unnecessary for his purpose, revoked the devise: *Goodtitle* v. *Otway*, 2 H. Bl. 516; 1 B. & P. 576; 7 T. R. 399; 2 Ves. jun. 604, n.; *Cave* v. *Holford*, 3 Ves. 650; 7 Br. P. C. Toml. ed. 593. See also *Vawser* v. *Jeffery*, 16 Ves. 519; 2 Swanst. 268; *Briggs* v. *Watt*, 2 Jur. (N. S.) 1041; *Walker* v. *Armstrong*, 8 De G. M. & G. 531.

In regard to copyholds.

This doctrine, however, did not apply to copyholds. Thus, where A., who was seised in fee of freehold and copyhold estates, devised them by his will (made before 1838), and subsequently conveyed the freeholds to the use of himself for life, with remainder

Revocation. *By Alteration of Estate.*

to the intent that B., his intended wife, should receive an annuity of 300*l.* for her life, by way of jointure, and subject thereto to trustees for ninety-nine years, upon trusts for securing the jointure, and subject thereto to the use of A., his heirs and assigns, for ever. At the same time, the testator surrendered his copyhold lands to the same uses; and it was held, that the devise (though clearly revoked as to the freeholds by the conveyance of them) was not, as to the copyholds, affected by the surrender beyond the particular estates; on the ground that, according to the doctrine of the case of *Thrustout* v. *Cunningham*, 2 W. Bl. 1046, Fea. C. R. 68, the fee simple of the testator was not disturbed or interrupted by the surrender of the ultimate inheritance to the use of himself: *Vawser* v. *Jeffery*, 3 B. & Al. 462. See also *S. C.*, in Equity, 3 Russ. 479.

Partition did not revoke.

And even, in regard to freeholds, the rule that a conveyance of the fee for a partial purpose produced revocation of a will made before 1838, admitted of two very important exceptions. The first was in the case of a partition between tenants in common, or co-heirs, which, by whatever kind of assurance effected, did not revoke a previous devise, provided the conveyance were confined to the mere object of the partition, *i.e.*, provided it assured to the testator, in the allotted lands, an estate precisely correspondent with that which he had in his undivided share: *Luther* v. *Kirby*, 8 Vin. Ab. 148, pl. 30, cit. 3 P. Wms. 170; *Riley* v. *Baltinglass*, Sir T. Raym. 240; *Webb* v. *Temple*, 1 Freem. 542.

Mortgages inaccurately said to revoke *pro tanto* only.

The other and well known exception was, where a testator, subsequently to his will, made a mortgage of the devised lands, which, it is familiarly said, revokes the will in equity *pro tanto* only: *Hall* v. *Dunch*, 2 Ch. Rep. 154; *Perkins* v. *Walker*, 1 Vern. 97. To speak of a mortgage as a *pro tanto* revocation, under the old law, however, is inaccurate, and tends to create an erroneous impression of its actual effect on the rights of the parties claiming under the testator; for the phrase might seem to import that the transaction was viewed in the light of a deliberate retraction by the testator of his bounty to the extent

Revocation.

By Alteration of Estate.

of the mortgage, in which case the devisee would take the property *cum onere*, as against not only the mortgagee, but also the testator's own representatives, in the same manner as if the testator had created the charge by his will; but so far is this from being the case, that the devisee was entitled to have the estate disincumbered out of the personal estate of the testator not specifically bequeathed: *Warner* v. *Hawes*, 3 Br. P. C. Toml. ed. 21 (*e*). It seems a perversion of language to call a mortgage a revocation *pro tanto*, in any of the cases in which the devise is defeated by the testator's subsequent conveyance of the devised property, which are all examples of ademption rather than of revocation.

Circumstances not varying the rule as to mortgages.

It was quite immaterial whether the testator had the legal estate or was equitable owner only (see *Tucker* v. *Thurstan*, 17 Ves. 131); whether the mortgage was created by fine or any other assurance (*Rider* v. *Wager*, 2 P. Wms. 334; *Jackson* v. *Parker*, Amb. 687); or, whether the mortgage was made to the devisee himself, or to a stranger: *Peach* v. *Phillips*, Dick. 538; *Baxter* v. *Dyer*, 5 Ves. 656, overruling *Harkness* v. *Bayley*, Pre. Cha. 514. In all these instances, the conveyance did not affect the devise farther than by giving to the mortgage creditor a claim to be satisfied his debt out of the devised estate.

Conveyance in trust for sale.

Bankruptcy.

And a conveyance in trust to sell for the payment of debts generally, was no less inoperative to vacate a previous devise of the property so conveyed, than a simple mortgage for a definite sum lent: *Vernon* v. *Jones*, 2 Vern. 241; see also *Earl Temple* v. *Duchess of Chandos*, 3 Ves. 685. And the same has been decided in regard to bankruptcy, which subjects the testator's property at large to a similar course of application: *Charman* v. *Charman*, 14 Ves. 580.

Mortgage for a term.

Mortgages by demise, of course, did not, even at law, produce revocation *ultrà* the estate to which

(*e*) This is no longer the case since the passing of Locke King's Act (17 & 18 Vict. c. 113); see *ante*, Vol. III., p. 873, sub tit. "Mortgages."

**Revocation.**

*By Alteration of Estate.*

they extended. Thus, where a testator, after devising freehold lands in strict settlement, demised them, by way of mortgage, for one thousand years, the inheritance, out of which the term has been carved, still passed by the devise : *Hodgkinson* v. *Wood*, Cro. Car. 23.

Partition or mortgage deed, having ulterior limitations.

If the partition, or mortgage deed, did not stop with merely effecting the partition or mortgage, but modified the ulterior ownership, it revoked the devise. As, where, by a deed of partition between two co-heirs of gavelkind lands (one of whom had previously made a will devising his share), the lands allotted to the testator were limited to such uses as he should, by deed or will, appoint, and, in default of appointment, to him in fee ; it was held, that, by this new limitation of the use, the previous devise of the property was revoked : *Tickner* v. *Tickner*, cit. 1 Wils. 309, and 3 Atk. 742, 745, 750. See also *Harmood* v. *Oglander*, 6 Ves. 199 ; 8 Ves. 106 ; *Hodges* v. *Green*, 4 Russ. 28 ; *Briggs* v. *Watt*, 2 Jur. N. S. 1041.

What words in the proviso for redemption rendered a mortgage revocatory.

What words introduced into the proviso for redemption indicated an intention to change the equitable ownership, so as to revoke a previous devise by the mortgagor, is not clear. The cases certainly authorise the conclusion, that such an intention would not be inferred from loose expressions affording conjecture merely ; but it must have been explicitly and unequivocally declared that the estate was to be reconveyed to uses different from those which previously existed ; a doctrine which seems to agree with the well-known rule, establishing that the interests of a husband and wife, joining in a mortgage of her property, are not varied by ambiguous expressions thrown into the proviso for redemption : *Brain* v. *Brain*, 6 Madd. 221 ; *Innes* v. *Jackson*, 16 Ves. 356 ; 1 Bli. 104 ; *Ruscombe* v. *Hare*, 2 Bli. N. S. 192 ; *Clarke* v. *Burgle*, 2 Coll. 221 ; *Hipkin* v. *Wilson*, 3 De G. & S. 738.

Mere acquisition of legal estate, no revocation.

Though an absolute conveyance by an equitable owner revoked a prior devise, by analogy to the rule which makes a similar alteration of estate a revocation at law, yet when the testator merely clothed his

Revocation.

*By Alteration of Estate.*

equitable title with the legal estate, by taking a conveyance to himself, this transaction, since it produced no change in the beneficial ownership, which was the subject of the devise, left that devise unrevoked. See *Parsons* v. *Freeman,* 3 Atk. 749 ; *Dingwell* v. *Askew,* 1 Cox, 427. If, therefore, a testator having contracted for the purchase of land, devised the equitable interest thus acquired and subsequently took a conveyance in fee, there was no revocation, but the heir at law was a trustee for the devisee : *Fullerton* v. *Watts,* at Doug. 691. If, however, the conveyance went beyond the mere transfer of the legal title to the equitable owner, and modified the property, revocation was of course produced : *Rawlins* v. *Burgis,* 2 Ves. & B. 382. See *Parsons* v. *Freeman,* 3 Atk. 741.

As to equitable interests created by marriage articles.

The same general doctrines were applicable in regard to equitable interests created by marriage articles as to those derived from contracts for purchase. The revoking effect of a conveyance made under the articles, upon a will disposing of the equitable interest derived under the articles, depended entirely upon the fact, whether the conveyance was a mere execution of the articles which created the equitable interest in question, or newly modified the ownership : *Parsons* v. *Freeman,* 3 Atk. 741 ; *Brydges* v. *Duke of Chandos,* 2 Ves. jun. 417, 7 Br. P. C. Toml. ed. 382.

Effect where the ultimate fee was to be conveyed to the covenantor himself.

But it is to be observed that where, by the articles, the intended settlor covenanted to convey the lands to certain uses, and, subject thereto, to the use of himself in fee, this did not sever the equitable from the legal ownership in regard to such ultimate fee, so as to support a devise made intermediately between the articles and the conveyance, since such severance could only be produced through the medium of an obligation attaching on the covenantor to convey the reversion in fee to himself, and there seems to be no title in any third person to call for such a conveyance ; for one cannot have a legal estate in trust for oneself : see *Harmood* v. *Oglander,* 8 Ves. 127 (a).

The opinions of eminent judges as to the revoking

Revocation. *By Alteration of Estate.*

effect of a void covenant under the old law are, however, somewhat conflicting: see *Williams* v. *Owen*, 2 Ves. jun. 595; *Vawser* v. *Jeffery*, 16 Ves. 519; *Wright* v. *Sittler*, 3 Burr. 1244. At all events, it is clear that a covenant to execute a conveyance which, if made, would not have revoked the will at law, was inoperative to revoke it in equity: *Vawser* v. *Jeffery*, 3 Russ. 479.

Revoking effect of a contract for sale.

Another and an obvious case of the revocation in equity of a devise of lands occurred, where the testator contracted for the sale of them: *Mayer* v. *Gowland*, Dick. 563; such a contract, if originally binding on the testator, revoked the devise, though it happened to be rescinded subsequently to his decease; and also, by the better opinion, even though it was rescinded antecedently to that event: see *Knollys* v. *Alcock*, 7 Ves. 558; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; *Tibbet* v. *Voules*, 6 Sim. 40; *Curre* v. *Bowyer*, 5 Beav. 6, n. And unless the contract goes off, it is, of course, equally an ademption under the new law. The legal estate passes under the devise, and the devisee is bound to carry the testator's contract into effect, by conveying the estate to the purchaser. If the devise, which might thus operate upon the legal inheritance, would have the effect of tying up the property in a manner incompatible with the convenient execution of the contract, as by creating limitations in favour of minors or unborn persons, the testator should, immediately after entering into the contract, execute a codicil vesting the property in trustees for the purpose of carrying the contract into effect.

Revocation of marriage articles.

Articles supported by the valuable consideration of marriage clearly had (and may now have) the same revoking effect in equity upon a previous devise of the property agreed to be settled, as a contract to sell: see *Cotter* v. *Layer*, 2 P. Wms. 624; *Vawser* v. *Jeffery*, 16 Ves. 519; 2 Swanst. 268.

Suggestion where one of the devised shares is afterwards settled on the devisee.

Another point proper to be noticed is, that, where a testator, who devises his real estate among his children in undivided shares, afterwards, upon the marriage of one of them, conveys or covenants to convey to uses, for the benefit of that child, an

Revocation.

*By Alteration of Estate.*

aliquot share equal to that which he has devised to him or her (no doubt intending to substitute it for the share so devised), such settlement or covenant does not revoke the devise of that entire share, there being nothing to connect or identify it with the settled share; but it revokes (or rather adeems) the devise of all the shares *pro tanto*, letting in the advanced child to participate equally with the others in the remaining shares not affected by the settlement. Thus, where a testator by his will gave one moiety of his real and personal estate to his elder daughter, and the other moiety to the younger daughter, and afterwards, upon the marriage of the elder with A., covenanted to settle one moiety of all his real estate to the use of himself for life, with remainder to A. and his intended wife for their lives, remainder to the younger children of the marriage in tail, remainder to A. in fee, it was held that this covenant revoked the will in equity as to one moiety of the testator's real estate, and that the other moiety passed under the devise in the will to the two daughters; and which was thought to be rendered still more clear by the republishing effect of a codicil executed after the articles: *Rider* v. *Wager*, 2 P. Wms. 334.

The Wills Act (1 Vict. c. 26) has materially altered the law as to the revocation of devises by alteration of estate. By sect. 23 of that Act it is enacted:—

Sect. 23.

Devise not to be revoked as to testator's disposable interest at decease by conveyance or like act.

"That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid (*f*), shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

This section applies to cases in which a gift would have been revoked under the old law, but not to cases of ademption: *Moor* v. *Reisbeck*, 12 Sim. 123; *Ford* v. *De Pontes*, 30 Beav. 572. Of course a valid

(*f*) See sect. 22 of the Act, *ante*, p. 378.

Revocation.

*By Alteration of Estate.*

contract for the sale of an estate, made subsequently to a will containing a devise of the estate, revokes the devise, and augments the residuary personal estate, to the disappointment of the devisee: *Farrer* v. *Winterton*, 5 Beav. 1. But the devisee is entitled to the rents till completion: *Watts* v. *Watts*, L. R. 17 Eq. 217.

Revoking effect of void deeds of conveyance under the old law.

*Revocation by a void Conveyance.*]—Sometimes an instrument, designed as a conveyance, but incapable of taking effect as such, operated, nevertheless, to revoke a previous devise. Such was the rule where the failure of the conveyance arose from either the incapacity of the grantee or the want of some ceremony which was essential to the efficacy of the instrument. Thus, in *Beard* v. *Beard*, 3 Atk. 72, Lord *Hardwicke* decided that a deed of gift by the testator to his wife of personal estate which he had previously bequeathed by his will, revoked the bequest, though the deed was inoperative under the rule of the common law, which incapacitated the wife from taking property by way of gift from her husband. So, it has been often ruled, from a very early period, that a feoffment without livery of seisin and a bargain and sale without inrolment, operated as a revocation of a previous devise of the lands thus ineffectually attempted to be aliened: see *Montague* v. *Jeffries*, Moor. 429, pl. 599; 1 Roll. Ab. 615, pl. 6, 7. See also 3 Atk. 73; 1 W. Bl. 349; 2 Swanst. 274. And the rule has been considered as applying to a common recovery, rendered void by the misnomer of the tenant to the præcipe (*Doe* v. *Bishop of Landaff*, 2 B. & P. N. R. 491), and to an instrument purporting to be an appointment under a power which at the time was not in the testator: *Shove* v. *Pinke*, 5 T. R. 124, 310. In this case, indeed, it was thought that the instrument, if void as an appointment, might take effect as a grant of the reversion; but Lord *Kenyon* unreservedly stated that, "even supposing it was an inadequate conveyance for the purpose for which it was intended, still, if it demonstrate an intention to revoke the will, it amounts, in point of law, to a revocation." And in the subse-

Revocation.
By Void Conveyance.

quent case of *Vawser* v. *Jeffery*, 2 Swanst. 274, Lord *Eldon* treated it as clear that an attempt by a testator to convey his copyhold estate by deed revoked a previous devise of that estate.

As to conveyances void under stat. 9 Geo. 2, c. 26.

It was held, however, that a conveyance to charitable uses, which was void by the stat. 9 Geo. 2, c. 26, on account of the grantor dying within twelve months after its execution, did not affect a prior devise, on the ground, it is presumed (for the reasons are not stated), that the event of the grantor surviving the year was an implied condition annexed to the deed, the effect being the same as if he had expressly made his conveyance dependent on such a contingency: *Matthews* v. *Venables*, 9 Moo. 286; 2 Bing. 136.

Deeds by *femes covert* revoked wills under powers, when.

So, it has been decided that a deed, executed by one who was under a personal incapacity to make the attempted disposition, had no effect in revoking a prior will; for, as the principle proceeded upon *intention*, a power to perform the act seems to be a necessary ingredient. Thus, where a *feme covert*, who had a power to appoint by will only, and had also the fee in default of appointment, made a will in pursuance of the power, and subsequently executed a deed professing to convey the lands, it was held that the deed was inoperative to revoke the testamentary appointment: *Eilbeck* v. *Wood*, 1 Russ. 564. But if a *feme covert*, who had a power of appointing by deed or will, made a will in exercise thereof, and afterwards, by deed, in execution of her alternative power, directed her trustees to convey to her, which they accordingly did, of course the testamentary appointment was revoked: *Lawrence* v. *Wallis*, 2 Br. C. C. 319.

Revoking effect of fraudulent deeds.

It seems clear that a conveyance, which was void at law on account of fraud or covin, was not a revocation; but a different rule was formerly considered to apply in regard to deeds which were valid at law, though impeachable in equity. The existence of this distinction formerly gave rise to some conflict of judicial decision, but is now fully established: *Simpson* v. *Walker*, 5 Sim. 1; following the decisions of Lord *Hardwicke* in *Hick* v. *Moss*, Amb. 215, and of Sir *R. P. Arden* in *Hawes* v. *Wyatt* (overruled on

Revocation.

*By Void Conveyance.*

appeal by Lord *Thurlow*), 2 Cox, 263; 3 B. C. C. 156; and the opinion expressed by Lord *Eldon* in *Att.-Gen.* v. *Vigor*, 8 Ves. 283.

Rule as to wills since 1837.

A question of this nature cannot arise in regard to wills made since 1837; the rule that actual conveyances are inoperative to revoke a will except so far as they render the will ineffective by alienating the testator's interest, of course, applies *à fortiori* to void conveyances.

Wills made before 1838.

*Revocation by a Subsequent Revoking or Inconsistent Will or Codicil.*]—In considering this head of revocation, with reference to wills made before 1838, wills of freehold and personal estate must be distinguished. The difference between them was created by the Statute of Frauds, 29 Car. 2, c. 3, s. 6, which enacts:—

Stat. 29 Car. 2, c. 3, s. 6.

Devises of lands, how to be revoked.

"That no devise in writing of *lands, tenements, or hereditaments*, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

Bequests of personalty how to be revoked.

Sect. 22. "That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

Unless these enactments had placed the revocation of wills under positive restrictions, they might still have been revoked as before the statute, notwithstanding the solemnities imposed by it on their execution; since there is no necessary implication that what is required to the execution of an instru-

Revocation.

*By Will or Codicil.*

ment is essential to its revocation. Hence, before the Statute of Frauds, it was held that a will, required to be in writing by the statute of 34 Hen. 8, c. 5, might be revoked by parol: *Cranvel* v. *Sanders*, Cro. Jac. 497. See also *Ex parte Earl of Ilchester*, 7 Ves. 348; *Richardson* v. *Barry*, 3 Hagg. 249.

Difference between devising and revoking clauses.

Though the Statute of Frauds required that a will which revoked a devise of lands should be attested by the same number of witnesses as a will devising them, yet in some particulars the formalities prescribed were different in the several instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking instrument was not; and, secondly, a revoking instrument was required to be signed by the testator in the presence of the witnesses, while a devising needed not to be signed in their presence; each, therefore, had a circumstance not applicable to them in common. This difference, however, which probably occurred without design, was attended with very little practical result, for it seldom happened that an instrument was executed for the mere purpose of revoking a previous will; and if it contained a new disposition, any revoking clause therein was a nullity, whether the substituted devise took effect or not, though for widely different reasons in the two cases. If the devise with which the clause in question was associated was effective, it reduced the latter to silence by rendering it unnecessary, the new devise itself producing the revocation; so that the efficiency of the will, as a revoking instrument, could not in such a case become a subject for consideration. If the new devise was ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause was inoperative on another principle, namely, that the revocation was dependent on and failed with the attempted new disposition, the purpose to revoke being considered to be not a substantive independent intention, but subservient to another purpose for which the instrument was incompetent, the testator meaning to do the one so far only as he effected the

Revocation dependent on efficiency of substituted disposition.

Revocation. *By Will or Codicil.*

other: *Eggleston* v. *Speke,* Carth. 79; 1 Show. 89; *Onions* v. *Tyrer,* 2 Vern. 441; 1 P. Wms. 343; *Locke* v. *James,* 11 M. & W. 101. See also *Ex parte Earl of Ilchester,* 7 Ves. 348; *Kirke* v. *Kirke,* 4 Russ. 435. But see *Richardson* v. *Barry,* 3 Hagg. 249.

Revocation where devise intended to be substituted fails.

But it seems that if the second devise failed, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise was revoked: *Frenche's Case,* 1 Roll. Ab. 614 (O), pl. 4; *Roper* v. *Constable,* 2 Eq. Ca. Ab. 359, pl. 9; *S. C.* nom. *Roper* v. *Radcliffe,* 5 B. P. C. Toml. ed. 360; *Tupper* v. *Tupper,* 1 K. & J. 665; *Quinn* v. *Butler,* L. R. 6 Eq. 225; see also *Re Gentry,* L. R. 3 P. & D. 80.

Revocation of wills of personalty.

With respect to the revocation of wills of personal estate, it is to be observed that questions concerning it most commonly occur in the Ecclesiastical Courts; which, of course, no less than the Temporal Courts, were bound by the 22nd section of the Statute of Frauds, excluding parol revocations. Accordingly, Sir J. *Nicholl* held, that evidence could not be received of the testator's intention, orally announced, to adopt the prior of two wills, both which were found at his decease uncancelled, though it appeared that most of the bequests in the posterior will had lapsed: *Daniel* v. *Nockolds,* 3 Hagg. 777. But the enactment in question was not considered to interfere with the reception of evidence of acts of a testator in his lifetime concerning his testamentary papers, as indicative of an intention to revoke, still less to exclude inquiry into the state in which such papers were found at his decease. Where a testatrix caused a letter to be written, desiring that her will might be destroyed, this was held to be a revocation, though the will was not destroyed: *Walcott* v. *Ochterlony,* 1 Curt. 580.

As to completeness of revoking will.

Revocation often depended on the completeness of the posterior of two testamentary papers, in regard to which it may suffice to refer to what has been stated in a former section respecting the necessity of every intended (though possibly in itself superfluous) solemnity of execution being perfected

(*ante*, pp. 360, *et seq.*), with the additional remark, that an unfinished paper had to meet an increased force of objection, where its operation went to disturb the dispositions of a previous complete and duly executed will. See *Griffin* v. *Griffin*, 4 Ves. 197, n.; *Gillow* v. *Bourne*, 4 Hagg. 192; *Blewitt* v. *Blewitt*, 4 Hagg. 410.

Revocation.

*By Will or Codicil.*

With regard to wills made since the year 1837, the question cannot arise as to the revoking operation of incomplete or informal writings, for by sect. 20 of the Wills Act (*ante*, p. 377), no will can now be revoked by any subsequent will or writing unless the same is executed in manner required for the execution of wills generally.

Effect of the Wills Act.

We proceed now to the consideration of the revoking contents of a subsequent will and codicil; and as, in this point of view, wills of freehold and personal estate under the old law, and wills within the operation of the new law, are referable to the same general principles, the decisions respecting them have been blended. A testamentary disposition may be revoked by a subsequent will or codicil by reason of the revoking instrument containing either an express clause of revocation, or a devise or bequest inconsistent with the prior disposition. Where a testator by his will gave his residue upon trusts in favour of his children as tenants in common, and by a codicil revoked all and every provision in his will in favour of his daughter, it was held that there was an intestacy as to the daughter's share in the residue: *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; see also *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Sykes* v. *Sykes*, L. R. 4 Eq. 200. But where a testator by his will gave property to A. and B. as tenants in common, and in a subsequent part of his will directed that C. should take a share with the other legatees; and by a codicil the testator revoked that part of his will which left a legacy to C.; it was held that effect of this revocation was to make the will operate as if the gift to C. was not in it, and that the revocation accordingly enured to the benefit of A. and B.: *Harris* v. *Davis*, 1 Coll. 416.

Revocation by will, &c., how effected.

Of course, a mere intimation by a testator of his

Mere intention

**Revocation.**

*By Will or Codicil.*

to revoke by a future act inoperative.

intention to make, by a future (*g*) act, a new disposition, does not produce actual revocation. Thus, where A. made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A., having acquired other real property, made another will, whereby he devised the newly-acquired property, and then wrote as follows:—"As to the rest of my real and personal estate, I *intend* to dispose of the same by a codicil to this my will hereafter to be made;" it was contended that this clause, though inoperative as a disposition, indicated an intention to revoke the will; but Lord *Ellenborough* and *Lawrence*, J., held that it was not a revocation. They considered the cases before the statute to be applicable; and that the testator merely intended to dispose of the subsequently-acquired real estate, and the property which had lapsed by the death of the residuary legatee; and that, even if this had imported an intent to revoke by making a *different* disposition in future, it would not, according to the authorities, have amounted to a revocation, unless the Court could ascertain what the difference was: *Thomas* v. *Evans*, 2 East, 488. See also *Griffin* v. *Griffin*, 4 Ves. 197, n. Even an express clause of revocation though present and absolute in its terms, may be rendered inoperative, by showing mistake: *Powell* v. *Mouchet*, 6 Madd. 216; *Re Oswald*, L. R. 3 P. & D. 162; or by showing that such an absolute construction would be unreasonable: *Hughes* v. *Turner*, 4 Hagg. 52; *Devery* v. *Barton*, 2 Phil. 575; *Re Meredith*, 29 L. J. Prob. 155. Nor is it sufficient, in order to revoke a will, that the existence of a subsequent will should have been found by a jury; it must be found to be different from the former: *Seymor* v. *Nosworthy*, Hard. 374; *S. C.*, Show. P. C. 146; and even the

(*g*) In an early case a distinction is taken between the effect of a testator saying, "I will revoke my will at P.," and saying, "my will at P. shall not stand," the former referring to a future act, and not being considered a revocation; the latter indicating a present resolution, and being considered an actual revocation: *Burton* v. *Gowell*, Cro. El. 306. See also *Chobury* v. *Beckett*, 14 Beav. 588.

latter finding will not avail, if it be added, that the nature of such difference is unknown to the jurors: *Goodright* v. *Harwood*, 3 Wils. 497; 2 Bl. 937; Cowp. 87; 7 Br. P. C. Toml. ed. 489. See also *Rawlins* v. *Richards*, 28 Beav. 370; *Wood* v. *Wood*, L. R. 1 P. & D. 309; *Hellier* v. *Hellier*, 9 P. D. 237.

Rule where several wills are subsisting at death.

Under the old law (see sect. 22 of the Wills Act, *ante*, p. 378), where a testator at different periods of his life made various testamentary papers, some of which he destroyed, and others he left undestroyed, each professing to contain his last will, this character belonged exclusively to such one of the uncancelled papers as was executed most proximately to his decease; see *Goodright* v. *Glazier*, 4 Burr. 2512; *Harwood* v. *Goodright*, Cowp. 92; and in order to ascertain the time of the execution of the respective papers, recourse might be had to evidence drawn either from their own contents or from extrinsic sources (*h*). Sometimes the water-mark, showing when the paper on which a will is written was manufactured, might afford decisive proof of its posteriority to another will, the period of whose execution could be ascertained by some other means.

Effect of contradictory wills of uncertain date.

If, from the absence of date, and of every other kind of evidence, it is impossible to ascertain the chronological relation of two wills, both are necessarily void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain. See *Phipps* v. *Earl of Anglesea*, 7 Br. P. C. Toml. ed. 443. And even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in determining which is to be preferred, the Courts will, if possible, adopt such a construction as

(*h*) The expression, "This is my *last* will and testament," does not operate as a revocation of a prior will without words to that effect, either as regards real or personal estate: *Freeman* v. *Freeman*, 5 De G., M. & G. 704; *Lemage* v. *Goodban*, L. R. 1 P. & D. 57; *Re De la Saussaye*, L. R. 3 P. & D. 42; *Re Petchell*, *ib.* 153.

Revocation.
*By Will or Codicil.*

will give effect to both, sacrificing the earlier, so far only as it is clearly incompatible with the later paper: *Weld* v. *Acton*, 2 Eq. Ca. Ab. 777, pl. 26; *Richards* v. *Queen's Proctor*, 18 Jur. 540; unless, of course, where the later paper contains a revocation clause, or a clear indication from its general tenor that the prior will shall not remain in force: *Dempsey* v. *Lawson*, 2 P. D. 98; see *Plenty* v. *West*, 6 C. B. 201; 16 Beav. 173.

The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior paper, however, exists only when the subsequent paper is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior paper would be to produce partial intestacy, or when the subsequent paper is styled a codicil; for the office of a codicil being to vary, and not wholly supplant a previous will, such a denomination of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained. See *Henfrey* v. *Henfrey*, 2 Curt. 468; 6 Jur. 355; *Cottrell* v. *Cottrell*, L. R. 2 P. & D. 397.

Questions often raised by codicils.

Numerous questions have been raised in regard to the extent to which a codicil affects the dispositions of a will, or antecedent codicil, and which are often occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the will or previous codicil; forcibly suggesting, therefore, the propriety of never preparing a codicil without an actual inspection of the will or codicil whose operation it is designed to alter. All that can be attempted here is, to glance at a few points exemplifying the principles of construction which have obtained in these cases. A primary rule, obviously, is not to disturb the dispositions of the will, or codicil intended to be altered, farther than is absolutely necessary for the purpose of giving effect to the altering codicil. See *Doe* d. *Murch* v. *Marchant*, 7 Sc. N. R. 644; *Vesey* v. *Vesey*, 12 Jur. 548; *Re Howard*, L. R. 1 P. & D. 636; *Follett* v. *Pettman*, 23 Ch. D. 337.

Thus, where a testator by his will devises lands to

Revocation.

*By Will or Codicil.*

A. in fee, and by a codicil devises the same lands in fee to the first son of B. who should attain the age of twenty-one and should assume the testator's name, the first devise would be revoked only quoad the interest comprised in the executory devise in the codicil; so that, until B. had a son who attained his majority, and assumed the testator's name, the property would pass to A. under the devise in the will: *Duffield* v. *Duffield*, 3 Bli. N. S. 261. See also *Doe* d. *Evers* v. *Ward*, 16 Jur. 709; *Re Colshead*, 2 De G. & J. 690; *Norman* v. *Kynaston*, 29 Beav. 96; *S. C.*, 3 De G. F. & J. 29.

Will revoked by codicil *pro tanto* only.

So, where a testator devises lands to A., subject to a rent-charge to B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the rent, the latter remains a charge on the land in the hands of the substituted devisee: *Beckett* v. *Harden*, 4 M. & S. 1. See *Young* v. *Hassard*, 1 Dr. & W. 638; *Fry* v. *Fry*, 9 Jur. 894; *Ravens* v. *Taylor*, 4 Beav. 425; *Kermode* v. *Macdonald*, L. R. 3 Ch. 584; *Bridges* v. *Strachan*, 8 Ch. D. 558.

The principle may be farther illustrated by the following cases. A testator devised his estates to C. B. for life *without impeachment of waste*, and by a codicil directed his trustees to let, until tenant for life married, the leases to be *impeachable of waste*, and the rents to be accumulated and laid out in lands to be settled to the same uses: it was contended, that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste: but Sir W. *Grant*, M. R., held, that there was no inconsistency, and nothing to take the timber from the tenant for life: *Lushington* v. *Boldero*, G. Coop. 216. See *Green* v. *Britten*, 1 De G. J. & S. 649.

So, where a testator, by his will, bequeathed as follows—"As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of

Revocation.
*By Will or Codicil.*

the *residue* of his personal estate to A., and gave the same to B. It was held that the revocation was confined to the residue, and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, &c.: *Clarke* v. *Butler*, 1 Mer. 304. See *Barclay* v. *Maskeleyne*, 5 Jur. N. S. 12; *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & S. 96.

So, in *Re Arrowsmith's Trusts*, 2 De G. F. & J. 474, a disposition by codicil of all the testator's real and personal estate and effects was held, on the context, not to include a specific bequest given by the will.

Where a testator by his will gave property to his daughter and another person as trustees for sale, and directed a moiety of the proceeds to be held in trust for the benefit of his daughter and her children, and by a codicil he revoked that part of his will which empowered his trustees to sell, and, instead thereof, authorised his daughter to take possession of his property, to be disposed of at her discretion: it was held that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will: *Newman* v. *Lade*, 1 Y. & C. C. C. 680. See *Barry* v. *Crandall*, 7 Sim. 430; *Froggett* v. *Wardall*, 3 De G. & S. 685.

As to the effect of gifts in codicils "instead of" gifts in wills: *Doe* d. *Murch* v. *Marchant*, 6 M. & Gr. 813; *Hill* v. *Walker*, 4 K. & J. 168; *Butler* v. *Greenwood*, 22 Beav. 303.

Where a testator appoints several persons to be executors and trustees, and guardians of his children, and by a codicil revokes the appointment of one of them as executor and trustee, and appoints another executor and trustee in his place, this does not affect the guardianship: *Re Parke*, 14 Sim. 89. See *Fry* v. *Fry*, 9 Jur. 894; *Hare* v. *Hare*, 5 Beav. 629; *Graham* v. *Graham*, 16 Beav. 550; *Cartwright* v. *Shepheard*, 17 Beav. 301; *Worley* v. *Worley*, 18 Beav. 58.

Estates A. and B. are devised to the same uses: revocation as to A. does not affect B.

It may be observed, that, where a testator, to avoid unnecessary repetition, has by his will declared his intention respecting a property which he was then devising to be similar to what he had before

Revocation.
By Will or Codicil.

expressed concerning another property antecedently given, and he afterwards, by a codicil or any other act, revokes his first gift, such revocation does not affect the second devise. Thus, where a testator, by his will, annexed one estate to another, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and by an act in his lifetime he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will: *Darley* v. *Langworthy*, 3 Br. P. C. Toml. ed. 359; reversing Lord Camden's decree in *Darley* v. *Darley*, Amb. 653. See also *Lord Sidney Beauclerk* v. *Mead*, 2 Atk. 167.

So, where a testator bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A., and by a codicil revoked the bequest of the residue; it was held that this was no revocation of the specific bequest: *Roach* v. *Haynes*, 6 Ves. 153. See also *Re Gibson's Trusts*, 2 J. & H. 656.

Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon the trusts thereinafter expressed concerning his residuary personal estate; he then bequeathed his residuary personal estate upon certain trusts, and afterwards, by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner—Sir *J. Leach*, M. R., held, that, by this alteration in the disposition of the personal estate, the devise of the realty was not affected, the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate; in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will would have been no revocation of the disposition of the produce of the freehold estate; and his Honor observed, it could make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents,

Revocation.
By Will or Codicil.

and purposes, by compendious words of reference: *Francis* v. *Collier*, 4 Russ. 33. But see *Evans* v. *Evans*, 17 Sim. 108, as to plate, pictures, &c., directed to go with a mansion-house as heirlooms.

Distinction where the first devise is modified only.

Where the devise of the principal estate is not simply revoked, but is modified, it must not too hastily be concluded that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the M. R. in the case of *Francis* v. *Collier, supra,* might seem to conduct to such a conclusion; for a different construction prevailed in the case of *Lord Carrington* v. *Payne*, 5 Ves. 404, where a testator devised his real estate to trustees to be conveyed to certain uses, and bequeathed personal estate, to be laid out in land to be settled "to such uses, and upon such trusts, &c., as he had declared concerning his real estate." By a codicil, he revoked so much of his will as directed the settlement of his real estate to those limitations and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir *R. P. Arden*, M. R., held that the bequest of the personalty was not revoked, but was modified by the codicil. He considered that, though the devisor had used the expression "revoke," yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of both parties); and it was no more than if the devisor had, with his own hand, inserted the name of one devisee before another, and then republished his will. Unless the case of *Lord Carrington* v. *Payne* can be referred to the distinction above suggested, which is very doubtful, it seems to be untenable.

Absolute revocation held not to be restrained by recital.

Where a testator, in a codicil to his will, recites an inconvenient consequence to result from a devise in his will, as that, in a particular event, the devisee or legatee would be unprovided for, contrary to his intention; and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the

Revocation.
*By Will or Codicil.*

land again to the same trustees upon certain trusts, which he particularises, and which are the same as the former trusts, with the exception of the particular expressly intended for correction, and of one other of the trusts, which he wholly omits; this omission, though probably undesigned, cannot be supplied: *Holder* v. *Howell*, 8 Ves. 97 (*i*). The principle of this case seems to be inconsistent with, and it may therefore be considered to have overruled, the case of *Matthews* v. *Bowman*, 3 Anst. 727, where a testator, having devised the residue of his estate to his daughters *as tenants in common*, by a codicil made for a particular purpose re-devised it to them, but *omitting the words of severance*, it was held that the legatees were tenants in common.

It is an established rule of construction that uncertain expressions in a codicil are not to be taken to revoke a devise or bequest given in clear and unequivocal terms by a will: see *Goblet* v. *Beechey*, 3 Sim. 24; *Gordon* v. *Hoffman*, 7 Sim. 29; *Pratt* v. *Pratt*, 14 Sim. 129; *Bunney* v. *Bunney*, 3 Beav. 109; *Doe* d. *Hewett* v. *Hicks*, 6 Bl. N. S. 37; *Stokes* v. *Heron*, 12 Cl. & F. 161; *Mann* v. *Fuller*, Kay, 624; *Sawrey* v. *Rumney*, 5 De G. & S. 698; *Wells* v. *Wells*, 17 Jur. 1020; *Williams* v. *Evans*, Ib. 1093; *Agnew* v. *Pope*, 1 De G. & J. 49; *Chobury* v. *Beckett*, 14 Beav. 583; *Baldwin* v. *Baldwin*, 22 Beav. 413; *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19.

And here it may be observed that where a testator by a codicil revokes a devise or bequest in his will, stating, as the ground for such revocation, a fact which turns out to be false, the revocation does not take effect, being made, it is considered, to depend on a condition which fails. Thus, where a testator, having bequeathed to the two grandchildren of his late sister 500*l.* each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, "*they being all dead*," it being

(*i*) See, also, on this question *Cole* v. *Wade*, 16 Ves. 46, and *Lord Holmesdale* v. *West*, L. R. 3 Eq. 486. In the appeal to the House of Lords in the last case the point was not raised: *S. C.*, L. R. 4 H. L. 543.

**Revocation.**
*By Will or Codicil.*

proved that they were living, Lord *Loughborough* held that the legacies were not revoked: *Campbell* v. *French*, 3 Ves. 321; see also *Doe* d. *Evans* v. *Evans*, 10 A. & E. 228. Had the testator in these cases, instead of assuming the death of the legatees, founded his revocation on his advice or belief only of the fact, it is conceived that the decision would have been different. This distinction seems to be warranted by the case of *Att.-Gen.* v. *Lloyd*, 3 Atk. 552; *S. C.* 1 Ves. sen. 32, where a testator, before the passing of the statute of 9 Geo. 2, c. 36, having devised lands and bequeathed personalty to be laid out in lands for charitable uses, by a codicil made after the passing of the statute, reciting that, being advised the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did thereby give his personal estate to the charitable uses before mentioned, and he did thereby give his real estate to B. It was held that the lands were effectually devised to B., though the testator's impression as to the invalidity of the devise in the will was erroneous: *Willett* v. *Sandford*, 1 Ves. sen. 178, 186.

So, where a testatrix by her will bequeathed 300*l.* among such of the children as should be living of E., and by a codicil declared as follows, "I give to my brother's son, C., the 300*l.* designed for E.'s children, as I know not whether any of them are alive, and if they are well provided for:" Sir *R. P. Arden*, M. R., held C. to be entitled, though the children of E. were living. His Honor, however, observed, "that it was argued, and with some ground, that if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case (so often cited from Cicero de Oratore) of *pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla:* but the testatrix goes further, that she doubted, if they were living, whether they might not be well provided for; and she totally deprives them of that provision. The Court will not inquire whether they are well pro-

vided for or not:" *Att.-Gen.* v. *Ward*, 3 Ves. 327. See also as to revocations stated to be made on grounds which turn out to be erroneous in fact, *Barclay* v. *Maskeleyne*, Johns. 124; *Allen* v. *Bewsley*, 7 Ch. D. 453.

Whether legacies by codicil follow those given by will.

Questions often arise whether legacies bequeathed by a codicil are payable out of the same fund, or are subject to the same restrictions as legacies bequeathed by the will. If the legacies are expressly given upon the same conditions, &c., of course the affirmative does not admit of doubt: *Lloyd* v. *Branton*, 3 Mer. 108; see also *Cooper* v. *Day*, *ib.*, 154; *Corporation of Gloucester* v. *Wood*, 1 H. L. C. 272. And the same construction will prevail where a testator, by a codicil, gives a legacy *in addition to* or substitution for a legacy given by his will: *Crowder* v. *Clowes*, 2 Ves. jun. 449 (*k*). In some instances the same construction has prevailed on less palpable indication of similarity of intention in regard to the respective legacies or classes of legacies: *Brudenell* v. *Boughton*, 2 Atk. 268; *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *Fitzgerald* v. *Field*, 1 Russ. 425. Where a testator by his will gave a fund in trust for the separate use of his three nieces for life, with a trust in remainder for their children, and by a codicil directed that each of his nieces should have a vested interest transmissible to her children upon her death, it was held that they took absolutely for their separate use: *Vesey* v. *Vesey*, 12 Jur. 548.

Whether legacy by codicil is exempt from duty like those of will.

A point which has been frequently agitated is, whether a legacy bequeathed by a codicil is to participate in an exemption from duty, created by the will in favour of the legacies thereby given, or of some particular legacy for which the legacy in ques-

(*k*) See as to legacies given "in addition," *Russell* v. *Dickson*, 2 Dr. & War. 138; *Day* v. *Croft*, 4 Beav. 561; *Burrell* v. *Earl of Egremont*, 7 Beav. 223; *Calor* v. *Calor*, 14 Beav. 463; *Warwick* v. *Hawkins*, 5 De G. & S. 481; *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19. And as to legacies in substitution, see *Cooper* v. *Day*, 3 Mer. 154; *Russell* v. *Dickson*, 2 Dr. & War. 133; *Martin* v. *Drinkwater*, 2 Beav. 215; *Bristow* v. *Bristow*, 5 Beav. 289; *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237; *Fenton* v. *Farringdon*, 2 Jur. (N. S.) 1120.

Revocation. *By Will or Codicil.*

tion is substituted. According to the cases, there must be a distinct manifestation of intention in the codicil in order to exempt the legacy : see *Early* v. *Benbow*, 2 Coll. 354. See also *ante*, pp. 240 *et seq.*, as to what expressions will exempt legacies from duty.

Revoking effect of codicil by republishing an earlier will.

Sometimes a codicil has the effect of impliedly revoking the posterior of two wills, by referring to the prior one as the actual and subsisting will of the testator.

Thus, if a testator makes a will in 1820, and another in 1830, both of which, though inconsistent, remain undestroyed, and the testator then makes a codicil, which he declares to be a codicil to his will of 1820, this would set up the will of 1820, in opposition to that of 1830 : *Lord Walpole* v. *Earl of Orford*, 3 Ves. 402 ; *S. C.*, nom. *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138 ; and parol evidence that he intended to refer to the will of 1830 would be inadmissible : *Crosbie* v. *Macdoual*, 4 Ves. 610. An inaccuracy in referring to the date of the first will would not prevent the application of this doctrine, unless it raised a doubt as to which was really intended : *Jansen* v. *Jansen*, cit. 1 Add. 139. The fact that the codicil is written on the same sheet of paper as the first will has been considered, in regard to personal estate at least, to indicate an intention to treat *that* as the subsisting will, especially as the second was out of the testator's possession, so that he had no opportunity of cancelling it : *Rogers* v. *Pittis*, 1 Add. 30. See also the judgment of *Eyre*, C. B., in *Barnes* v. *Crowe*, 1 Ves. jun. 488. As to erroneous references in a codicil to the date of the will intended to be revived, see *Thompson* v. *Hempenstall*, 1 Rob. 783 ; 13 Jur. 814 ; *Re Ince*, 2 P. D. 111. In the case of *Burton* v. *Newbury*, 1 Ch. D. 234, however, *Jessel*, M. R., held that a codicil referring to a will by date affects the will, and not intermediate codicils. See also *Re Reynolds*, L. R. 3 P. & D. 35.

Every codicil deemed part of will.

In applying the doctrine of *Lord Walpole's Case*, it is necessary to bear in mind that every codicil is a constituent part of the will, which in a general

Revocation.
*By Will or Codicil.*

and comprehensive sense consists of the aggregate contents of all the papers through which it is dispersed. Such a construction of the term "will," of course, prevents the confirming act of the testator from having the effect of setting up the will (using the word in its more confined sense), in contradistinction to, and in exclusion of any intermediate codicil or codicils which the testator may have engrafted on it. And, therefore, in a case where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of and additions to the will; and by a further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will; this confirmation of the will was held not to revive the parts of it which were altered or revoked by the former codicils; Sir *R. P. Arden*, M. R., observing, that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it: *Crosbie* v. *Macdoual*, 4 Ves. 610. See *Gordon* v. *Reay*, 5 Sim. 274; *Wade* v. *Nazer*, 12 Jur. 188; *Re De la Saussaye*, L. R. 3 P. & D. 42; *Green* v. *Tribe*, 9 Ch. D. 231.

In regard to wills made since 1837, Mr. Jarman thinks that such questions may still occur, "for," he observes (Jarm. Wills, Vol. I., p. 191), "though the 22nd section of the recent statute prevents the revival of a revoked will, except by re-execution, or by 'a codicil showing an intention to revive the same,' and, therefore, no such effect would follow from the *mere* revocation of a posterior revoking will; yet, probably, it would still be held, according to the doctrine of *Lord Orford's Case*, that a recognition in a codicil of the earlier of the two inconsistent and undestroyed wills, by date or otherwise, as the will on which the codicil is founded, shews an intention to revive the will." But such a will, in order to be revived, must be in existence: *Hale* v. *Tokelove*, 2 Rob. 318; 14 Jur. 817; *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342. See also *Ex parte Earl of Ilchester*, 7 Ves. 377; *Powell* v. *Powell*, L. R. 1 P. & D. 209.

## CHAPTER VII.

### REPUBLICATION.

Republication.

Nature and effect of republication.

REPUBLICATION is, in fact, re-execution, being a repetition of those ceremonies which are essential to the original efficacy of the will; so that, to republish the devise of a freehold estate under the old law, required an attestation by three witnesses; while a will might have been republished with respect to copyholds and personalty without any attestation (*a*). It was rarely necessary, however, to inquire into the republication of wills of personal estate, for this reason, that as a residuary *bequest* even before the recent Act embraced all the property of which the testator died possessed, it was not generally susceptible of enlargement by republication, whose effect is only to make the will speak from the period of its being republished, which, in regard to real estate, was often an important consideration; because, otherwise, the devise operated only on the property of which the testator was seised at the time of its execution: see *Acherley* v. *Vernon*, Com. 381, 2 Eq. Ca. Ab. 769, pl. 1; 3 B. P. C. Toml. ed. 85; *Potter* v. *Potter*, 1 Ves. sen. 437; *Beckford* v. *Parnecott*, Cro. Ell. 493; *Barnes* v. *Crowe*, 1 Ves. jun. 486, 4 B. C. C. 2. See also 1 Wms. Saund. 277, n.

Republication, actual and constructive.

Republication by codicil.

Republication is of two kinds, express and constructive. Express republication, as already noticed, is merely the repetition of the ceremonies which constitute an execution of the will. Constructive republication takes place where a testator makes a codicil to his will, the effect of which, if the codicil be duly attested, is to republish the will, and thereby under

(*a*) As to the republication of wills of personalty under the old law, *vide Long* v. *Aldred*, 3 Add. 48; *Miller* v. *Brown*, 2 Hagg. 209.

Republication.

the old law to bring within any general or residuary devise which it might contain lands of inheritance acquired since the execution of such will, though the codicil expressed no intention to republish, or though it was not annexed to, or declared to be a part of, or did not in terms confirm the will, and whether the codicil related to real estate or to personalty only, the result being precisely the same as if the general or residuary devise had been incorporated into the republishing codicil: *Pigott* v. *Waller*, 7 Ves. 98; *Goodtitle* v. *Meredith*, 2 M. & Sel. 5; *Guest* v. *Willasey*, 12 Moo. 223; *Skinner* v. *Ogle*, 4 No. Cas. 74; *Re Earl's Trust*, 4 K. & J. 673. See also *Doe* v. *Davy*, Cowp. 158; *Gibson* v. *Montfort*, 1 Ves. sen. 485. Under the present law, however, a will cannot be revived by mere implication; the codicil must show "an intention to revive the same," by expressly referring to the will, or by some expression or disposition clearly indicating such intention: *Re Steele*, L. R. 1 P. & D. 575. See sect. 22 of the Wills Act, *ante*, p. 378.

It was held, under the old law, that the circumstance of the testator having, by the codicil, expressly devised part of his estates, purchased since the execution of the will, to the uses therein declared concerning his residuary real estate, did not exclude the rest from the operation of the same residuary devise brought down by the republishing effect of the codicil to the date of such codicil: *Coppin* v. *Fernyhough*, 2 Br. C. C. 291; *Hulme* v. *Heygate*, 1 Mer. 285. Indeed, when we admit that the effect of the republication is to make the will speak from the period of the execution of the codicil, it seems necessarily to follow that an express devise in the codicil of particular lands, acquired since the execution of the will, to the residuary devisee, could no more exclude the rest from the residuary devise thus republished than a similar devise in the will itself could prevent other lands, then belonging to the testator, from passing to him under such residuary clause: see *Doe* d. *Murch* v. *Marchant*, 6 M. & Gr. 813; *Williams* v. *Goodtitle*, 10 B. & C. 895.

Case of *Rowley* v. *Eyton*.

Perhaps in no instance has the republishing ope-

Republication.

ration of a codicil been carried to so great a length as in the case of *Rowley* v. *Eyton*, 2 Mer. 128, where after-acquired lands, expressly devised by the codicil to the residuary devisee of the will, were held to be subject to a general charge of debts created by the will. The testator, after charging his real and personal estate with the payment of his debts, devised the residue of his real and personal estate to his son E., and, having subsequently purchased several copyhold estates, by a codicil attested by three witnesses, devised them to his said son in fee: Sir *W. Grant*, M.R., held that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts. Perhaps it is not quite clear that the decision would have been the same if the codicil had devised the lands in question to any other person than the residuary devisee in the will.

But, of course, the operation of a codicil to extend the devise in a will made before 1838 to intermediately acquired lands, may be negatived by the language of the codicil itself, indicating a contrary intention; for, though the republication takes place without any positive expression of intention, yet it can never operate in spite of the intention: see *Bowes* v. *Bowes*, 7 T. R. 482; 2 B. & P. 500; *Parker* v. *Biscoe*, 3 Moo. 24; 8 Taunt. 699; *Smith* v. *Dearmer*, 3 Y. & J. 278; *Monypenny* v. *Bristow*, 2 Russ. & M. 117; *Ashley* v. *Waugh*, 4 Jur. 572. See also *Hughes* v. *Turner*, 3 My. & K. 666; *Smith* v. *Dearmer*, 3 Y. & J. 278. But see *Williams* v. *Goodtitle*, 10 B. & Cr. 895; *Doe* d. *York* v. *Walker*, 12 M. & W. 591; *Cole* v. *Scott*, 12 Jur. 509.

Effect of republication on particular devises.

Hitherto republication has been viewed only as affecting general devises. In regard to particular devises the principle, that the will speaks from the date of the republication, is to be received with more qualification and reserve. Unquestionably, the devise of a particular property republished by the re-execution of the will or the execution of a codicil would, even under the old law, comprise a new estate in that property intermediately acquired by the testator, and falling within the terms of the re-

Republication.

published devise, but did not operate on a property different from that which the devise was originally designed to embrace, though answering to the same description. Thus, in a case under the old law, where a testator, having a renewable leasehold estate, devised it, afterwards renewed the lease and then republished the will, the renewed lease passed under the devise: *Carte* v. *Carte*, 3 Atk. 180. See also *Alford* v. *Earle*, 2 Vern. 209. So, where a testator, by such a will, devised certain freehold lands, which devise was revoked by a conveyance of the lands to particular uses, with the ultimate limitation to the use of the testator himself in fee, after which the testator made a codicil to his will, attested by three witnesses; the estate which reverted to the testator on the execution of the revoking conveyance passed under the devise, by the effect of the republication: *Jackson* v. *Hullock*, 2 Eden, 263.

Adeemed legacy not revived by republication.

On the other hand, republication by a codicil or otherwise did not, under the old law, extend a specific gift in the will to property which that gift was not originally intended to comprehend. Thus, it has been repeatedly held, that a pecuniary legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy: *Izard* v. *Hurst*, 2 Freem. 224; *Monck* v. *Lord Monck*, 1 Ba. & B. 298. See also *Drinkwater* v. *Falconer*, 2 Ves. sen. 623; *Crosbie* v. *Macdowal*, 4 Ves. 610; *Sidney* v. *Sidney*, L. R. 17 Eq. 65. The case of *Holmes* v. *Coghill*, 7 Ves. 499; 12 Ves. 206, seems to afford a further confirmation of the principle here stated. There the testator having, under his marriage settlement (subject to an estate for life to himself, and an estate tail limited to his sons in strict settlement), a power to charge 2000*l.* upon certain estates, executed that power by will duly attested. Afterwards he and his eldest son suffered a common recovery, and limited the lands to uses discharged from the power. By the same instrument they limited to the testator a power by will to charge the 2000*l.* on other lands. Subsequently he executed

Republication.

a codicil duly attested to his will. It was contended that this codicil, by republishing the will, rendered it a good execution of the new power. But Sir *W. Grant*, though he admitted the general principle as to republication, held, that this was not a good execution of the power. "It speaks," said he, "only of the power given by the marriage settlement, which was as much gone as if it never had existed. There is no way in which the will can be made to speak of the new power, for a new consideration, affecting different estates."

Devise or bequest lapsed by death of object.

The same rule applies both under the old and new law, as regards the persons who are the objects of a gift, so that a republication by codicil does not revive a devise or bequest which has lapsed by the death of the object in the testator's lifetime. Thus where a testator devises lands to his son John, who dies in the testator's lifetime, and he afterwards has another son of the same name, the republication of the will would be inoperative to carry the property to the second son John: 2 Ves. sen. 626. Nor is the case of *Perkins* v. *Micklethwaite*, 1 P. Wms. 275, rightly understood, at all contradictory to this hypothesis; for, though in that case a legacy, originally designed for a son of the testator, who died after the execution of the will, was held to belong to a subsequently born son of the same name by the effect of the codicil, yet the express terms of the codicil appear to have warranted the construction, since it gave to the latter a legacy *over and above what the testator had given him by his will.*

The effect of republication is of course to confirm the will as it stands, and cannot alter the construction of the will so as to cure any defect of expression therein: see *Lane* v. *Wilkins*, 10 East, 241.

Whether a republished residuary devise passed what had lapsed.

Though it is quite clear, as we have seen, that republication has no effect in restoring the operation of a lapsed specific, or rather particular devise, yet a different and more difficult question under the old law was, whether the lands of which the devise had so lapsed would pass by a residuary devise in the republished will. This seems to depend on the point, whether, if the particular devisee had been

Republication.

dead when the will was made, the residuary devise would have comprised the lands expressed to be given to the person so deceased; for, if it would not, then the lands, the devise of which *subsequently* lapsed, could not, by the effect of the republication, have passed under the residuary devise, because republication merely made the will speak from its own date, and could not bring within the grasp of a devise in the will any subject which it would not have comprehended, in case the circumstances under which the republication takes place had existed at the original execution of the will. In short, the inquiry is simply, whether, under wills made before 1838, a residuary devise included particular lands, the devise of which was void *ab initio*.

The only direct authority on the point seems to be *Doe* v. *Sheffield*, 13 East, 526, where the Court of King's Bench treated it as clear, that, where a testator devised certain lands to the sister of A., and the residue of his lands, not hereinbefore disposed of, to B., and it turned out that all the sisters of A. were dead when the will was made, the estate so devised passed by the residuary clause. The facts of the case, however, as eventually ascertained, did not raise the question.

Remarks on *Doe* v. *Sheffield* and *Williams* v. *Goodtitle*.

Although, in the case just stated, the extension of a residuary clause to lands comprised in a specific or particular devise in fee, which was void *ab initio*, appears rather to have been assumed than discussed; and though, if the matter were *res integra*, there would certainly be strong ground to contend that a residuary devise, being, under the old law, in its nature specific, ought not to extend to any interest in real estate, which was professed to be otherwise disposed of by the same will; yet, considering how unsteady has been the adherence to this principle, the probability seems to be, that it would be held, in accordance with the impression of the Judges who decided *Doe* v. *Sheffield* and *Williams* v. *Goodtitle*, that a residuary devise took in all that was not effectually disposed of, according to circumstances existing at the making of the will; and the consequence would be, that, in the case of a particular

Republication.

devise in fee lapsing, followed by the republication of the will, a residuary clause in the republished will would have operated on the lands comprised in the lapsed devise. The point, however, cannot be considered as settled. It cannot arise under a will made since 1837, because the stat. 1 Vict. c. 26, s. 25, makes a residuary devise include estates comprised in lapsed and void devises.

Republication does not revive lapsed residuary devise.

If the residuary devise itself has lapsed, of course the republication of the will was and is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would, nevertheless, die intestate as to one-third, since the subsisting devise, which originally embraced two-thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety. See *Skrymsher* v. *Northcote*, 1 Swanst. 566; *Humble* v. *Shore*, 7 Hare, 247; *Re Wood's Will*, 29 Beav. 236.

Republication, how far affected by the recent act.

The operation of the clause of the Wills Act, which makes the will speak, in regard to the subjects of disposition, from the death of the testator; and that of the provision which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease, greatly diminish the importance of the doctrine of republication. With respect to the *objects* of gift, indeed, the recent act leaves the law as it was; but inasmuch as a republication by codicil does not revive a lapsed gift this exception is not of great practical effect.

Where a will made before, has been republished by a codicil made on or since the 1st of January, 1838, or by re-execution, in the manner prescribed by the new law, such republication, unless a contrary intention be indicated, has the effect of subjecting the will for all purposes to the operation of the new act, and of bringing within its operation all the real

Republication.

estate to which the testator may be entitled at his decease, and making the will speak, in regard to the property comprised in it, from that period; the 34th section having expressly provided that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of the Act, be deemed to be made at the time at which the same shall be so re-executed, republished, or revived. See *Winter* v. *Winter*, 5 Hare, 306; *Andrews* v. *Turner*, 3 Q. B. 177; *Skinner* v. *Ogle*, 4 No. Cas. 74; *Anderson* v. *Anderson*, L. R. 13 Eq. 381.

Whether republication of will by codicil sets up intermediate codicils.

The republication of a will does not set up an intermediate codicil which is itself inoperative, unless such codicil is expressly referred to in the subsequent codicil: *Burton* v. *Newbery*, 1 Ch. D. 234. But a codicil confirming a will, confirms also all intermediate codicils which are themselves operative though not referred to: *Green* v. *Tribe*, 9 Ch. D. 231. But see *Re Reynolds*, L. R. 3 P. & D. 35.

See further as to republication by re-execution, or by codicil of a will revoked by marriage, or otherwise, *ante*, p. 411.

# CHAPTER VIII.

## RESTRAINTS ON THE TESTAMENTARY POWERS (*a*).


PAGE

1. RULE AGAINST PERPETUITIES.
   - *Statement and History of the Rule* ..... 420
   - *Case of* Cadell *v.* Palmer ... 422
   - *Executory Devises* ..... 424
   - *Remainders* ..... ..... 428
   - *Subsequent Events* ..... 430
   - *Alternative Gifts*..... 436
   - *Postponement of Possession*... 438
   - *Gifts to Unborn Persons for Life* ..... 440
   - *Powers of Appointment* ..... 441
   - *Doctrine of Cy près*..... 443
   - *Exceptions to the Rule* ..... 446

2. RESTRAINT ON THE ACCUMULATION OF INCOME.
   - *Operation of the Thellusson Act* ..... 447
   - *Destination of Income Illegally directed to be Accumulated* ..... 452
   - *Exemptions from the Operation of the Act* .... ..... 454


### 1. RULE AGAINST PERPETUITIES.

**Rule against Perpetuities.**

Rule against perpetuities explained.

THE rule against perpetuities is that rule of public policy which prohibits the suspending of the absolute ownership in real or personal estate beyond a certain period. The new modifications of estate consequential on the introduction of uses first drew attention to the necessity of imposing some restraint of this nature, though they did not wholly create that necessity; for if uses had never existed, some restriction would have been necessary on executory

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Charitable gifts.

(*a*) In addition to the restraints on the testamentary power discussed in the following pages, gifts to superstitious and charitable uses have been subjected to statutory enactments whereby the power of making such gifts has been defined and restricted. This subject has been already fully discussed, *ante*, sub tit. MORTMAIN, Vol. IV. p. 1, *et seq.*

As to the heir taking by devise.

There also formerly existed a restraint arising from the doctrine which precluded a testator from vesting in his heir an estate in fee-simple by purchase. By the effect of this doctrine, if a testator devised lands of inheritance to his heir apparent and his heirs, the devise was inoperative, and the heir took the fee by descent as his elder or paramount title; but the law on this subject has been completely altered by the Act of 3 & 4 Will. 4, c. 106, s. 3, stated *ante*, Vol. I. pp. 131, *et seq.*, which declares, that, where land is devised to the heir, he shall be considered to have acquired it as a devisee and not by descent.

Rule against Perpetuities.

and future interests in personal estate, analogous to that rule of the common law concerning remainders, which precluded (and still precludes) the limitation of lands to an unborn person for life, with remainder to his issue: *Somerville* v. *Lethbridge*, 6 T. R. 213; *Beard* v. *Westcott*, 5 Taunt. 393; *Hayes* v. *Hayes*, 4 Russ. 311; or, as it was sometimes expressed, the limiting of a possibility upon a possibility. For some time the Judges had no very distinct notions of the restrictions to be placed on springing uses and executory devises (*b*), of whose evil tendency, as promotive of perpetuities, they one and all expressed the utmost apprehension. A life in being was first reluctantly conceded, *Duke of Norfolk's Case*, 3 Ch. Cas. 1; but was soon perceived to involve the allowance of any number of co-existing lives, whose utmost measure of duration is only that of the life of the survivor: *Thellusson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112. It was then held, that a life or lives in being and *a little more* was allowable. Thus, where a testator devised to his wife for life; remainder to C., his second son, in fee; provided that if D., his third son, should, within three months after his (testator's) wife's decease, pay 500*l.* to C., his executors, &c., then he devised the same lands to D. and his heirs: this was held to be a good executory devise to D.: *Marks* v. *Marks*, 1 Stra. 179; *S. C.*, 10 Mod. 420; see Fea. C. R. 432. See also *Lloyd* v. *Carew*, Pre. Ch. 72; Show. P. C. 137;

Gradual establishment of the present rule.

A life and three months allowed.

(*b*) In the discussion in the text, it has been assumed that the reader is acquainted with the distinction between contingent remainders and executory devises, rendered familiar to every one by the admirable treatise of Mr. Fearne. The result of the elaborate definition of a remainder, contained in that work, is, that it is a limitation expectant on the expiration of a particular estate of freehold created by the same instrument. An executory devise is a devise of a future estate or interest, which cannot take effect as a remainder; or, in other words, of a future interest which is not to arise on the expiration of a precedent particular estate of freehold created by the same will. If there is no preceding estate of freehold, or if the future interest takes effect in derogation of such estate, or an interval *necessarily* occurs between the expiration of the one and the taking effect of the other, the future estate is executory.

Distinction between a remainder and an executory devise.

**Rule against Perpetuities.**

Fea. C. R. 432, where a period of one year after the survivor of two persons was allowed.

Gift to unborn person to vest at twenty-one.

It was next decided that an executory limitation to the unborn child of a living individual (and who must necessarily come in esse during a life in being and the period of gestation), to take effect at his or her majority, reaching, therefore, possibly to a period of a life and twenty-one years, and nine or ten months afterwards, was valid : *Stephens* v. *Stephens*, Cas. temp. Talbot, 228 ; see *Long* v. *Blackall*, 7 T. R. 100 ; *S. C.*, 3 Ves. 486.

Still, the preceding cases left it undecided whether the period which the rule allowed to be added to a life was merely the infancy of the object of the future limitation (as in *Stephens* v. *Stephens*), or was an absolute term of twenty-one years irrespective of such infancy. See *Thellusson* v. *Woodford*, 4 Ves. 477 ; *Beard* v. *Westcott*, 5 Taunt. 393 ; *S. C.*, 5 B. & Al. 801.

*Cadell* v. *Palmer.*

But this question was finally settled by the decision of the House of Lords in the leading case of *Cadell* v. *Palmer*, 10 Cl. & F. 372, in which case the following questions were submitted for the opinion of the Judges :—

Questions submitted to the Judges.

1. Whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or any other person.

2. Whether a limitation by way of executory devise is void as being too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards together with the number of months equal to the ordinary period of gestation ; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person born, or *en ventre sa mère.*

3. Whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards together with the number of months equal to the longest period of gestation ; but

the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère.* Rule against Perpetuities.

The unanimous opinion of the Judges was stated by *Bayley*, B., who, at the conclusion of his address to the House, said, "We consider ourselves warranted in saying, that the limit is a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon the authority of the dicta or text writers I have named; and it will not tie up the alienation an unreasonable length of time. Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère,* the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists." And this opinion was adopted by the House of Lords, thus laying down the rule that an executory devise is not too remote if twenty-one years is added beyond the existence of a life or lives in being, but that beyond that point any further time would be too remote. Opinion of the Judges.

On this subject Mr. Jarman has the following observations in his Treatise on Wills (Vol. I., p. 252) :—"A possible addition of the period of gestation to a life and twenty-one years occurs in the ordinary case of a devise or bequest to A. (a person of the male sex), for life, and after his death to such of his children as shall attain the age of twenty-one

**Rule against Perpetuities.**

years, or, indeed, in the case of a devise or bequest simply to the children of A. (a male), who shall attain majority, though not preceded by a life-interest; in either case A. may die, leaving a wife enceinte, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these supposititious cases, we add the circumstance that A., the parent, were (as of course he might be) an infant *en ventre sa mère* at the testator's decease, there would be gained a double period for gestation (namely), one at the commencement, and another at an intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child *en ventre sa mère* is considered as a life in being."

Executory devise to arise on an indefinite failure of issue void, unless engrafted on an estate tail.

To the test of this rule, the limits of which have been thus finally settled by the highest judicial authority, every gift of real and personal estate, created by will or otherwise, must be brought. The application of such test instantly shows, that an executory limitation in a deed or will, to arise on an indefinite failure of issue, must be void for remoteness: *Badger* v. *Lloyd*, 1 Salk. 232; *Moore* v. *Parker*, 1 Lord Raym. 37; *Lady Lanesborough* v. *Fox*, Forrest, 262; *Fisher* v. *Webster*, L. R. 14 Eq. 283 (but see stat. 1 Vict. c. 26, s. 29, as to the meaning of the words "failure of issue" in wills made since 1837); though it is to be observed, that, in this and all other cases, if the executory devise is limited in defeasance of or immediately following an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all defeating or posterior limitations, executory as well as vested, by means of a disentailing assurance duly enrolled, takes the case out of the mischief of, and consequently out of the rule against, perpetuities: *Gul-*

Rule against Perpetuities.

*liver* v. *Ashby*, 4 Burr. 1929; *Att.-Gen.* v. *Miller*, 3 Atk. 111; *Heaseman* v. *Pearse*, L. R. 7 Ch. 275. Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favour of another, in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and wear the arms of the testator; or in case another property should devolve to him or them, or on any other such event, this executory limitation, though it would have been clearly void if annexed to an estate in fee-simple, is good, as applied to an estate tail: *Nicholls* v. *Sheffield*, 2 Br. C. C. 215; *Carr* v. *Earl of Erroll*, 6 East, 58; *Earl of Scarborough* v. *Doe* d. *Saville*, 3 A. & E. 897.

Whether a remainder, which is destructible, can be void for remoteness.

The same reasoning might seem to apply, in some degree, to contingent remainders not rendered indestructible by an estate created for their preservation; but there does not appear to be any authority for the application of the doctrine to such cases. If, therefore, freehold lands, of which the legal inheritance is in the testator, were devised to A. for life, with remainder to his eldest son who should be living at his decease, for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease, although A. in his lifetime might (previous to the stat. 8 & 9 Vict. c. 106) have destroyed all the remainders, and the eldest son, after his decease, might have destroyed the ulterior remainder in fee devised to his children, without being, in the slightest degree, amenable either at law or in equity to the persons whose estates are thus destroyed, such remainder would, nevertheless, it is conceived, be void for remoteness, on the ground that the destruction in such cases being effected by what the law calls a tortious or wrongful act, it is not to be presumed that such a wrong will be committed. In the case of *Cole* v. *Sewell*, 4 Dru. & W. 1, the exemption of legal contingent remainders from the operation of the rule against perpetuities was emphatically asserted by Sir *E. Sugden*, for the reasons above suggested. In that case a settlement contained limitations to the use of the settlor's daughters for their lives as tenants in common with remainders as

Rule against Perpetuities.

to the share of each daughter to the use of her issue in tail, and the deed contained limitations over to take effect on a general failure of issue: Sir *E. Sugden* (then Chancellor of Ireland) held that the limitations in case of a general failure of issue were not void for remoteness. His lordship in his judgment said: "It is now perfectly settled that where a limitation is to take effect in remainder, remoteness is out of the question, for the given limitation is either a vested remainder—and then it matters not whether it ever vests in possession, because the previous estate may subsist for centuries or for all time—or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends, happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all." This decision was affirmed in the House of Lords (*S. C.*, 2 H. L. C. 186), but apparently on the ground that the remainder in question was barrable so long as it subsisted. See also *Jack* v. *Featherstone*, 2 Hods. & Br. 320; *Doe* d. *Winton* v. *Perratt*, 9 Cl. & F. 606; *Heasman* v. *Pearse*, L. R. 7 Ch. 275. The general question as to whether or not legal remainders are within the rule against perpetuities, whether such remainders are barrable or not, seems still open to discussion, and has given rise to much conflict of opinion. The Real Property Commissioners appear to have thought that the rule is not applicable to such limitations: 3 R. P. Com. Rep. 29. And the same view has been taken by Sir *W. P. Wood*, in *Cattlin* v. *Brown*, 11 Hare, at p. 377; by Mr. *Joshua Williams*, in Will. R. Prop. 14th ed. 288; by Mr. *Tudor*, in the notes to *Cadell* v. *Palmer*, Tud. L. C. Conv. pp. 366 *et seq.* The contrary view is maintained by Mr. *Fearne*, C. R. 501; by Mr. *Jarman* (though not by his editors): see Jarm. Wills, p. 258: and see App. A. See also Theob. Wills, pp. 425 *et seq.*

Terms of years, trusts of, when void.

A term of years limited by way of remainder upon an estate tail, to take effect upon a failure of issue of persons taking under the entail is not too remote, as it may be barred by the tenant in tail: *Morde* v. *Lord Ormonde*, 5 Madd. 99; *S. C.* aff. on appeal, 1 Russ. 382. See also *Eales* v. *Conn*, 4 Sim.

65; *Faulkner* v. *Daniel*, 3 Hare, 199; *Bristow* v. *Boothby*, 2 S. & St. 465. But if the trusts of a term, which is precedent to the estate tail, and consequently cannot be defeated by the acts of the tenant in tail (see Co. Litt. 203, b. n. 1, sect. 4; *Eales* v. *Conn*, 4 Sim. 65; and *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 A. & E. 16, 17), are not to arise until the failure of issue under the entail, those trusts are necessarily void. Thus, in *Case* v. *Drosier*, 2 Kee. 764 (affirmed, 5 M. & Cr. 246; 3 Jur. 1164), where a testator devised two estates to trustees for 500 years, and, subject thereto, he then devised one estate to A., for life, with remainder to his sons and daughters in tail in strict settlement, in the usual manner, with remainder to B. and his sons and daughters, in like manner. He then devised the other estate in a similar manner *mutatis mutandis*. The testator declared the trusts of the term of 500 years to be for the purpose (among others) of raising portions for two granddaughters, payable at twenty-one or marriage, and further portions in case either A. or B. should die without issue. Lord *Langdale* said: "The strong inclination of my opinion is, that he meant such issue as he had described in the former limitations; but whether so or not, he has directed the sums to be raised on failure of that issue. It might be at a very remote period, and there are no means by which the charges, in this case, could be barred; they depend on a term, and that term is precedent to the estates tail, so that after a recovery there would remain a term and a trust to be performed: a trust which could not be defeated, and a term which cannot be destroyed." See *Browne* v. *Stoughton*, 14 Sim. 369; *Sykes* v. *Sykes*, L. R. 13 Eq. 56.

Rule against Perpetuities.

It must be borne in mind that the stat. 8 & 9 Vict. c. 106, sect. 8, by protecting contingent remainders against the premature failure, by forfeiture, surrender, or merger of a preceding estate, has deprived of its force the argument in favour of the validity of such limitations on the ground of their destructibility. But in other respects the question whether a contingent remainder limited on a remote

8 & 9 Vict. c. 106.

**Rule against Perpetuities.**

contingency is void does not seem to be affected by that Act, nor by the stat. 40 & 41 Vict. c. 33, which enacts as follows :—

40 & 41 Vict. c. 33.

"Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder, vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

As to equitable remainders.

Equitable remainders are not in strictness remainders at all, but of the nature of executory interests, which, as has been seen (*ante*, p. 424), are within the ordinary rule against perpetuities. An equitable contingent remainder, which may not take effect within the permitted limits, will not be rendered valid by reason of the contingency actually happening during the continuance of the particular estate : *Re Finch*, 28 W. R. 903 ; 29 W. R. 449 ; and see *post*, p. 430.

Most frequently occurring cases of remote gifts.

The most frequent instances of gifts rendered void by their transgressing the rule against perpetuities, occur in devises or bequests to classes comprising either individuals who are not *in esse* at the death of the testator, and the vesting of whose shares is postponed beyond majority, or persons who do not necessarily come into existence, if at all, during a life in being and twenty-one years afterwards.

Gift to an unborn class, to vest after majority.

An example of the former is furnished by the common case of a gift to a person for life, and after his decease to his or her children who reach an age subsequent to majority ; which, as it would, if allowed, have let in objects born after the death of the testator, and the vesting of whose shares might be postponed for more than twenty-one years after the decease of the tenant for life, is (unless in the excepted case presently noticed) necessarily void for remoteness. The books are replete with cases of

Rule against Perpetuities.

vacated gifts of this nature. See *Dodd* v. *Wake*, 8 Sim. 616; *Newman* v. *Newman*, 10 Sim. 51; *Vawsley* v. *Geddes*, 1 R. & My. 203; *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Russ. 213; *Boughton* v. *James*, 1 H. L. C. 406; *Pickford* v. *Barr*, 2 K. & J. 426; *Griffith* v. *Blunt*, 4 Beav. 264; *Southern* v. *Wollaston*, 16 Beav. 166; *Merlin* v. *Blagrave*, 25 Beav. 125; *Reed* v. *Gooding*, 4 De G. M. & G. 510; *Rowland* v. *Tierney*, 26 Beav. 67; *Smith* v. *Smith*, L. R. 5 Ch. 342; *Abbiss* v. *Burney*, 17 Ch. D. 211. If, however, the class must be finally ascertained within the legal limit of time, the gift is good: *Picken* v. *Matthews*, 10 Ch. D. 264.

Distinction in regard to remainders.

It is proper to remark, that, in the class of cases under consideration, a limitation which would, as an executory devise, be void for remoteness, may be good as a contingent remainder, on account of the necessity which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life, which being limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper limits. Thus, if lands of which the testator had the legal inheritance, were devised to A., for life, with remainder to his children in fee, who should attain the age of twenty-two, the devise would be good, because, if, at the decease of A., no child had attained the vesting age, the remainder would fail, under the doctrine in question. See Fea. C. R. 4; see also *Festing* v. *Allen*, 12 M. & W. 279; *Alexander* v. *Alexander*, 16 C. B. 59. And if any child has attained that age at the death of the tenant for life, such child will be entitled to the estate to the exclusion of any children afterwards attaining that age: *Brackenbury* v. *Gibbons*, 2 Ch. D. 417.

Effect of postponement for more than twenty-one years without a life.

Where the vesting of a gift to unborn persons is postponed for a fixed term exceeding twenty-one years, though not preceded by a life, the gift is necessarily avoided. Thus, where a testator bequeathed Bank Stock upon trust to accumulate, and to transfer the accumulated fund unto all and every the child and children of his son C., who should be

Rule against Perpetuities.

living at the expiration of twenty-eight years, to be computed from the testator's decease, except an eldest or only son; and, in case no such child should then be living, then to the children then living of J. S., another son, with remainders over—Sir *J. Leach*, M.R., said, "The expressed intention of the testator is, that all the children of his son C., other than an eldest son, should take, who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children, who were unborn at the death of the testator, would have been suspended for more than twenty-one years, and the gift, therefore, is too remote, and void; and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also:" *Palmer* v. *Holford*, 4 Russ. 403. See *Speakman* v. *Speakman*, 8 Hare, 180.

The principle of this case clearly would apply where any, the most inconsiderable, addition was made to the term of twenty-one years; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years. It is clear, therefore, that a devise to such of the grandchildren of the testator as should be living at the expiration of twenty-one years and *a day* from the testator's decease, would be void.

In determining the validity of a set of limitations the will must be applied to the facts of the particular case, as they stood at the death of the testator, and not as they stood at the date of the will: *Vanderplank* v. *King*, 3 Hare, 17; see *Williams* v. *Teale*, 6 Hare, 251; *Cattlin* v. *Brown*, 11 Hare, 382; *Peara* v. *Kekewich*, 15 Beav. 173; *Southern* v. *Wollaston*, 16 Beav. 166, 276; *Hale* v. *Hale*, 3 Ch. D. 643.

Gifts originally void not validated by subsequent events.

But possible not merely actual events must be regarded. Thus, where a devise or bequest to a class, according to the state of circumstances existing at the death of the testator, may happen to comprehend objects who are beyond the legal boundary, the fact that it does not eventually comprise *some*

Rule against Perpetuities.

of such objects, will not render it valid *quoad* those objects: *Leake* v. *Robinson*, 2 Mer. 363. In that case (stated *post*, p. 437) the principle governing the distinction between gifts to individuals and gifts to classes was expressed by Sir *W. Grant*, M. R., with admirable clearness and brevity:—"To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz., a series of particular legacies to particular individuals, or, what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death." See also *Hale* v. *Hale*, 3 Ch. D. 643; *Pearks* v. *Moseley*, 5 App. Ca. 714; *Blight* v. *Hartnoll*, 19 Ch. D. 294.

And even if *all* the individuals actually composing the class are within the line, this fact will not render the gift valid: *Jee* v. *Audley*, 1 Cox, 324. Thus, if a sum of money were bequeathed to A. for life, and, after his decease, to his children who should attain the age of twenty-two years, though all the children of A. happen to be born in the lifetime of the testator, and therefore might have taken under a gift confined to children so born, and attaining the prescribed age of twenty-two years, yet, as their claim must be made as members of a class which is too remote, their individual competency can avail nothing. See *Harris* v. *Davis*, 1 Coll. 424. And where the testator had combined with the remote class, a living person, in such a manner as to constitute him a member of the class, *Shadwell*, V.-C., said:—"If the whole of the testator's intention cannot prevail, effect cannot be given to any part of it. It would be inconsistent with that in-

**Rule against Perpetuities.**

tention to allow T. O. to take a third share of the fund; for the testator meant each person's share to be determined by the number of the class, consisting of his grandchildren and T. O., who should be living when the first attained twenty-five: *Porter* v. *Fox*, 6 Sim. 485. For the purpose of determining whether or not a gift is void for remoteness, it has been held in several cases, that evidence is not admissible to show that at the date of the will a woman was past the age of child-bearing: *Re Sayers' Trusts*, L. R. 6 Eq. 319. See also *Jee* v. *Audley*, 1 Cox, 324; *Re Dawson*, W. N. 1888, p. 147. But see *contra*, *Cooper* v. *Laroche*, 17 Ch. D. 368.

As to the application of the doctrine (that the validity of a gift is to be tried by possible not actual events) to individuals, see *Porter* v. *Fox*, 6 Sim. 485; *Griffiths* v. *Pownall*, 13 Sim. 393; *James* v. *Lord Wynford*, 1 Sm. & Gif. 58; *Storrs* v. *Benbow*, 3 De G. M. & G. 390; *Greenwood* v. *Roberts*, 15 Beav. 92; *Cattlin* v. *Brown*, 11 Hare, 372; *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; *Webster* v. *Boddington*, 26 Beav. 136; *Wilkinson* v. *Duncan*, 30 Beav. 111; *Re Merrick's Trusts*, L. R. 1 Eq. 551; *Floyer* v. *Banks*, L. R. 8 Eq. 115; *Smith* v. *Smith*, L. R. 5 Ch. 342; *Bentinck* v. *Duke of Portland*, 7 Ch. D. 693. See as to the distinction between provisions by a testator for his own grandchildren and those for the grandchildren of another, Jarm. Wills, 276 *et seq.*

**Gifts may be moulded according to subsequent events.**

Gifts, however, may be so framed as to be valid or not, according to events, bringing them within, or placing them beyond, the allowed line. An example of such a devise is afforded by a case in the House of Lords, where a testator, after devising lands (subject to certain terms for years, which he created for the purposes thereinafter mentioned), to A. for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A. in tail general, with remainders over, directed that when a certain sum of money should be raised out of the rents of his lands, under a term of sixty years (*c*), the same should be settled to the use for

(*c*) This was prior to the stat. 40 Geo. 3, c. 98, *post*, p. 448.

Rule against Perpetuities.

life of the person who happened then to be entitled in possession under the limitations in his will, with remainder to his issue in strict settlement (*d*). When the time arrived for laying out the money, it happened that the person entitled in possession under the limitations in question was not *in esse* at the testator's death, and therefore could not be made tenant for life, with remainder to his issue; so that the trusts for laying out the money had failed *in event: Tregonwell* v. *Sydenham*, 3 Dow, 194. The grounds on which Lord *Eldon* rested the decision of the House in this case conclusively show, that if the person entitled in possession had been a person *in esse* at the testator's death, the trust for laying out the money would have been legal: so that the case affords an exact illustration of the doctrine in question.

Case of *Lord Deerhurst* v. *Duke of St. Albans*.

In the case of *Lord Deerhurst* v. *Duke of St. Albans*, 5 Madd. 232, the testator, Lord Vere, gave certain furniture, plate, and other articles, to trustees, upon trust that his wife should have the use of them for her life, and then for the use of his son for his life, and, after the death of the survivor of his wife and son, upon trust for such person as should from time to time be Lord Vere, it being his will that the said furniture, &c., should, after the death of his wife, be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. At the death of the testator, the title of Lord Vere descended upon his son, the legatee for life, upon whose decease it descended to his son, the testator's grandson, who was living at the death of the testator, and, upon the death of the grandson, it descended to his son, the testator's great-grandson, who was born after the death of the testator. The principal question was, whether the personal representatives of the grandson or those of the great-grandson were the parties entitled. "As the former," observes Mr. Jarman (1 Treat. on Wills, 277), "was born in the testator's lifetime, it was clear, that he *might* have been made legatee for life,

(*d*) This was the effect, though not the precise language.

Rule against Perpetuities.

with remainder absolutely to the person next in succession; and the question, therefore, was, whether the will authorised such a construction." *Leach*, V.-C., before whom the case was originally brought, decided in the affirmative.

The case was then brought by appeal successively before Lords *Eldon* and *Lyndhurst*, the latter of whom affirmed the judgment of the Vice-Chancellor; but the decree of the Court below was eventually reversed, after an elaborate argument in the House of Lords. The Lord Chancellor (Lord *Brougham*), after shortly commenting on those authorities in particular which had been cited, and which might be thought to cast light upon the case, thus proceeded: "It is admitted, that, in the events which have happened, the end would not have been attained by the testator's vesting the interest in Duke William, and even in a succeeding Lord Vere, but with a qualification to determine all interest on events happening within the limits of the rule: or it might have been effected by annexing the gift to the limitations of the land, and directing that the chattels should go in the same course of limitation. But to annex personal chattels to a title of honour is equally difficult upon any view of the nature of the estate in a dignity, whether it is to be considered as a succession of inheritances, and whether in fee or in tail, even if it is in each individual an estate only for life, a subject cannot engraft on such an estate, by way of limitation, estates for lives in perpetual succession, so as to make each of them a purchaser. If he attempts to create a fee tail in chattels, the interest vests absolutely in the first quasi donee in tail. It is a new species of investiture or limitation of estate unknown to the law, treating the Lords Vere as a species of corporation sole, to whom the estate is to be limited. The person who secondly, after the death of the testator, became Lord Vere (the grandson) was *in esse* at the date of the will; but whether he would take, or whether he would ever be Lord Vere, was at the time uncertain. The next life estate after those named in the will was not to the person by name, but to the Lord

Rule against Perpetuities.

Vere, whoever he might be. It was an attempt to create a new species of limitation in succession to spring up with the person, contrary to all rule and analogy for restricting the period of tying up or deferring the vesting of estates in fee or absolutely. Being or coming into *esse* is a notion familiar to the law. But a peer does not, in a legal sense, come into existence. It was argued for the respondent, that it was the same thing as limiting to the son and grandson and great-grandson successively, because they must succeed to the inheritances of the dignity in this order. But that view is not quite accurate; for it was not certain that either of them would be Lord Vere. Upon a barony in fee, by writ of summons or creation, the first taker might have a son, and that son might have only two daughters; what person would then take the title? It would be in abeyance; and until the Crown should please to select one of them to hold the dignity, it would remain in abeyance, and there might be no peer during the lives of the two coheiresses. In the case put of an abeyance of the title, the Crown might not select either or any of the daughters; and, in that case, the title might remain in abeyance for a century; and such an event would demonstrate that the limitation is not partially, but altogether void. It is said that the case has not happened; but the soundness of the limitation cannot depend upon contingencies which may cause it to be good or bad, according to the event: *S. C.* sub nom. *Tollemache* v. *Earl of Coventry*, 8 Bli. (N. S.) 547.

Directions, &c., tending to perpetuities.

The following are instances of directions, gifts, &c., held to be void as tending to create perpetuities.

Restraint on alienation beyond legal limits.

A restriction on alienation extending beyond the limits allowed by the rule against perpetuities is void for remoteness. Where a testatrix having under her marriage settlement power to appoint among the children of the marriage appointed a share of the settled funds to the separate use of a daughter without power of anticipation, it was held, by an application of the doctrine of *cy près* (as to which, see

**Rule against Perpetuities.**

*post*, p. 443), that the appointment was valid, discharged from the restraint on anticipation which was too remote and therefore ineffectual: *Re Teague's Settlement*, L. R. 10 Eq. 564; see *Re Cunynghame's Settlement*, L. R. 11 Eq. 324; *Re Ridley*, 11 Ch. D. 645.

Directions as to leases at fixed rents.

A direction that lands devised by the testator shall be leased in perpetuity to his kindred at a fixed rent is void: *Att.-Gen.* v. *Greenhill*, 33 Beav. 193. So also a covenant in a deed of grant that on the expiration of a then subsisting term of 99 years in a farm, part of the hereditaments granted, the grantees should, on the request of the heirs of the body of a person named in the grant, being kindred of the grantor, make a new lease of the farm at a fixed rent was held to be invalid as creating a perpetuity: *Hope* v. *Mayor, &c., of Gloucester*, 7 De G. M. & G. 647. So where an estate was devised for charitable purposes, with a direction that the rents should for ever continue the same as at the death of the testatrix, it was held that the direction was void, but that the charity took under the devise discharged from the direction: *Att.-Gen.* v. *St. Catherine's Hall, Cambridge*, Jac. 382.

Gifts to institutions, &c.

Where a gift to an institution, not being charitable, is in such terms as to make the subject of it an accession to the permanent property of the institution, then there is a tendency to a perpetuity and the gift is void: see *Carne* v. *Long*, 2 De G. F. & J. 75; *Neo* v. *Neo*, L. R. 6 P. C. 381; *Re Clark's Trust*, 1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54.

Gift alternative to one too remote, also void.

Where an executory gift is made in favour of too remote an object, an alternative gift, which is to arise simply in default of such object, will be also void, although the failure of the object of the prior gift occurs under circumstances which would have admitted of a valid gift over being limited. Thus, where a testator devised to the first or other son of Thomas Proctor that should be bred a clergyman, *and be in holy orders*, and to his heirs and assigns; *but if the said T. P. should have no such son*, then to T. M., his heirs and assigns. T. P. died without ever having had *any* son. As by the canons of the

Rule against Perpetuities.

church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the least. The Court of Common Pleas, therefore, held the first devise to be void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect: *Proctor* v. *Bishop of Bath and Wells*, 2 Hen. Bla. 358. See also *Robinson* v. *Hardcastle*, 2 B. C. C. 22; 2 T. R. 241, 371, 380; *Cambridge* v. *Rous*, 8 Ves. 12; *Beard* v. *Westcott*, 5 B. & Al. 801.

Distinction where the second gift is to arise on a collateral event.

Care should be taken, however, to distinguish between the cases just mentioned and those in which the second or substituted devise is not simply alternative to the first, but is made to arise also on some collateral event: or is to arise on an alternative event, one branch of which is within, and the other is not within the prescribed limits, so that the gift over will be valid, or not, according to the event. An instance of this species of limitation is afforded by the case of *Leake* v. *Robinson*, 2 Mer. 363, where certain stock and monies were bequeathed to A. for life, and after his decease to the child or children of A., who, being a son or sons, should attain the age of twenty-five, or, being a daughter or daughters, attain that age or be married with consent; and in case A. should die *without leaving issue living at the time of his decease*, or, *leaving such, they should all die before any of them should attain twenty-five*, if sons, and, if daughters, before they should attain such age or be so married, then over. A. died without leaving issue, and it was not contended, that, *in the events which had happened*, the bequest over was void on any other ground than that of the remoteness of the objects of the ulterior bequest, who were a class of persons possibly unborn at the death of the testator, and whose shares did not vest until the age of twenty-five. See also *Longhead* v. *Phelps*, 2 W. Bl. 704; *Cambridge* v. *Rous*, 8 Ves. 12; *Goring* v

Rule against Perpetuities.

*Howard*, 16 Sim. 395; *Monypenny* v. *Dering*, 2 De G. M. & G. 145; *Hodgson* v. *Halford*, 11 Ch. D. 959; *Miles* v. *Harford*, 12 Ch. D. at p. 703; *Watson* v. *Young*, 28 Ch. D. 436.

Where alternative limitations are separate and distinct in their nature the devise which is substituted or which is to arise on the alternative event will be good, although the limitations be included in one clause which includes and applies equally to all the limitations, some being legal and others illegal: see *Doe* v. *Challis*, 18 Q. B. 224.

Clause empowering trustees to protract the absolute ownership, void.

As the law does not permit to be done indirectly what cannot be done directly, the rule which forbids the limitation of real or personal estate to an unborn person for life, with remainder (*e*) to his issue, equally invalidates a clause in a settlement or will, empowering trustees, on the birth of tenants in tail, to revoke the uses and limit estates for life to such objects, who could not, by the rule under discussion, have been made tenants for life: *Duke of Marlborough* v. *Earl of Godolphin*, 1 Ed. 404.

Effect of possession only being too remote.

The circumstance of the *possession* being postponed beyond the limits prescribed for the *vesting* of estates, does not affect the validity of the gift, the only effect of the application of the doctrine in question being to accelerate the possession. Thus, where lands were devised to trustees and their heirs, in trust for A. for life, remainder in trust for B. for life, remainder unto and amongst all and every the issue, child, and children of B. as should be living at the time of the decease of the survivor of A. and B., to be divided share and share alike, *when and as they should respectively attain the age of twenty-four years*, and to their respective heirs, &c.; and if only one, then the whole to such only or surviving child, in fee, *upon attaining the said age*. It was contended, that the gift to children was too remote; but the Court of Common Pleas certified that the children living at the death of the survivor took "equitable

(*e*) The application of this term to personalty is convenient but not accurate, being strictly applicable only to real estate.

estates in fee": *Farmer* v. *Francis*, 9 Moo. 310; 3 Bing. 151. See also *Murray* v. *Addenbrook*, 4 Russ. 407; *Greet* v. *Greet*, 5 Beav. 123; *Harrison* v. *Grimwood*, 12 Beav. 192; *Gosling* v. *Gosling*, Johns. 265. **Rule against Perpetuities.**

Testators frequently attempt to give property to unborn persons for life, with remainder to their issue. Such limitations are clearly bad, so far, at least, as respects the issue of the unborn persons; but there is no reason, upon principle, for invalidating the gift to the legatees for life; for it would be absurd to hold that though the testator might have given absolute interests to such persons, yet he might not give partial interests to the same persons. The remoteness consists not in the nature of the interest attempted to be given, but in the nature of the objects, namely, the issue of unborn persons, which, not necessarily coming into existence within a life in being and twenty-one years, are clearly too remote. Thus, if a testator devise lands to his son A. for life, with remainder to the children of A. for life, with remainder to the children of such children in fee, the last limitation would unquestionably be void; but the prior devises to the testator's son and his children would be valid, and the reversion in fee subject to those devises, and that only, would descend to the testator's heir-at-law, as real estate undisposed of. So, if personal estate were bequeathed in a similar manner, the gifts to A. and his children successively for life would be good, and the ulterior interest, and that only, would devolve to the next of kin. Whether property can be given to unborn persons for life.

The case of *Cotton* v. *Heath*, 1 Roll. Ab. 612, pl. 3, is a direct authority for this doctrine. A testator bequeathed a term for years to his wife for eighteen years, and then to B. his eldest son for life, and then to the eldest issue male of the son *for life*. Although B. had no issue male at the time of the devise and of the death of the testator, it was said, that, if he had issue male before his (the son's) death, such issue should take by way of executory devise: see also *Duke of Marlborough* v. *Godolphin*, 1 Ed. 415; *Doe* d. *Liversage* v. *Vaughan*, 5 B. & Al. 464; *Ashley* v. *Ashley*, 6 Sim. 358; *Hay* v. *Earl of Coventry*, 3 Devise to unborn person for life held to be valid.

**Rule against Perpetuities.**

T. R. 83; *Foster* v. *Romney*, 11 East, 594; *Burley* v. *Evelyn*, 16 Sim. 290; *Avern* v. *Lloyd*, L. R. 5 Eq. 283; *Stuart* v. *Cockerell*, L. R. 5 Ch. 713; *Hampton* v. *Holman*, 5 Ch. D. 183 (*f*).

Remainders after life interests given to unborn persons.

After a gift of a life interest to an unborn person the absolute interest may be given to any person living at the time of the testator's death, or capable of being ascertained within the limits of perpetuity: *Evans* v. *Walker*, 3 Ch. D. 211; *Re Roberts*, 19 Ch. D. 520.

Appointee under a special power must be competent to take immediately from the donor of the power.

And here it may be observed that, in the case of appointments, testamentary or otherwise, in pursuance of powers of selection or distribution among defined classes of objects, the appointees must be persons competent to have taken immediately under the deed or will creating the power as they are *in* under that deed: *Crompe* v. *Barrow*, 4 Ves. 681; *Robinson* v. *Hardcastle*, 2 T. R. 240, 380, 781. The power must be read as inserted in the deed or will creating it. Attention is often called to this doctrine in practice; for it frequently occurs, that a power having been reserved by a settlement to one or both of the marrying parties, to appoint an estate or fund among the issue generally of the marriage, the donee wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot be done; for, as the grandchildren of the marrying persons could not have been made objects of gift immediately under the limitations of the settlement, since they do not (as in the instance of children) necessarily come *in esse* during the lives of any of the parties then in being, they cannot take under the appointment founded on such settlement: *Bristowe* v. *Ward*, 2 Ves. jun. 336; *Crompe* v. *Barrow*, 4 Id. 681. See also *Robinson* v.

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(*f*) In *Hayes* v. *Hayes*, 4 Russ. 311, it was laid down by *Leach*, M. R., that a limitation of a life estate to an unborn person is void, unless the remainder vests in interest at the same time: but this decision was overruled in *Ashley* v. *Ashley*, *supra*, and is contrary alike to sound principle and authority. See the remarks of *Jessel*, M. R., on the case of *Hayes* v. *Hayes*, in 5 Ch. D. at p. 118.

Rule against Perpetuities.

*Hardcastle*, 2 T. R. 241, 380, 781; *Wollaston* v. *King*, L. R. 8 Eq. 165; *Morgan* v. *Gronow*, L. R. 16 Eq. 1; *Re Brown and Sibley*, 3 Ch. D. 156; *Hodgson* v. *Halford*, 11 Ch. D. 959. In order to bring the appointment within the prescribed limits, it must be confined to such issue as shall be born in the lifetime of the marrying parties or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as in the case of *Cadell* v. *Palmer*) of twenty-one years afterwards, unless the vesting is postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the vesting of the shares must not be postponed beyond the decease of the surviving parent and the attainment of majority, or a period of twenty-one years after such decease. The fact that a power purports to authorise an appointment which would be void for remoteness, will not invalidate an exercise of the power, if the appointment does not transgress the legal limit: *Slack* v. *Dakyns*, L. R. 10 Ch. D. 35. Where, however, an appointment is made under a general power exercisable either by deed or will, or by will only, the rule against perpetuities will run not from the date of the instrument creating the power, but from the date of the deed of appointment, or of the death of the appointing testator, as the case may be: *Rouse* v. *Jackson*, 29 Ch. D. 521; *Re Flower*, 53 L. T. 717; 34 W. R. 149. See suggestions as to settlement of shares appointed under power of selection, 1 Jarm. Wills, 289, n. (*b*).

As to appointees under general powers.

Where a power authorises an appointment to issue only who are born within the prescribed limit, an appointment to a more extensive range of issue would be good *pro tanto*, though made to them as a class; for, as the issue who are beyond the line are also strangers to the power, the instrument would be simply nugatory as to the shares expressed to be appointed to them. But in the case of a power embracing issue generally, and the appointment being confined to issue within the line, there can be no doubt (assuming that the power authorises an exclusive appointment to such objects) that the

Effect of power and appointment, or one of them, embracing too wide a range of objects.

Rule against Perpetuities.

appointment would be good: *Attenborough* v. *Attenborough*, 1 K. & J. 296. But if the power and appointment *both* embrace too wide a range of objects (the appointment being made to them as a class), the appointment will be void *in toto*, as well as to members of the class who are within, as to those who are not within the line: *Routledge* v. *Dorril*, 2 Ves. jun. 357; *Thomas* v. *Thomas*, 14 Sim. 234. It may be observed that a limitation giving to an unborn child a power of appointment which is testamentary only is void. So where a testatrix having by her marriage settlement power to appoint a fund in favour of the children of her marriage appointed a part of the fund to a son for life with remainder to such persons as he should by will appoint, it was held that this limitation was void for remoteness, as its operation would be to tie up the property and render it incapable of disposition during the life of the son, a person not *in esse* at the date of the settlement: *Wollaston* v. *King*, L. R. 8 Eq. 165; see *Morgan* v. *Gronow*, L. R. 16 Eq. 1. But the limitation of a power to appoint by *deed or will* would be good, as conferring an absolute power of disposition on the donee: see *Falkner* v. *Button*, Amb. 514; *Bray* v. *Brea*, 2 Cl. & F. 453; *Phipson* v. *Turner*, 9 Sim. 227; *Slack* v. *Dakyns*, L. R. 10 Ch. 35.

Validity of an unlimited power of sale.

It has now been decided in several cases, that a power of sale introduced into a deed or will containing limitations in strict settlement, and which is not in terms restricted in its exercise to the period allowed by law, is valid, inasmuch as such a power does not prevent but rather facilitates alienation: see *Biddle* v. *Perkins*, 4 Sim. 135; *Powis* v. *Copson*, ib. 138, n.; *Wallis* v. *Freestone*, 10 Sim. 225; *Waring* v. *Coventry*, 1 My. & K. 259; *Cole* v. *Sewell*, 4 D. & W. 32; *Lantsbury* v. *Collier*, 2 K. & J. 709.

Gift over of property given to charity.

On the same principle it has been held that a gift over, in however remote an event, of property given to a charity is good, as its effect is to render the property alienable again: *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460. See *Re Randall*, 38 Ch. D. 213.

Construction

It is clear, that, in order to render a gift to a class

Rule against Perpetuities.

of persons valid, the class will not be narrowed to a more limited range of objects than the gift, according to the general rules of construction, would comprise; for though it is highly probable in such cases that the testator, if asked, would have preferred to cut down his bequest, in order to bring it within valid limits, yet, as he has intimated no such intention, a judge is not warranted in acting upon such an hypothesis: see *Cattlin* v. *Browne*, 11 Hare, 279; *Heasman* v. *Pearse*, L. R. 7 Ch. at p. 283. But this doctrine has not been always inflexibly adhered to, and the Courts, in their desire to give as far as possible effect to the dispositions made by testators, have established a rule that where a testator by his will gives property absolutely in favour of unborn persons, and then by a codicil revokes the gift and in lieu thereof directs that the property shall be settled on the same persons for their lives with remainder to their children, the codicil will be treated as a nullity, and the bequest will take effect according to the will as originally framed: *Arnold* v. *Congreve*, 1 R. & My. 209. And on the same principle, where a will contains an absolute gift with a subsequent proviso qualifying the gift and introducing limitations which would be void for remoteness, the qualifying clauses will be rejected, notwithstanding the general rule of construction whereby the last of two inconsistent clauses in a will is to be upheld: *Carver* v. *Bowles*, 2 R. & My. 306; *Kampf* v. *Jones*, 2 Kee. 756; *Ring* v. *Hardwick*, 2 Beav. 352; and see Jarm. Wills, Vol. I., pp. 295 *et seq.*, where these cases are stated and considered. See also *Church* v. *Kemble*, 5 Sim. 525; *Blacket* v. *Lamb*, 14 Beav. 482; *Harvey* v. *Stracey*, 1 Drew. 73; *Fry* v. *Capper*, 163; *Stephens* v. *Gadsden*, 20 Beav. 463; *Re Lord Sondes' Will*, 2 Sm. & Gif. 416.

not strained in order to bring a gift within legal limits.

Doctrine of *cy près*.

The doctrine of approximation, or *cy près*, as it is called, is that which obtains in certain cases where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail. As such limitations are clearly incapable of taking effect, the remainder to the issue being absolutely void, the doctrine, in order to prevent the

Rule against Perpetuities.

total frustration of the intention in favour of the issue, gives to the parent the estate tail, which was designed for the issue; under which estate tail, unless barred by some act on the part of the parent, the lands will descend to the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue is considered as paramount to that which regulates the manner of their taking, and the latter is therefore sacrificed. The first unexceptionable (*g*) authority for the doctrine is the case of *Nicholl* v. *Nicholl*, 2 Bl. 1759, where the devise was "to the second son of W. Nicholl (*who at the death of the testator had no son*) *for his life*, and after his death, or in case he should inherit the paternal estate by the death of his brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively in tail male, remainder over." The Court of Common Pleas, on a case sent from Chancery, certified that the estate would vest in the second son by executory devise; and in order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate. See the observations of *Rolfe*, B., on this case, 16 M. & W. 434.

Unborn tenant for life made tenant in tail under the *cy près* doctrine.

So, in *Robinson* v. *Hardcastle*, 2 T. R. 241, 380,

(*g*) The case of *Humbertson* v. *Humbertson*, 1 P. Wms. 332, has usually been considered as a leading authority for the doctrine. A testator directed trustees to convey lands to M. H. for life, and then to his first son for life, and so to the first son of that first son for life, &c. This trust was executed by a strict settlement, making the sons born before the death of the testator tenants for life, and those born afterwards tenants in tail. The trust, however, being executory, the Court was authorised to mould the limitations so as to bring them within the established limits, independently of the doctrine in question. The case of *Chapman* d. *Oliver* v. *Brown*, 3 Burr. 1626 (*S. C.* in Dom. Proc. 3 B. C. C. Toml. ed. 269), cited by Mr. Butler, Butl. Fea. C. R. 237, n., is also distinguishable (though the doctrine underwent discussion), as there was an express devise in tail to the unborn son, the only question being, whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby render the devise void. This was refused, and, consequently, the devise was held to be good.

781, where, on the marriage of A. and B., lands were limited to A. for life, remainder to such of the children of the marriage as A. should appoint, and in default, over; A. by will appointed to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such son successively in tail male, with remainder to his daughters as tenants in common in tail. Mr. Justice *Buller* expressed an opinion that the son, by the application of the *cy près* doctrine, took an estate tail; but the Court was not called upon to decide the point. See *Hopkins* v. *Hopkins*, Cas. temp. Talb. 44; 1 Atk. 580; Co. Litt. 271, b. Butl. n., *S. C.* See also *Parfitt* v. *Hember*, L. R. 4 Eq. 443.

Rule against Perpetuities.

The case which has carried this doctrine the greatest length is *Pitt* v. *Jackson*, 2 Br. C. C. 51; cited 2 Ves. jun. 349; which was as follows:—On the marriage of Pinckney Wilkinson, certain monies to be paid by him were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage in tail, subject to such powers, limitations, and provisoes as P. W. by deed or will should appoint, with remainders over. By will he bequeathed certain sums of money in trust to be laid out in real estate, to be conveyed in trust for his daughter Mary, during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter*, with remainders over. *Kenyon*, M. R., declared the appointment to be invalid, and that the whole of the share appointed to the daughter for her separate use was, to effectuate the testator's general intention, to be considered to vest in her an estate tail.

Case of *Pitt* v. *Jackson*.

This case went beyond the preceding decisions, because the manner in which the children were intended to have taken the estate under the appointment differed more considerably from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In those cases, the first and

Remarks on the case of *Pitt* v. *Jackson*.

Rule against Perpetuities.

other sons were to take successively; *here*, all the children, female as well as male, were to take concurrently. The authority of *Pitt* v. *Jackson* has been often questioned; even the eminent Judge who decided it, on a subsequent occasion (1 East, 451), admitted that the case went to the outside of the rules of construction: adding, however, that still he did not think it was wrong. Lord *Eldon*, in quoting this observation (7 Ves. 390), intimated that it was not proper to go one step farther; for those cases, in order to serve the general intent and the particular intent, destroyed both. The decision in *Pitt* v. *Jackson* was, however, followed by *Wigram*, V.-C., under similar circumstances, in *Vanderplank* v. *King*, 3 Hare, 1, and it was expressly approved by Lord *St. Leonards* in *Stackpoole* v. *Stackpoole*, 4 D. & W. 320, and again in *Monypenny* v. *Dering*, 2 De G. M. & G. at p. 173.

Limitations imposed on the *cy près* doctrine.

It has since been decided, in relation to the doctrine in question, 1*st*, That it does not apply to limitations of personal estate: *Routledge* v. *Dorril*, 2 Ves. jun. 365; nor of a mixed fund: *Boughton* v. *James*, 1 H. L. C. 406. 2*ndly*, That it is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations: *Somerville* v. *Lethbridge*, 6 T. R. 213; *Seaward* v. *Willock*, 5 East, 198; *Beard* v. *Westcott*, 5 Taunt. 393; 5 B. & Al. 801; T. & R. 25. And 3*rdly*, That the doctrine is not applicable where the limitation to the children of the unborn person gives them an estate in fee-simple. The last point was decided in the case of *Bristowe* v. *Warde*, 2 Ves. jun. 136, where money directed to be laid out in lands was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband in favour of the children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease among their children, as they should appoint. It was held to be real estate, and that the husband's appointment, which would have the effect of vesting absolute interests in the children of the

children, in default of appointment by those children, was void as to them, and could not, Lord *Loughborough* was of opinion, be executed *cy près*. See *Hale* v. *Pew*, 25 Beav. 335. As to the doctrine of *cy près*, see further *Hampton* v. *Holman*, 5 Ch. D. 183, where the doctrine is fully considered and explained; see also Sugd. Pow., and Fea. C. R., by Butl. 208; Jarm. Wills, Vol. I., pp. 297, *et seq.*; Theob. Wills, 441, *et seq.* Rule against Perpetuities.

2. Restraint on the Accumulation of Income.

Restraint on the accumulation of the rents and profits of lands was unknown to the common law, except so far as it was involved in the doctrine which prohibited the giving an estate for life to an unborn person, with remainder to his issue. The rule against perpetuities necessarily prevented accumulation from being carried beyond its limits (see *post*, p. 451), though, in the early discussions of the rule, no allusion is made to it, probably because for a long period trusts directing the accretion of income were of rare occurrence, so that little or no inconvenience was experienced from the allowance of so wide a range of accumulation. Mr. Thellusson was the first who, by the extraordinary exercise of the power which this rule placed in his hands, showed the necessity of further restraint. The validity of this gentleman's will, which suspended the absolute ownership, and postponed the usufructuary enjoyment of the bulk of his estate until the expiration of nine lives in being at the time of the testator's death, was established, after many hard struggles, occasioned rather by the immense value of the property implicated (computed to amount, with the accumulations, to upwards of 18,000,000*l.*), than by any real difficulty in the principle; for, by confining the restriction to existing lives, the testator had, with a prudent foresight worthy of a better purpose, escaped the question since agitated respecting the allowance of an absolute term in addition to a life. See *Thellusson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112. Accumulation of income, how restrained.

This case led to the passing of the stat. 40 Geo. 3, Stat. 40 Geo. 3, c. 98.

Restraint on Accumulation.

c. 98, by which, after reciting that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions thereinafter contained, it is enacted :—

No person to settle or dispose of property so as to accumulate the income longer than for the life of the settlor and twenty-one years, or certain minorities.

Sect. 1. "That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise soever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, *or* the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, *or* during the minority or respective minorities of any person or persons who shall be living, or *in ventre sa mère*, at the time of the death of such grantor, devisor, or testator, *or* during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Act not to extend to provisions for payment of debts, or for raising portions for children in certain cases.

Sect. 2. "That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed."

Sect. 3 (since repealed by the stat. 11 & 12 Vict. c. 36, s. 41) declares that the Act shall not extend to dispositions of heritable property in Scotland. And it has been held that the Act does not extend

Restraint on Accumulation.

to Ireland: *Ellis* v. *Maxwell*, 12 Beav. 104; *Heywood* v. *Heywood*, 29 Beav. 9. But leaseholds situate in England belonging to a domiciled Irishman are subject to the Act: *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

Accumulation for one only of specified periods allowed.

The language of the statute is disjunctive, and accordingly, a testator or settlor cannot take more than one of the periods of accumulation mentioned in the statute; for instance, he is not at liberty to accumulate income for a term of twenty-one years, and also for the minority of any person entitled under the limitations: *Re Rosslyn's Trust*, 16 Sim. 391; *Wilson* v. *Wilson*, 1 Sim. (N.S.) 288; *Ellis* v. *Maxwell*, 3 Beav. 595; *Jagger* v. *Jagger*, 25 Ch. D. 729. See also the observations of Lord *Eldon* in *Griffiths* v. *Vere*, 9 Ves. 136.

Construction of clause as regards minority of persons unborn entitled under the limitations.

The clause allowing accumulation during the minority of any of the persons entitled under the uses or trusts, has been decided not to authorise a positive trust for accumulation extending over the minority of a person unborn at the time of the testator's death, but who might come into existence during a life then in being, and to whom, at majority, the accumulated fund and the principal from which it arose, are given. Thus, in the case of *Haley* v. *Bannister*, 4 Mad. 275, the testator had directed certain sums of stock in the public funds to be purchased by his executors, and the dividends accumulated, until one of the children of his daughter, born or to be born, should attain the age of twenty-one, when the whole was to be transferred to such child and any other child or children who might be then living; the will contained a residuary clause. Sir J. *Leach*, V.-C., said: "The statute prevents an accumulation of interest during the minority of an unborn child; but, as to the principal, the law remains as before the statute. The excess of accumulation, prohibited by the statute, would form part of the residue." It is pointed out by the learned editor of Jarman on Wills (Vol. I., p. 304), that by the words "during the minority of an unborn child," the V.-C. must apparently have meant "until an unborn child should come of age," which was the case before

Restraint on Accumulation.

him. On any other construction, this decision would reduce the clause of the Act, which allows accumulation during the minority of any person, who, if of age, would be entitled to the income, to a mere saving or reservation of the rule of law which so disposes of the income of minors, or rather of their surplus income, after providing for maintenance. It would limit the term of accumulation authorised by the Act to twenty-one years from the testator's decease, or the minority of a person then *in esse*, which, in fact, is included in the former, since every person born before the death of the testator must necesssrily attain majority before the expiration of twenty-one years, computed from that period. But the stricter interpretation of the V.-C.'s decision seems to have been adopted in the dicta of Lord *Langdale* in *Ellis* v. *Maxwell*, 3 Beav. 596, and of *Romilly*, M. R., in *Bryan* v. *Collins*, 16 Beav. 17. The decision in *Haley* v. *Bannister*, therefore, might seem to place in some peril the accumulating trusts ordinarily introduced into provisions for the maintenance of minors, being persons unborn at the testator's decease, which direct the unapplied surplus income from time to time to be added to the principal. Such trusts, however, are distinguishable from the bequest in *Haley* v. *Bannister* in this, that they extend only to the unapplied surplus and not to the entire income, and therefore approach more closely to the principle of the rule of law which accumulates the income of minors after providing for maintenance, though they differ from that rule in regard to the ultimate destination of the accumulated fund which the law gives to the minor himself, but which the express trust commonly annexes to the principal fund; though even this difference is considerably narrowed where the trustees (as they frequently do, and always ought to) posses a power of applying the accumulated fund at any subsequent period of minority (*h*), which clause would

Trusts for accumulation in maintenance clauses.

(*h*) This power is now, by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 42, conferred on trustees generally of settlements and wills coming into operation

Restraint on Accumulation.

certainly afford a strong argument for taking the trusts in question out of the vacating principle of the case of *Haley* v. *Bannister;* indeed, considering the extreme inconvenience of holding them to be invalid, it is probable that the Courts would not come to that conclusion unless they felt themselves to be irresistibly impelled to it by authority.

Excessive accumulating trust good *pro tanto.*

It is well settled that a trust for accumulation, reaching beyond the allowed period, is good *pro tanto.* Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A. and B. (who had no children at the death of the testator), and, on their attaining twenty-one, the whole to be divided among them; Sir W. *Grant,* M. R., held, that the accumulation was good for twenty-one years from the death of the testator: *Longdon* v. *Simson,* 12 Ves. 295. See also *Griffiths* v. *Vere,* 9 Ves. 127; *Palmer* v. *Holford,* 4 Russ. 403.

Trust for accumulation beyond limits of perpetuity void *in toto.*

But a trust for accumulation which extends beyond the limits allowed by the rule against perpetuities is altogether void, whether or not it be for a purpose excepted from the operation of the Act: *Brown* v. *Stoughton,* 14 Sim. 369; *Scarisbrick* v. *Skelmersdale,* 17 Sim. 187; *Curtis* v. *Lakin,* 5 Beav. 147; *Boughton* v. *James,* 1 H. L. C. 406; *Turvin* v. *Newcome,* 3 K. & J. 16. As to such excepted purposes, see *post,* pp. 454 *et seq.*

Right of legatee to stop accumulations.

Where there is a vested and indefeasible gift of a legacy, with a direction for accumulation, the legatee has a right, on attaining twenty-one years of age, to stop any further accumulation, and to require his money to be paid to him at once: *Gosling* v. *Gosling,* Johns. 265; *Coventry* v. *Coventry,* 2 Dr. & Sm. 470. But charities cannot require accumulations of legacies directed by a testator to be stopped before the expiration of twenty-one years from the

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after the commencement of that Act, unless a contrary intention is expressed in the instrument under which the interest of the infant arises.

**Restraint on Accumulation.**

testator's death: *Harbin* v. *Masterman*, L. R. 12 Eq. 559.

Accumulation arising from nature of gift, and not from express direction.

The statutory restraint on accumulation applies to gifts in which the accumulation results, not from an express direction to accumulate, but from any disposition of property which has the effect of necessarily, or in events which happen, causing an accumulation of income for a period exceeding twenty-one years in duration. The application of the Act to implied as well as express directions for accumulation, has been affirmed by numerous decisions, and may be regarded as fully established. See *Evans* v. *Hellier*, 12 Cl. & F. 114; *Tench* v. *Cheese*, 6 De G. M. & G. 453; *Macdonald* v. *Bryce*, 2 Kee. 276; *Countess of Bective* v. *Hodgson*, 10 H. L. C. 656; *Matthews* v. *Keble*, L. R. 3 Ch. 691; *Wade Gery* v. *Handley*, 1 Ch. D. 653; 3 Ch. D. 374. But it would seem that the validity of the accumulation may depend in some cases on the events which happen and the purposes to which it is in such events applicable: see *Re Clulow's Trusts*, 1 J. & H. 639.

Destination of income released from accumulation.

The following seem to be the rules of law with regard to the destination of income released by the operation of the statute from a direction to accumulate beyond the legal limits:—

First. Where there is an absolute gift in the first instance with a subsequent trust for accumulation, the effect of the statute is that, so far as such trust is invalidated thereby, the income goes to the persons to whom the absolute interest is given, and who would have been entitled to the income if there had been no trust for accumulation: *Trickey* v. *Trickey*, 3 My. & K. 560; *Combe* v. *Hughes*, 2 De G. J. & S. 657; *Norton* v. *Johnstone*, 30 Ch. D. 649.

Secondly. If a specific fund is bequeathed, subject to a trust for accumulation, so as to postpone the vesting of a contingent interest, or the possession of a vested interest, the effect of the statute is not to accelerate the vesting or possession: *Macdonald* v. *Bryce*, 2 Kee. 276; *Nettleton* v. *Stephenson*, 3 De G. & S. 366; *Green* v. *Gascoyne*, 4 De G. J. & S. 565; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261: see

Restraint on Accumulation.

also *Talbot* v. *Jevers*, L. R. 20 Eq. 255. In such a case the intermediate profits would not accumulate for the specific legatee, but would belong to the residuary legatee, if there was one (*i*), and to the next of kin if there was not: *Ellis* v. *Maxwell*, 3 Beav. 597; *Att.-Gen.* v. *Poulden*, 3 Hare, 555; *Jones* v. *Maggs*, 9 Hare, 605. So, if the subject were real estate, the heir-at-law, or the residuary devisee, as the case might be, would be entitled to the immediate income, as an interest in real estate not included in the particular devise: *Nettleton* v. *Stephenson*, 3 De G. & S. 366; *Green* v. *Gascoyne*, 4 De G. J. & S. 565; see *Re Clulow's Trust*, 1 J. & H. 639; *Simmons* v. *Pitt*, L. R. 8 Ch. 978; *Re Williams*, 54 L. T. 831.

Thirdly. Where the property, whether real or personal, directed to be accumulated is residuary, the accumulations will follow the nature of the property. After the expiration of twenty-one years from the testator's decease, until the vesting, therefore, the accumulations of real estate will go to the heir: *Halford* v. *Stains*, 16 Sim. 488; *Wildes* v. *Davies*, 1 Sm. & G. 475; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261; and the accumulations of personalty will go to the next of kin: *Elborne* v. *Goode*, 14 Sim. 165; *Pride* v. *Fooks*, 2 Beav. 437; *Oddie* v. *Brown*, 4 De G. & J. 179. And in the case of a mixed fund the accumulations would go to the heir and next of kin proportionately: *Eyre* v. *Marsden*, 2 Kee. 564; *Burt* v. *Sturt*, 10 Hare, 415; *Edwards* v. *Tuck*, 3 De G. M. & G. 40. And the same principle would regulate the destination of the income of accumulated fund; *i.e.*, that portion of the income which resulted from real estate would belong to the heir; and that portion of it which proceeded from personalty to the next of kin: see *Eyre* v. *Marsden*, 2 Kee. 577; *Ellis* v. *Maxwell*, 12 Beav. 104.

Period at which ac-

It is to be observed, that the statute does not

(*i*) If the residue is not given absolutely, the accumulations will apparently go to form part of the *capital* of the residue: *Crawley* v. *Crawley*, 7 Sim. 427; *Morgan* v. *Morgan*, 4 De G. & S. 175; but see *contra*, *Re Phillips*, 28 W. R. 340.

**Restraint on Accumulation.**

cumulations must cease.

allow of accumulation for twenty-one years whenever commencing, but requires that it should be comprised within the term of twenty-one years computed from the testator's death. Thus, if an accumulating trust were made to arise on a contingency, which did not happen until nineteen years after the testator's decease, the trust would be determined by the statute at the expiration of the twenty-one years, though it had run only two years; and by parity of reason, if the contingency did not occur until twenty-one years after the testator's decease, the trust would be void *in toto: Shaw* v. *Rhodes,* 1 My. & Cr. 154; *Webb* v. *Webb,* 2 Beav. 493; *Att.-Gen.* v. *Poulden,* 3 Hare, 555; *Nettleton* v. *Stephenson,* 3 De G. & S. 366. In calculating the period of accumulation the day of the death of the testator is excluded: *Gorst* v. *Lowndes,* 11 Sim. 434; *Lester* v. *Garland,* 15 Ves. 248.

Accumulations for payment of debts of testator.

*Exceptions from the operation of the Act.*]—A trust or direction for accumulation to be made for the purpose of paying the testator's own debts or incumbrances on his estate is not within the mischief of the statute, nor is it void as transgressing the rule against perpetuities: *Lord Southampton* v. *Marquis of Hertford,* 2 Ves. & B. 54; *Bacon* v. *Proctor,* T. & R. 40; *Bateman* v. *Hotchkin,* 10 Beav. 426; *Briggs* v. *Lord Oxford,* 1 De G. M. & G. 363. Such a trust or direction is therefore valid though not limited in point of duration.

Accumulations for payment of debts of a stranger.

A trust or direction to accumulate a fund for the purpose of paying the debts of a person other than the testator is not excepted from the operation of the rule against perpetuities, and will therefore be void for remoteness if it does or may extend beyond a life or lives in being and twenty-one years afterwards. But such accumulations are excepted from the operation of the Thellusson Act (see sect. 2, *ante,* p. 448), and they are good as regards not only past debts but also future debts accruing within the limits allowed by the rule against perpetuities: *Varlo* v. *Fadden,* 1 De G. F. & J. 211; see *Barrington* v. *Liddell,* 2 De G. M. & G. at p. 488.

**Restraint on Accumulation.**

Conditions of the exception.

In order to bring the accumulation within the exception, it must be the primary and *bonâ fide* object of the testator's direction to make provision for payment of the debts: *Matthews* v. *Keble*, L. R. 3 Ch. 691. And where rents and profits are directed to be applied in payment of debts, which are in fact paid off by other means, as out of the proceeds of sales of part of the estates, an accumulation will not be allowed to continue for the purpose of raising an amount equal to the value of the property sold for the benefit of the persons entitled under the limitations of the will subject to the trust for payment of debts, even though the will contains an express provision to that effect: *Tewart* v. *Lawson*, L. R. 18 Eq. 490.

Accumulations to raise a certain amount.

And a direction to accumulate a fund until it should reach a certain sum and then to apply it for the benefit of certain persons for their lives, and upon the death of the survivor to divide the same as directed, is not void for remoteness, inasmuch as the accumulations whatever the amount might be at the death of the last surviving tenant for life would necessarily vest, so that the person or persons then absolutely entitled might stop the accumulation and dispose of the fund; but if the period required to accumulate the amount extends beyond the twenty-one years from the testator's death, then by the operation of the Thellusson Act the income of the accumulated fund goes to the next of kin, from the expiration of the twenty-one years, until the fund would, if the accumulation had proceeded, have reached the sum named, or until the death of the surviving tenant for life, if it should turn out that it would not have amounted to that sum before the happening of that event: *Oddie* v. *Brown*, 4 De G. & J. 179.

Exception as to portions.

The next exception from the operation of the Act relates to provisions for raising portions for children of a settlor or testator, or of any person taking an interest under a settlement or will.

The exception extends to provisions for raising portions charged or created either by the will itself: *Beech* v. *Lord St. Vincent*, 3 De G. & S. 678; or by

Restraint on Accumulation.

a previous instrument: *Barrington* v. *Liddell*, 2 De G. M. & G. 480; see *Halford* v. *Stains*, 16 Sim. 496.

What are portions.

A "portion" means a part or share of the testator's estate, and therefore a gift of the whole or of the residue of such property with the accumulations thereof, for the benefit of children of the testator or other person taking an interest is not a direction for raising portions, and accordingly is not within the exception: *Edwards* v. *Tuck*, 3 De G. M. & G. 58; see *Wildes* v. *Davies*, 1 Sm. & Gif. 475; *Eyre* v. *Marsden*, 2 Kee. 573; *Burt* v. *Sturt*, 10 Hare, 415; *Drewett* v. *Pollard*, 27 Beav. 196; *Mathews* v. *Keble*, L. R. 3 Ch. 691; *Re Walker*, 54 L. T. 792. Whether the same principle applies to a legacy of a certain sum directed to be accumulated for the benefit of a child, is a question which is not altogether free from doubt. In *Jones* v. *Maggs*, 9 Hare, 605, *Turner*, V.-C., held that such an augmented legacy is not a portion. But in *Middleton* v. *Losh*, 1 Sm. & Gif. 61, *Stuart*, V.-C., took a different view, and held that a direction to accumulate the income of a legacy was valid, as being a good provision for raising a portion within the meaning of the Act: see also the remarks of the same learned V.-C. in *Wildes* v. *Davies*, 1 Sm. & Gif. 475; and see the observations on *Middleton* v. *Losh* of *Wood*, V.-C., in *Burt* v. *Sturt*, 10 Hare, at p. 426. A fund directed to be accumulated for a certain period, and at the expiration thereof to be applied for the benefit of A. for life with remainder to his children, is not a portion: *Watt* v. *Wood*, 2 Dr. & Sm. 56. Where a fund is directed to be accumulated to raise portions for children, if any, but if there should be no children, then for another purpose, the validity of the direction will depend on the event, whether there be any children or not: *Re Clulow's Trusts*, 1 J. & H. 639.

What interest the parent must take.

The portions must be for the benefit of children either of the testator or of a person taking an interest under the will; if, therefore, an accumulation is directed for the benefit of children of several

Restraint on Accumulation.

parents some of whom take no interest under the will, the exception does not apply, and the provision will apparently be void *in toto: Eyre* v. *Marsden*, 2 Kee. 564.

The interest taken by the parent must be under the will directing the accumulation, but need not be in the identical fund directed to be accumulated: *Burt* v. *Sturt*, 10 Hare, 423; *Barrington* v. *Liddell*, 2 De G. M. & G. 480. Any interest however small given to the parent is sufficient: *Evans* v. *Hillier*, 5 Cl. & F. 126; see *Edwards* v. *Tuck*, 3 De G. M. & G. 40.

Provisions as to keeping up policies of life assurance not within the Act.

A direction in a will to apply a sufficient part of the income of the testator's estate in keeping on foot policies effected by him on the lives of his children, and to be settled in case of their marriage on their wives and children, is not a trust for accumulation within the statute, and is accordingly effectual for a period of more than twenty-one years from the testator's death: *Bassil* v. *Lister*, 9 Hare, 177.

# CHAPTER IX.

## LAPSE.


| | PAGE |
|---|---|
| 1. The Doctrine of Lapse. | |
| *Nature and Application of Doctrine Generally* | 458 |
| *Excessive Appointment* | 461 |
| *Gift to Next of Kin of Married Woman* | 462 |
| *Death of Joint Devisee* | 462 |
| *Gifts to Classes* | 463 |
| *Alternative Gifts* | 466 |
| *Effect of Lapse on Devise of Onerated Lands* | 467 |
| 2. Effect of Failure of Particular Gifts | 468 |
| 3. Operation of Residuary Bequest | 471 |
| 4. Operation of Residuary Devise. | |
| *Every Devise Specific under the Old Law* | 475 |
| *Whether a Devisee Takes Beneficially or as Trustee* | 477 |
| 5. Effect of the Wills Act, Sects. 25, 32, and 33, on the Doctrine of Lapse... | 479 |


### 1. Doctrine of Lapse.

**Doctrine of Lapse.**

Doctrine of lapse stated.

The liability of devises and bequests to failure from the decease of the object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which, as they do not take effect until the death of the testator, can communicate no benefit to persons who previously die (*a*), in like manner as a deed cannot operate in favour of those who are dead at the time of its execution. The doctrine applies indiscriminately to gifts with and without words of limitation (*b*).

Applied to devises in tail and in fee.

Thus, if a devise be made to A. and his heirs, or to A. and the heirs of his body, and A. dies in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general, of A., takes no interest in the property, he being merely included in the words of limitation, *i.e.* in the terms which are

(*a*) See as to this, *Elliott* v. *Smith*, 22 Ch. D. 236.

(*b*) As to lapse occasioned, in the case of a gift till marriage, by the marriage of the donee in the testator's lifetime, see *Andrew* v. *Andrew*, 1 Coll. 690.

Doctrine of Lapse.

used to mark the quantity or duration of the estate to be taken by the ancestor, through whom alone any title could flow to such heir: *Brett* v. *Rigden*, Plow. 345; *Fuller* v. *Fuller*, Cro. El. 422; *Wynn* v. *Wynn*, 3 Br. P. C. Toml. ed. 95. See also *Goodright* v. *Wright*, 1 P. Wms. 397; *Ambrose* v. *Hodgson*, 3 Br. P. C. Toml. ed. 416.

Bequests of personalty.

Bequests of personal property of course are subject to the same principle; and it is observable, that, in applying it to them, a legacy to one and his executors or administrators, is construed simply as an absolute gift: *Elliott* v. *Davenport*, 1 P. Wms. (*c*);

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As to the lapse of legacies forgiving debts.

(*c*) In this case, the legacy was of a debt, which is liable to lapse equally with gifts in any other form: *Toplis* v. *Baker*, 2 Cox, 118. It is true, that, in *Sibthorpe* v. *Moxton*, 1 Ves. sen. 49; *S. C.*, *nom. Sibthorpe* v. *Moxom*, 3 Atk. 580, Lord *Hardwicke* held, that the forgiving of a debt, coupled with a general direction to the executor to deliver up the security, (without saying to whom), operated as a release, though the legatee died in the testator's lifetime—his Lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone; his Lordship admitting, however, that, in regard to the administration of assets, it was to be considered as a legacy. In *Maitland* v. *Adair*, 3 Ves. 231, the words were—"I return A. his bond." A. died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (Treat. Leg. 411), who has dwelt more on the merely verbal distinction between the giving and forgiving of a debt, than seems warranted by the principles of the cases. See the case of *South* v. *Williams*, 12 Sim. 566, where the testator directed that certain sums which he had lent to C. W., his daughter's husband, on bonds, should be taken and allowed in account as part of her share; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him, and to take a security from him for payment of the balance by instalments. The daughter died in the testator's lifetime; and it was held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. In *Philips* v. *Philips*, 3 Hare, 281, it was, among other things, determined that the shares of the residue attributed to the debts of creditors under a composition deed (which contained no release of the debtor) did not lapse by their death in the lifetime of the testator. See also *Williamson* v. *Naylor*, 3 Y. & C. 208. It would have been otherwise if the deed had contained a release: *Coppin* v. *Coppin*, 2 P. Wms. 295. But where a bankrupt, who had obtained his certificate, by his will

Doctrine of Lapse.

the circumstance that, in the instance of personal estate, words of limitation are not requisite to carry the absolute interest, not having been considered sufficient to denote an intention to make the executors or administrators substituted and independent objects of gift: *Shuttleworth* v. *Greaves*, 4 My. & Cr. 35. And, where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to vest the subject in the representatives of the deceased person: *Maybank* v. *Brooks*, 1 Br. C. C. 84.

Declaration that gift shall not lapse.

And even a declaration that the devise or bequest shall not lapse, does not *per se* prevent it from being defeated by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of those on whom the law, in the absence of disposition, casts the property, is by giving it to some one else. Such a declaration accompanying a bequest to a person and his executors or administrators, would be considered as indicating an intention to substitute the executors or administrators for the original legatee: *Sibley* v. *Cook*, 3 Atk. 572; see also *Palin* v. *Hills*, 1 My. & K. 470; *Long* v. *Watkinson*, 17 Beav. 471; *Re Clay*, W. N. 1885, p. 22. But a declaration that a legacy shall vest in the legatee immediately on the execution of the will is not sufficient: *Browne* v. *Hope*, L. R. 14 Eq. 343.

Confirmation by codicil.

Confirmation by a codicil of a will containing a legacy to a person who has died since the date of the will, and his executors and administrators does not prevent lapse so as to vest the legacy in the representatives of the deceased legatee: *Hammond* v. *Hammond*, 3 Br. C. C. 127.

Testamentary gift in pursuance of covenant.

A gift by will in pursuance of a covenant in that behalf is not protected from the operation of the doctrine of lapse: *Re Brookman's Trust*, L. R. 5 Ch. 182; see *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.

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directed his creditors to be paid in full, it was held that the discharge did not render the gift liable to lapse: *Re Sowerby's Trust*, 2 K. & J. 630; *Turner* v. *Martin*, 7 De G. M. & G. 429.

Doctrine of Lapse.

A devise by A. to the uses of B.'s will does not take effect in favour of a devisee under B.'s will who does not survive A.: *Calsha* v. *Cheese*, 7 Hare, 245.

Lapse by death of appointee.

So the exercise of a testamentary power of appointment will be defeated by the death of the appointee in the lifetime of the donee of the power: *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. 61; *Jones* v. *Southall*, 32 Beav. 31; *Freeland* v. *Pearson*, L. R. 3 Eq. 658. Where an excessive appointment in point of amount is made by will and one of the appointees dies in the testator's lifetime, the other appointees, and not the persons who would take in default of appointment, are entitled to the benefit of the lapse: *Eales* v. *Drake*, 1 Ch. D. 217.

Excessive appointment.

Interests of persons taking in default of appointment.

The interests of persons taking in default of appointment do not lapse by reason of the death of the donee of the power in the testator's lifetime, but take effect upon his death: *Hardwick* v. *Thurston*, 4 Russ. 380; *Nicholls* v. *Haviland*, 1 K. & J. 504; *Kellett* v. *Kellett*, I. R. 5 Eq. 298. And the same rule applies to remaindermen generally: *Olney* v. *Bates*, 3 Drew. 319; *Meyer* v. *Townshead*, 3 Beav. 443; *Stewart* v. *Jones*, 3 De G. & J. 532; *Re Potter's Trust*, L. R. 8 Eq. 60; *Re Speakman*, 4 Ch. D. 620.

Gift to a person "or his heirs," &c.

The insertion of the word "or," between the name of the devisee or legatee and the words of limitation, as in a gift to one *or* his heirs, or to him *or* his executors or administrators *or* personal representatives, will not vary the construction, the expression being regarded as an inaccurate mode of annexing words of limitation to the gift, and not as designed to create a substitutional gift in the event of the failure of the first by lapse: *Stone* v. *Evans*, 2 Atk. 86; *Wright* v. *Wright*, 1 Ves. sen. 409; *Read* v. *Snell*, 2 Atk. 642; *Corbyn* v. *French*, 4 Ves. 418, 435; *Tidwell* v. *Ariel*, 3 Mad. 403, where the gift was not to take effect immediately on the testator's death; and see *Leach* v. *Leach*, 35 Beav. 185. And see *Waite* v. *Templer*, 2 Sim. 524. But where there was an immediate gift of personalty to A. "or his heirs," the next of kin were held to be entitled: *Gittings* v. *M'Dermott*, 2 My. & K. 69; see *Re*

Doctrine of Lapse.

*Porter's Trusts*, 4 K. & J. 188. So, where the gift was to A. or his legal personal representatives, the expression was construed as meaning the persons entitled beneficially under the Statute of Distributions: *Bridge* v. *Abbott*, 3 Br. C. C. 224; *Cotton* v. *Cotton*, 2 Beav. 69; *Re Thompson, Machell* v. *Newman*, W. N. 1886, p. 130; 55 L. T. 85.

Gift to next of kin of a married woman.

A bequest to the next of kin of a married woman, in the event of her dying in the lifetime of her husband, ought not to be regarded as a bequest to her executors and administrators; such a gift is not intended merely to indicate the interest of the legatee in case of her dying in the lifetime of her husband after having survived the testator, but will prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime.

This question may be regarded as having been settled by the case of *Edwards* v. *Saloway*, 12 Jur. 487, 493, in which the decision of *Knight Bruce*, V.-C. (2 Ph. 625), was affirmed by Lord *Cottenham* (2 De G. & S. 248). In that case, E. P. gave the residue of his real and personal estate to trustees to invest the same, and pay the interest to his wife for life for her separate use, and, after her decease, as to half the capital, upon trust for such persons as his wife by deed or will should appoint; and, in default of appointment, he gave the same unto, between, and amongst her next of kin, as in case of distribution of intestate's effects. The wife died in the lifetime of the testator, without having exercised the power of appointment over the moiety of the residue. The V.-C. held that the bequest of the moiety of the residue did not lapse, and this decision was affirmed on appeal. See also *Hardwick* v. *Thurston*, 4 Russ. 380. The decision to the contrary in *Baker* v. *Hanbury*, 3 Russ. 340, must be regarded as overruled.

No lapse on the death of a joint devisee.

Where a gift is made to a plurality of persons, as joint tenants (which is always the construction in the absence of words of severance, in regard to both real and personal estate, *Crooke* v. *De Vandes*, 9 Ves. 197; *Swaine* v. *Burton*, 15 Ves. 365), no lapse can

occur, unless *all* the objects die in the testator's lifetime; because, as joint tenants take *per mis et per tout*, or, as it has been expressed—"each is a taker of the whole, but not wholly and solely" (Carter, 4), any one joint tenant, existing when the will takes effect, will be entitled to the entire property. Thus, if lands are devised to A. and B., or to them and their heirs, or personal property is bequeathed to A. and B., and one dies in the testator's lifetime, the other surviving the testator will take the whole: *Davis* v. *Kemp*, Carter, 4, 5, Eq. Ca. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628. And the same consequence would ensue, if the gift failed from any other cause: *Humphrey* v. *Tayleur*, Amb. 136; *Larkins* v. *Larkins*, 3 B. & P. 16; *Short* d. *Gastrell* v. *Smith*, 4 East, 419; while it is equally clear, that, if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift as to one object, would not have entitled the others to the whole, without an express gift over of the share of the deceased object in such event: *Page* v. *Page*, 2 P. Wms. 489; *Peat* v. *Chapman*, 1 Ves. sen. 542; *Re Wood's Settlement*, 29 Beav. 236; *Sykes* v. *Sykes*, L. R. 4 Eq. 200.

Doctrine of Lapse.

As to tenants in common.

Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, [see *ante*, pp. 430, *et seq.*, and *post*], the decease of any such persons during the testator's lifetime will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying never become objects of the gift. Thus, if property be given generally to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any children or child, brother or sister, surviving the testator, without regard to previous deaths: *Doe* d. *Stewart* v. *Sheffield*, 13 East 526; *Shuttleworth* v. *Greaves*, 4 My. & Cr. 35; and the rule is the same where the gift is to the children of a person then deceased; which has this

Gifts to classes.

Doctrine of Lapse.

peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase, the possibility of future accessions by births being precluded by the death of the parent: *Viner* v. *Francis*, 2 Br. C. C. 658; 2 Cox, 190; *Leigh* v. *Leigh*, 17 Beav. 605; *Dimond* v. *Bostock*, L. R. 10 Ch. 358 (*d*).

Distinction where the individuals of the class are ascertained before the lapse.

If, however, the class is defined at some period occurring in the testator's lifetime, the subsequent decease of any of its members, in the interval between that period and the decease of the testator, it was formerly thought, would occasion the lapse of their shares, precisely in the same manner as if the gift had been originally made to them *nominatim*: *Allen* v. *Callow*, 3 Ves. 289. In this case, the point did not arise; but Lord *Alvanley* expressed a decided opinion on it. And in *Gaskell* v. *Holmes*, 3 Hare, 434, *Wigram*, V.-C., appears to have been so strongly impressed with the same opinion, that he resorted to special circumstances to exclude its application to the case before him. Perhaps it would have been a sounder rule to say, that the throwing into the description of children an additional ingredient, such as that of requiring that they should be living at a given period, does not vary in other respects the construction applied to the gift. Such was the view ultimately taken by *Wigram*, V.-C., and acted on in the case of *Lee* v. *Pain*, 4 Hare, 250; 9 Jur. 247. In that case the testatrix by her will bequeathed 500*l*. upon trust for B. M. for life, with remainder to the children of B. M. living at his decease, equally between them. B. M. died in the lifetime of the testatrix, leaving three children, one of whom afterwards died in the lifetime of the testatrix. It was held that there was no lapse of the third part of the legacy by the death of one of the children of

(*d*) The same rule will apply where any members of a class are incapable of taking, by reason of attestation of the will or otherwise: *Fell* v. *Biddulph*, L. R. 10 C. P. 709. So also where a gift to a member of the class is revoked: *Shaw* v. *Mahon*, 4 Dr. & W. 431. See also *Young* v. *Davies*, 2 Dr. & Sm. 167; *Re Coleman and Jarrom*, 4 Ch. D. 165.

Doctrine of Lapse.

B. M. after him and before the testatrix, and that the two surviving children were entitled to the whole legacy.

What is a gift to a class.

Inasmuch as, in the case of a gift to a class, the share of a member of the class who dies in the lifetime of the testator does not lapse, but goes to the other members of the class, it is important to consider what is a gift to a class. A gift to the children of A. in equal shares to vest at twenty-one years of age, is a gift to a class: *Re Colley's Trusts*, L. R. 1 Eq. 496.

A gift to executors is a gift to a class, if given to them in respect of their office, but not otherwise: *Knight* v. *Gould*, 2 My. & K. 295; *Barber* v. *Barber*, 3 My. & Cr. 688; *Hoare* v. *Osborne*, 12 W. R. 397. See Jarm. Wills, Vol. I., p. 342.

A gift to A., B., and C. and the children of D. may be in effect a gift to a class if the testator shows an intention to treat the legatees as a class: see *Porter* v. *Fox*, 6 Sim. 485; *Clark* v. *Phillips*, 17 Jur. 886; *Re Stanhope's Trust*, 27 Beav. 201; *Re Jackson*, *Shiers* v. *Ashworth*, 25 Ch. D. 162. See also *Re Spiller*, 18 Ch. D. 614. But see *Havergal* v. *Havergal*, 7 Beav. 49. So a gift to "all my children including W." does not prevent the members from taking as a class: *Shaw* v. *MacMahon*, 4 Dr. & W. 431. Generally speaking, however, a gift to several persons *nominatim* as tenants in common is not legally a gift to a class, even though all the legatees may be members of what would in ordinary acceptation be regarded as members of the same class. So where a testator directed his residue to be divided among the children of L. D., to wit, J. D., E. D., and A. D., it was held that the gift was not to the children as a class, but as individuals: *Bain* v. *Lescher*, 11 Sim. 397. See *Cresswell* v. *Cresswell*, 2 Ed. 123; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129. So where the gift was to persons "hereinbefore mentioned," and whose names had been previously given: *Re Gibson*, 2 J. & H. 656. And if the number of the members of a class is specified, the legatees will take as *personæ designatæ*, and not as a class: *Re Smith's Trusts*, 9

Doctrine of Lapse.

Ch. D. 117; *Re Stansfield*, 15 Ch. D. 84. A direction to settle the shares of members of a class will not save such shares from lapse: see *Stewart* v. *Jones*, 3 De G. & J. 532; and the decision of the Court of Appeal in *Re Roberts, Tarleton* v. *Bruton*, 30 Ch. D. 234, overruling the decision of *Malins*, V.-C., in *Re Speakman, Unsworth* v. *Speakman*, 4 Ch. D. 620.

Where a testator gives property in trust for persons who at a date subsequent to his death shall be his next-of-kin under the Statutes of Distribution, an artificial class is created to be ascertained on the assumption that the testator died on the specified date: *Sturge and Great Western Rail. Co.*, 19 Ch. D. 444.

Gift to a peer.

Where a testator bequeathed to a peer, describing him by his title only, and his heirs a cup, for an heirloom, it was held that the gift was to the bearer of the title living at the date of the will, and that inasmuch as he had died in the testator's lifetime, the gift lapsed, and passed to the residuary legatee: *Re Whorwood, Ogle* v. *Lord Sherborne*, 34 Ch. D. 446.

Gift to next of kin of a person deceased.

It does not appear to be settled what would be the effect of a gift to such classes of persons, as, to the next of kin or relations, as tenants in common, of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or relations dying in the interval between the decease of A. and of the testator; since, in the cases where such gifts have occurred, (and in which the entirety has been held to belong to the surviving next of kin at the death of the testator), the bequest seems to have contained no words to sever the joint tenancy: *Bridge* v. *Abbot*, 3 Br. C. C. 224; *Vaux* v. *Henderson*, 1 J. & W. 388, n. See also *Re Ham's Trusts*, 2 Sim. (N. S.) 106.

Alternative gifts.

Where there are several alternative gifts, and the legatee in whose favour the contingency happens dies in the lifetime of the testator, the legacy lapses precisely in the same manner as if it had been originally absolute. So, if the person whom the event determines to be the object of the gift, sur-

Doctrine of Lapse.

vives the testator, the bequest to him would not be affected by the event of the death of the alternative legatee. Thus, if a testator gives to A. an estate, or a sum of money, in case he shall attain the age of twenty-one years, and, if A. shall die under that age, to B., and A. happens to attain twenty-one, and then dies in the lifetime of the testator, the legacy will lapse; while, on the other hand, if A. had died in the lifetime of the testator under that age, the gift to B. would have taken effect: *Doo* v. *Brabant*, 3 Br. C. C. 392; 4 T. R. 705. See also *Humberstone* v. *Stanton*, 1 Ves. & B. 385; *Walker* v. *Main*, 1 J. & W. 1; *Williams* v. *Jones*, 1 Russ. 517; *Archer* v. *Jegon*, 8 Sim. 446; *Rickett* v. *Guillemard*, 12 Sim. 88.

Where the devise which lapses comprises the legal or beneficial ownership only, such lapse creates a failure in the disposition only to that extent. See Jarm. Wills, Vol. I., p. 344.

Effect of lapse of devise of onerated lands.

And here it may be noticed, that, where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if a man devises Blackacre to A. and his heirs, charged with or on condition that he pay 50*l.* a year or the sum of 500*l.* to B., in case A. should die in the testator's lifetime, the estate would descend to the heir-at-law, subject to the charge: *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Worley*, 2 Atk. 605.

This principle is strongly exemplified by a case in which a person having a power of appointment over a sum of money, by will appointed a smaller sum, part of the sum in question, to A., and, in consideration thereof, he was to pay to his mother an annuity of 100*l.* during her life, for her separate use, and to enter into a bond with a penalty for the payment thereof; and the testatrix gave the residue of what she had power to dispose of to B. A. died in the donee's lifetime; but it was held, that, nevertheless, the mother was entitled to her annuity out of the fund, the whole of which, by the death of A., had devolved to B., the residuary appointee: *Oke* v. *Heath*, 1 Ves. sen. 135.

## 2. Effect of Failure of Particular Gifts.

Failure of gift for life by death of donee.

Where a gift for life, or any other such partial estate, is followed by a limitation over of the residuary interest, the death of the prior devisee or legatee, in the lifetime of the testator, causes the ulterior gift to take effect in *possession;* and sometimes the circumstance that the precedent interest is removed out of the way in a manner not expressly provided for by the terms in which the remainder is limited, will not prevent this from taking place. As, if a testator devises lands to A. and the heirs of his body, and, if he dies without issue, or without leaving issue, then over, and A. dies in the testator's lifetime, leaving issue, the devise in remainder will take effect, though, according to the literal expressions of the will, the event described has not happened, the words in question being evidently used merely as a mode of framing the remainder expectant on the estate tail; (as, if the testator had said—"I give to A. in tail, with remainder over);" and not as designed to render it dependent on the contingent determination of the preceding estate. The prior devise, therefore, failing by lapse, the ulterior devise operates as an immediate gift: *Fuller* v. *Fuller,* Cro. El. 423.

Gifts void or refused.

So, if a devise for life or in tail is void, or is refused by the devisee, it seems, by the better opinion, that the devise in remainder will be accelerated: Perk. sect. 557, 569; Shep. Touchst. 435, 451; *Fuller* v. *Fuller,* Cro. El. 425; *Cranmer's Case,* Dy. 309 *b*; but see and consider *Corrick* v. *Errington,* 2 P. Wms. 361; 5 Br. P. C. Toml. ed. 391.

Devise in remainder accelerated.

In this case lands were settled to the use of T. E. (a papist) for life; remainder to trustees during T. E.'s life to preserve contingent remainders, remainder to his first and other sons in tail male; remainder to W. E. The limitations in favour of the papist were then (before stat. 18 Geo. 3, c. 60) void; and it was held, that the remainders were not accelerated, on the special ground, that such a construction would have defeated the limitations to the first and other sons of T. E. Where a devise of a life estate is

Failure of Particular Gifts.

revoked by the testator, the estate in remainder will be accelerated: *Lainson* v. *Lainson*, 5 De G. M. & G. 754. As to the destination of terms of years created by the will, but the beneficial interest in which is not entirely disposed of, see *Tregonwell* v. *Sydenham*, 3 Dow, 194; *Davidson* v. *Foley*, 2 Br. C. C. 203; *Sidney* v. *Shelley*, 19 Ves. 352.

Devise over not defeated by failure of prior devise.

A strong instance of the construction which reads a secondary or substituted devise as intended to take effect in all events in which the prior devise is removed out of the way, occurs in the case of *Avelyn* v. *Ward*, 1 Ves. sen. 420, where a testator devised his real estate to A. and his heirs, on condition that, within three months after his decease, he should execute a general release to the testator's trustee of all demands; and, in default, the testator devised the estate to B. and his heirs. A. died in the lifetime of the testator; and Lord *Hardwicke* held, that the devise to B. took effect, the evident intention being, that, if in any event the first devise could not take place, the subsequent should; and that, if no such release was executed, whereby the demand against his estate would exist, the estate should go over. See *Scatterwood* v. *Edge*, 1 Salk. 229; *Doe* v. *Scott*, 3 M. & S. 300. See also, as to a bequest of personalty failing through the legatee's husband being an attesting witness, *Re Clark*, 31 Ch. D. 72.

Effect of lapse of devise of money charged on land.

Another species of question occurs where lands are devised, subject to the payment of a sum of money, annual or in gross, and the charge fails by the death of the devisee thereof in the lifetime of the testator, or otherwise. It is clear, that, if the charge is to arise on a contingency which does not happen, it is extinguished, and the devisee of the property has the benefit of such extinction, as the devise of the land evidently includes the interest comprised in the incumbrance, in the events alternative to those on which it is to arise. Thus, if lands were devised to A. in fee, charged with the payment to B. of 500*l.* in case B. should attain the age of twenty-one years, and B. died under that age in the lifetime of the testator, or afterwards, the charge would sink for the benefit of the devisee: *Att.-Gen.*

Failure of Particular Gifts.

v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60; *Sydenham* v. *Tregonwell*, 3 Dow, 212. If B. attained the age of twenty-one years, and afterwards died in the lifetime of the testator, the point is more doubtful, depending, as it then does, on the general question, whether a sum of money primarily and absolutely payable out of land lapsing, becomes extinguished therein, or subsists for the benefit of the heir, as real estate undisposed of; which has never been decided. But see and compare *Hutcheson* v. *Hammond*, 3 Br. C. C. 128, 148, and *Noel* v. *Lord Henley*, 7 Price, 240.

Rule where devise of the charged sum is void *ab initio*.

As regards the destination of a sum of money, the charge of which fails *ab initio*, on account of the illegality of its object, (as where it is devoted to charity), the following is a brief statement of the result of the decisions:—The cases of *Arnold* v. *Chapman*, 1 Ves. sen. 108, and *Bland* v. *Wilkins*, cit. 1 Br. C. C. 61, where the charge was of a gross sum, and *Gravenor* v. *Hallum*, Amb. 643, where it was a perpetual rent-charge, are in favour of the heir. The authority of *Arnold* v. *Chapman*, was recognised by Sir *John Leach* in the case of *Henchman* v. *Att.-Gen.*, 2 S. & St. 498. And the case of *Jackson* v. *Hurlock*, 2 Eden, 263, where the charge was of a gross sum, and the cases of *Barrington* v. *Hereford*, 1 Br. C. C. 62, and *Baker* v. *Hall*, 12 Ves. 497, where it was annual, are in favour of the devisee of the land. In the case of *Sidney* v. *Shelley*, 19 Ves. 363, Lord *Eldon* referred to the principle in terms which seem to favour the claim of the heir; but he described the cases as turning upon extremely nice distinctions. In fact, they are so directly conflicting, that no distinctions, however refined, can reconcile them. Having regard, however, to the consideration that *Jackson* v. *Hurlock* was decided upon its particular circumstances, that *Barrington* v. *Hereford* has been referred to by Lord *Eldon* as being virtually a contrary decision, and that *Baker* v. *Wall* was decided in the absence of the heir, the balance of authority seems to be in favour of the heir. This view is further supported by dicta of Lord *Eldon*, who, on more than one occasion (19 Ves. 363; 3 Dow, 212), has treated the cases in favour of the

Failure of Particular Gifts.

devisee as exceptions to the general rule, his language being, "That where the gifts, rendered void by the statute, did not go to the heir, they all seem to have been decided upon one or other of these grounds: that the heir-at-law was completely disinherited, and that his claim was barred under the intention of the testator." And the principle of decision is thus stated by *Leach*, M. R., in *Cooke* v. *The Stationers' Co.*, 3 My. & K. at p. 364: "If the devise to a particular person or for a particular purpose is to be considered as intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure. If it is to be considered as intended by the testator to be a charge only upon the estate devised and not an exception from the gift, the devisee will be entitled to the benefit of the failure." It is to be observed, that the rentcharge in *Gravenor* v. *Hallum* was expressly treated as an exception, and that the cases above referred to, which were decided in favour of the devisee of the land, were all cases of mere charges. As to the distinction between exceptions and mere charges, see *Ridgway* v. *Woodhouse*, 7 Beav. 437; *Re Cooper's Trusts*, 4 De G. M. & G. 757; *Re Clulow's Trusts*, 1 J. & H. 667. And as to the application of this distinction to cases of lapse, see *Sutcliffe* v. *Cole*, 3 Drew. 135. It must further be borne in mind that by sect. 25 of the Wills Act (see *post*, p. 479) real estate comprised in lapsed or void devises is generally included in the residuary devise, if any; and accordingly, the question in this class of cases would now generally be between the devisee of the land and the residuary devisee instead of the heir. If the charged property were leasehold, there can be little doubt that a lapsed or void legacy charged on it would sink for the benefit of the specific legatee, whose title would seem to be preferable to that of the general residuary legatee.

### 3. Operation of Residuary Bequest.

Residuary bequest includes

A residuary bequest, even before the Wills Act, comprised all the personal property belonging to the

Residuary Bequest.

all the property at the death.

testator at the time of his decease; and such, it is clear, would have been its operation, even without words expressly pointing at future acquisitions; as, where the bequest was in general terms of the testator's property or effects. Indeed, so averse were the Courts to suppose an intention in the testator to confine the disposition to present personal property, which would generally have produced a partial intestacy, that even a gift of all the property "I *am* possessed of," was thought not to have this restrictive effect; (see *Wilde* v. *Holtzmeyer*, 5 Ves. 816; see also *Bland* v. *Lamb*, 2 J. & W. 399); though, generally speaking, verbs and adverbs expressive of present time refer to the date of the will: see *Abney* v. *Miller*, 2 Atk. 597.

Its operation in relation to lapsed gifts.

The necessary consequence of holding a residuary bequest to operate upon the property as it exists at the death, is, that there cannot be an intestacy in regard to any part, however small, of the personal estate while there is an operative residuary gift, since it comprises whatever does not eventually pass under the specific and particular bequests of the will, as well those which are originally void, as those which lapse by the decease of legatees in the lifetime of the testator; *Jackson* v. *Kelly*, 2 Ves. sen. 283; *Brown* v. *Higgs*, 4 Ves. 708; *Clowes* v. *Clowes*, 9 Sim. 403; *Blight* v. *Hartnoll*, 23 Ch. D. 218; even though it should become, by this means, a bequest of the entire personal property. But, of course, a residuary clause may be so specially framed as not to take in lapsed legacies: *Att.-Gen.* v. *Johnstone*, Amb. 577; *Davers* v. *Dewes*, 3 P. Wms. 40; *Wainman* v. *Field*, Kay, 507; *Russell* v. *Clowes*, 2 Coll. 648. A gift of the residue of real and personal estate "not hereinbefore specifically disposed of," has been held to include specific legacies lapsing, the words being read, "not hereinbefore *particularly* disposed of": *Roberts* v. *Cooke*, 16 Ves. 451: see also *Evans* v. *Jones*, 2 Coll. 516; *Markham* v. *Ivatt*, 20 Beav. 579; *Bernhard* v. *Minshull*, Johns. 276.

Legacy to residuary legatee.

It is to be observed, too, that an express declaration that a legacy shall, in the event of the legatee dying before the testator, fall to the person who is

Residuary Bequest.

made residuary legatee, is not wholly without effect, since it places the residuary legatee, in respect of the legacy in question, in the situation of a particular legatee; so that, in the event of a deficiency of assets, he would be liable to abate only *pari passu* with other legatees of the same class: *Rose* v. *Rose*, 17 Ves. 347.

Failure of gift of residue itself.

But, when the disposition of an aliquot share in the residue fails, intestacy is produced to the extent of such failure; for instance, in the case of a residue given in moieties, to hold that one moiety lapsing would accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole; whatever argument applies to the entirety of the moiety applies to every part of it: the distinction is mere subdivision: see the judgment of Sir T. *Plumer* in *Skrymshe* v. *Northcote*, 1 Swanst. 570. See also *Bagwell* v. *Dry*, 1 P. Wms. 700; *Page* v. *Page*, 2 P. Wms. 489; *Owen* v. *Owen*, 1 Atk. 495; *Peat* v. *Chapman*, 1 Ves. sen. 542; *Lloyd* v. *Lloyd*, 4 Beav. 231; *Gibson* v. *Hale*, 17 Sim. 129; *Simmons* v. *Rudall*, 1 Sim. (N. S.) 115; *Green* v. *Pertwee*, 5 Hare, 249. So, where the residue was bequeathed to three persons as tenants in common, the revocation by a codicil of the bequest as to one of the three legatees was held not to entitle the other two, but to let in the title of the next of kin to such one third share: *Cheslyn* v. *Cresswell*, 2 Ed. 123. And the rule will prevail notwithstanding a direction by the testator that the aliquot share shall, in an event which happens, sink into the residue: *Humble* v. *Shore*, 7 Hare, 247; *Lightfoot* v. *Burstall*, 1 H. & M. 546; *Re Beirs' Trusts*, L. R. 4 Eq. 200; *Re Barker's Estate*, 15 Ch. D. 636; but not if the lapsed share is expressly directed, in the event, to go as the other shares: *Crawshaw* v. *Crawshaw*, 14 Ch. D. at p. 819.

Future gift of residue.

But, the postponement of the possession, or even of the residuary personal property to a period subsequent to the testator's death, does not necessarily produce intestacy as to the intermediate income, which would accompany the capital in its final destination. Thus, if a testator bequeaths the residue of his personal estate to such of the children of A. as shall happen to attain the age of twenty-one, the

Residuary Bequest.

income accruing in the interval between the death of the testator and the happening of the vesting event will pass, together with the capital, to the legatees: *Butler* v. *Butler,* 2 Atk. 473, 3 Atk. 58; *Trevanion* v. *Vivian,* 2 Ves. sen. 430; *Bullock* v. *Stones,* Id. 521; see *Cunningham* v. *Murray,* 1 De G. & Sm. 366; (supposing the accumulation not to be carried beyond the legal term, *vide ante,* p. 453). And, if the bequest failed in event, by reason of A. having no child who survived the testator, and lived to attain the age of twenty-one, the accumulated income, with the capital (unless there was an alternative disposition of them), would go to the testator's next of kin, as personalty undisposed of. See *Chambers* v. *Brailsford,* 18 Ves. 368.

With regard to wills not making any express dispositions of the residue of personal estates an important alteration in the rights of executors was made by the stat. 1 Will. 4, c. 40, which enacted:

Executor to be a trustee of undisposed-of residue for next of kin.

Sect. 1. "That when any person shall die, after the first day of September next after the passing of this Act, having, by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of; unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

Sect. 2. "Provided that nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of."

Sect. 3. Act not to extend to Scotland.

This Act does not interfere with the question whether the bequest of a residue to an executor carries the beneficial interest, leaving it to be divided according to the ordinary rules of construction (as to which see *post,* p. 670): *Williams* v. *Arkle,* L. R.

7 H. L. 606. If there is no next of kin, if the executor is also a trustee, the personalty will vest in the Crown as *bona vacantia: Cave* v. *Roberts*, 8 Sim. 214; otherwise he will take for his own benefit: *Re Knowles*, 49 L. J. Ch. 625. Residuary Bequest.

4. Operation of a Residuary Devise—Question whether a Devisee takes beneficially or as Trustee.

As a will of real estate made before the year 1838, operated only on the property of which the testator was seised at the time of its execution (*vide ante*, p. 350), it followed that every devise, however general in terms, was necessarily specific: see *Hill* v. *Cock*, 1 Ves. & B. 175; and a residuary devise could have no wider extent of operation, than if the testator, instead of devising the rest of his estate, had given by name the lands he had not previously disposed of. Thus, if a man, being seised of Blackacre and Whiteacre, devised Blackacre to A. in fee, and the residue of his lands to B., the latter devise, viewed in this light, would amount only to a devise of Whiteacre, and could not, it should seem, be extended to Blackacre, in case it should turn out that the devise of the latter was void, from its being in favour of charity, or from any other cause affecting its validity at the time of the execution of the will. A residuary devise, therefore, was incapable of being enlarged by subsequent events to a comprehension of any subject not originally within its reach; so that, if a devise in fee of particular lands lapsed by the death of the devisee in the testator's lifetime, the residuary devisee was not entitled to stand in the place of such deceased devisee: *Wright* v. *Hall*, Fort. 182; *Roe* v. *Fludd*, Id. 184. Every devise of realty specific, under the old law. Effect of particular devises lapsing, under the old law.

This principle might seem to apply with equal force to a devise which was void *ab initio*, but a different doctrine appears to have obtained in several instances: *Doe* d. *Stewart* v. *Sheffield*, 13 East, 527; *Williams* v. *Goodtitle*, 10 Br. & C. 134; see *ante*, p. 417. These decisions are, however, somewhat difficult to Devise void *ab initio*.

Residuary Devise.

reconcile with those referred to *post*, p. 500, in which specific gifts out of proceeds of real estate directed to be sold, which were void *ab initio*, have been held to belong to the heir and not to the residuary devisee of the fund. See also *Page* v. *Leapingwell*, 18 Ves. 463; *Jones* v. *Mitchell*, 1 S. & St. 293.

The question as regards wills made before 1838 is perhaps not altogether free from doubt. See further on this point Jarm. Wills, Vol. I., pp. 645 *et seq.*

Operation of residuary devise on devises of partial interests.

If the particular devises of the will dispose of less than the testator's entire estate in the subject-matter, the residuary devisee will, even in a will made before the year 1838, attach on the remaining estate, precisely in the same manner as if such interest had been in terms given to the residuary devisee. Thus, if lands of inheritance are devised to a person for life or in tail, a residuary clause will carry the reversion in fee expectant on such estate for life or estate tail: *Cook* v. *Gerrard*, 1 Lev. 212; *Willows* v. *Lydcot*, 2 Vent. 285; *Doe* d. *Briscoe* v. *Clarke*, 2 B. & P. N. R. 343; *Bennet* v. *Lowe*, 7 Bing. 535; *Saumarez* v. *Saumarez*, 4 My. & Cr. 331; *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552; the reversion, in the event of the death of the devisee for life or in tail in the lifetime of the testator, would, at the death of the testator, vest as an estate in possession. And the reversion in fee would not be excluded by the fact that the devise was expressed to embrace only the lands *not before devised*, (for these words would be considered as referring to the interest, and not to the corpus of the lands: *Rooke* v. *Rooke*, 2 Vern. 461); or by the fact that it was made in favour of the particular devisee for life or in tail himself; who, therefore, by the combined operation of the particular and residuary devise, would take the entire fee-simple: *Ridout* v. *Pain*, 3 Atk. 486; see also *Bradford* v. *Belfield*, 2 Sim. 264; *Williams* v. *Goodtitle*, 10 B. & C. 895; or by its appearing that the residuary property was charged with the payment of an immediate annuity: *Doe* v. *Fossick*, 1 B. & Ad. 186.

On executory and contingent devises.

The same principle applied to executory and contingent clauses; for where the particular devise disposes of the fee-simple in certain events only, the

Residuary Devise.

residuary clause would carry the fee in the alternative events. Thus, in the case of a devise to A. in fee, in case the testator's personalty should prove insufficient for payment of his debts upon trust for sale, with a residuary devise to B., the devise to B. carried the whole legal estate, if the personalty proved sufficient for payment of the debts: see *Goodtitle* d. *Hart* v. *Knott*, Cowp. 43. So, if lands are devised to A. in fee, in case he shall attain the age of twenty-one years, or to the children of B. who shall be living at his decease, and the residue of the real estate to C. in fee, it is clear, that if A. should die under twenty-one, or no child of B. should be living at his decease, the property would belong to C. by virtue of the residuary devise: *Doe* v. *Scott*, 3 M. & S. 300; *Doe* v. *Fossick*, 1 B. & Ad. 186. See also Willes, 300.

On the immediate income of lands devised *in futuro*.

And it is to be observed, that, wherever the immediate rents and profits are left undisposed of by any particular devise in the will, the residuary clause will carry such rents and profits, which would, if the will contains no such clause, descend to the heir: *Stephens* v. *Stephens*, Cas. temp. Talb. 228; and they would not be excluded from such residuary devise, by the circumstance of its containing a trust for sale, might seem not very apposite to an interest of this nature; for though such an argument might have weight in construing equivocal expressions, it cannot cut down the effect of clear unambiguous words: *Duffield* v. *Duffield*, 3 Bli. (N. S.) 261. See also *Holmes* v. *Prescott*, 10 Jur. (N. S.) 507; *Re Mowlem*, L. R. 18 Eq. 9, which was a case of a gift to a child *en ventre sa mère*. See further Jarm. Wills, p. 652. The question as to immediate income is not affected by the Wills Act: see *Re Townsend's Estate*, 34 Ch. D. 357.

*Whether a Devisee takes beneficially or as Trustee.*] —In applying the doctrine, that the ulterior beneficial interest in particular lands, previously devised for partial purposes, passes by a residuary devise, a previous and sometimes rather nice question is, whether the particular devise vests in the devisee

**Residuary Devise.**

Distinction between beneficial and fiduciary devises.

beneficially such ulterior interest, or leaves it undisposed of, so as to let in (if there had been no residuary gift) the title of the heir. In regard to this, the distinction seems to be, that, if I give to A. and his heirs all my real estate, *charged with* my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is *upon trust* to pay my debts, that is a devise for a particular purpose, and nothing more; the former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest—*per* Lord *Eldon*, in *King* v. *Denison*, 1 Ves. & B. 272. In *Hill* v. *Bishop of London*, 1 Atk. 618, where a testator devised an advowson to his honoured mother-in-law, G. H., willing and desiring her to sell and dispose thereof to certain colleges, Lord *Hardwicke* considered the devise to be beneficial, being only an injunction on the devisee to enjoy the thing devised in a particular manner.

Examples of beneficial devises.

So, in the case of *Rogers* v. *Rogers*, 3 P. W. 193, where a testator constituted his wife his sole executrix, and heiress of all his lands and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, the devisee was held to take beneficially, subject to the debts and legacies, to the exclusion of the heir. And, in the subsequent case of *King* v. *Denison*, 1 Ves. & B. 261 (S. P. *Smith* v. *King*, 16 East, 293), the same construction was given to a devise of the testatrix's real estate to her cousin, the wife of R., and to her cousin A., their heirs and assigns for ever, *subject nevertheless to, and chargeable with*, the payment of the annuities thereinafter mentioned. See further on this point, *Wych* v. *Packington*, 3 Br. P. C. Toml. ed. 44; *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; *Coningham* v. *Mellish*, Pre. Ch. 31.

Of course, the mere circumstance of a pecuniary legacy being given to the heir, will not rebut a resulting trust in his favour: *Starkey* v. *Brooks*, 1 P. Wms. 390; see also *Randall* v. *Bookey*, 2 Vern.

425; but parol evidence, it seems, is admissible for the purpose: *Mallabar* v. *Mallabar*, Cas. temp. Talb. 78. **Residuary Devise.**

### 5. Effect of the Wills Act, sects. 25, 32, and 33, on the Doctrine of Lapse.

By the 25th section of the Wills Act, 1 Vict. c. 26, it is provided,— Stat. 1 Vict. c. 26, s. 25.

"That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." Residuary devise includes real estates comprised in lapsed or void devises.

As to the destination of a specific sum given out of real estate to a person who dies in the testator's lifetime, or the gift of which is void *ab initio*, it is evident that the Act applies to such a case; and that the exception or charge will enure for the benefit of the residuary devisee as an interest in real estate. "If, however, the will does not contain an operative residuary devise, or the sum excepted affects the property comprised in the residuary devise, such sum falls to the heir. Of course the Act has no bearing on the question whether the sum be an exception or simply a charge; nor does it apply to the class of cases first noticed, in which the gift of a sum of money charged upon land on a contingency is defeated by the failure of the event (whether it be the decease of the object before a certain age, or otherwise), and not by lapse:" Jarm. Wills, Vol. I., p. 351. See also Mr. Jarman's observations on the operation of a general devise in regard to void, lapsed, and partial specific devises, 1 Jarm. Wills, 645 *et seq.* Whether the Act affects destination of lapsed sums charged on real estates.

By the same Act it is provided,—

Sect. 32. "That, where any person to whom any real estate shall be devised for an estate tail or an estate in *quasi* entail shall die in the lifetime of the testator leaving issue who would be Sect. 32. Devises of estates tail shall not

**Effect of Wills Act on Lapse.**

lapse if devisee leaves issue.

inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Sect. 33. Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

Sect. 33. "That where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Cases determined under 1 Vict. c. 26.

It has been held that the 33rd section does not substitute for the predeceased devisee or legatee the issue whose existence prevents the lapse, and that a devisee or legatee within the section would take the same provision under the will, and with the same powers, incidents, and obligations of property, as if his death had happened immediately after that of the testator: *Johnson* v. *Johnson*, 3 Hare, 157; *Skinner* v. *Ogle*, 4 No. Cas. 74; see *Re Mason's Will*, 34 Beav. 494; *Pickersgill* v. *Rodger*, 5 Ch. D. 163; *Eager* v. *Furnivall*, 17 Ch. D. 115; *Re Hensler*, *Jones* v. *Hensler*, 19 Ch. D. 612; *Re Hone's Trust*, 22 Ch. D. 663. And it makes no difference whether such death happened before or after the date of the will: *Wisden* v. *Wisden*, 2 Sm. & G. 396; *Mower* v. *Orr*, 7 Hare, 473; *Backhouse* v. *Young*, 4 Drew. 1. But the section does not apply to the interest of a person dying before the Act came into operation: *Winter* v. *Winter*, 5 Hare, 306. The term issue is used as a *nomen collectivum*, so that no lapse will occur if there is any person belonging to the same line of issue in existence at the death of the testator: *Re Parker*, 1 Sw. & Tr. 523. In *Griffiths* v. *Gale*, 12 Sim. 354, it was held, that the 33rd section does not apply to a testamentary appointment under a power to appoint in favour of particular objects, where the instrument creating the power contains a gift over in default of appointment; but it does apply so as to prevent lapse where the power is

Effect of Wills Act on Lapse.

general, though there is a gift over: *Eccles* v. *Cheyne*, 2 K. & J. 676. See also *Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, Johns. 210; *Freeland* v. *Pearson*, L. R. 3 Eq. 658; *Holyland* v. *Lewin*, 26 Ch. D. 266 (overruling *Freme* v. *Clement*, 18 Ch. D. 499). A covenant in a settlement to settle after-acquired property will not include property preserved from lapse by this section: *Pearse* v. *Graham*, 11 W. R. 415.

# CHAPTER X.

## CONVERSION.


| | PAGE | | PAGE |
|---|---|---|---|
| 1. The Doctrine of Constructive Conversion. | | *Exclusion of the Doctrine* ... | 489 |
| *Statement of the Doctrine* ... | 482 | *Duties of Trustees, &c., as to Actual Conversion* ..... | 494 |
| *Election* ..... | 483 | 2. Undisposed-of Interests in Realty ..... | 496 |
| *Conversion of Residue*..... | 485 | | |


### 1. The Doctrine of Constructive Conversion.

**Doctrine of Constructive Conversion.**

Lands directed to be sold considered as personal estate, and *vice versâ*.

*Statement of the Doctrine.*]—Where a person takes, under a deed or will, property which, by that deed or will, is directed to be converted, he of course takes it in the character which the instrument has impressed upon it. Thus, if lands are devised in trust to be sold, and the produce laid out on security as personal estate for the benefit of A. for life, with remainder to B. absolutely; upon the decease of B. his personal representative would be entitled to the produce of the land, subject to the prior life-interest, as part of his personal estate, although the lands should actually remain unsold; while, in the converse case, namely, of money being directed to be laid out in land, to be settled to the use of A. for life, with remainder to B. in fee, the money, though not laid out, would be real estate of B., and as such would, at his decease, devolve to his heir or devisee: *Guidott* v. *Guidott*, 3 Atk. 254; *Pulteney* v. *Darlington*, 1 Br. C. C. 224; *S. C.*, 7 Br. P. C. Toml. ed. 530; *Fletcher* v. *Ashburner*, 1 Br. C. C. 497; *Att.-Gen.* v. *Holford*, 1 Price, 426; *Simpson* v. *Ashworth*, 6 Beav. 412. And see the authorities collected, Jarm., Wills, Vol. I., p. 585. In order to change the nature of property, however, the direction to convert must be absolute. Thus, if a discretion is lodged in trustees to invest money in land

Conversion must be absolute.

Doctrine of Constructive Conversion.

or personal security, there will be no conversion in law until there is a conversion in fact: *Van* v. *Barnett,* 19 Ves. 102. See also *Wheldale* v. *Partridge,* 5 Ves. 388; *Lucas* v. *Brandreth,* 28 Beav. 273; *Re Ibbitson's Estate,* L. R. 7 Eq. 226. But a discretion given to trustees as to the time at which the sale may best be effected will not prevent a direction to convert from being imperative, and operating from the death of the testator: *Doughty* v. *Bull,* 2 P. Wms. 320; *Robinson* v. *Robinson,* 28 Beav. 273; *Re Raw, Morris* v. *Griffiths,* 26 Ch. D. 601.

A devise over, in a certain event (which does not happen), of so much of the land as should remain unsold, has been held not to prevent the prior legatee of the produce of the land from taking it as personal estate, there being no inconsistency in saying that it shall be personalty as to the first taker, and real estate with respect to the second: *Ashby* v. *Palmer,* 1 Mer. 296; stated also Jarm., Wills, Vol. I., p. 93. See also *Crabtree* v. *Bramble,* 3 Atk. 680.

Heir takes land as personalty, when.

Land directed to be sold will sometimes be personal estate, even in the hands of the heir, though his claim must originally attach to it in the character of real estate. The distinction seems to be that, where the disposition for the purposes of which the conversion is directed to be made *wholly* fails, the property is real estate of the heir, and, on his decease, would devolve to his real representative; but, where there is a partial failure only of those purposes, as, where the heir takes by lapse or otherwise an aliquot share, or an interest ulterior to that of a legatee for life, the property forms part of his personal estate; since the conversion directed by the will would still be required *quoad* the other undivided share or the interest for life, in respect to which the will takes effect: *Wright* v. *Wright,* 16 Ves. 188; *Smith* v. *Claxton,* 4 Mad. 484.

Person entitled may elect to take property in its actual state.

*Election to take Property in its Actual State.*]—It is in the power of any person absolutely entitled to property which is directed to be converted, to elect

Doctrine of Constructive Conversion.

to take it in its actual as distinguished from its destined state. For this purpose, of course, it is necessary that the party should be personally competent to change the nature of the property, and should have evinced an intention to do so. What acts have this effect has been the frequent subject of adjudication. Entry upon and the letting for a term of years of an estate devised to be sold would clearly be an election to take it as land: *Crabtree* v. *Bramble,* 3 Atk. 680. And, placing out on security, as the absolute property of the party, money which was directed to be laid out in land would evince an intention to treat it as personalty: *Lingen* v. *Sowray,* Pre. Ch. 400, 1 P. Wms. 172. And, in either case, a will or other instrument disposing of the property, by an express description adapted to its actual condition, would of course determine its constructive character accordingly: *Triquet* v. *Thornton,* 13 Ves. 345. Whether continued receipt of rents is evidence of election to take as realty property devised on trust for sale depends on the circumstances of the particular case: see *Re Gordon,* 6 Ch. D. 531; *Re Lewis, Foxwell* v. *Lewis,* 30 Ch. D. 654; *Potter* v. *Dudeney,* 56 L. T. 395. Where a testator had agreed to sell land, and received a deposit, and the residuary devisee agreed to sell the same property to the same purchaser at the same price, and to accept the deposit paid as part of the price, it was held that the devisee had not accepted the testator's contract so as to effect a conversion relating back to the testator's lifetime: *Re Harrison,* 34 Ch. D. 214.

What amounts to election.

Whether parol declaration sufficient.

It appears, in one instance, to have been decided in conformity to a dictum of Lord *Macclesfield* in the case of *Edwards* v. *Countess of Warwick,* 2 P. Wms. 173, that the election may be made by parol: *Chaloner* v. *Butcher,* cit. 3 Atk. 685; though the contrary was asserted by Lord *Hardwicke* in the case of *Bradish* v. *Gee,* Amb. 229. At all events, the intimation of intention, by whatever means made, must be explicit and unequivocal: *Stead* v. *Newdigate,* 2 Mer. 531. As to the question where the obligation to lay out and the right to call for the

money meet in the same person, see *Chichester* v. *Bickerstaff*, 2 Vern. 295; and *Pulteney* v. *Darlington*, 1 Br. C. C. 223, 7 Br. P. C. (Toml. ed.) 530, in which Lord *Thurlow* said, after referring to many cases: "The use that I make of these cases, notwithstanding the dicta they contain, is this,—that where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim; like the case of *Chichester* and *Bickerstaff*, against which I think there is no judgment, though there are a number of opinions. I know no better authority than that case." And see Jarm., Wills, Vol. I., p. 535, n. (*k*).

Doctrine of Constructive Conversion.

*Conversion of Residue.*]—The consideration of what is the nature of residuary property, as it regards the relative rights of particular and ulterior legatees, forms an important branch of law connected with the duty of executors; and as the doctrine has received much elucidation from modern cases, a statement of it in this place may be useful. The following propositions embrace the adjudicated points:—

1. Where a general residue of personalty is bequeathed to a person for life, and after his death over to another, though there is no express trust for conversion, if any part of the residuary estate consists, on the one hand, of property which is wearing out and diminishing in value, as leaseholds, or life or other terminable annuities, the income of which obviously partakes of the nature of capital, or, on the other hand, of property which yields no present income, but the value of which is constantly progressive, as reversions, the property is not in either case, unless the will contains indication of a contrary intention, to be considered as intended for enjoyment *in specie*, according to the respective interests of the parties under the bequest, but ought to be converted. See as to wasting property, *Howe* v. *Lord Dartmouth*, 7 Ves. 137 (terminable annuities); *Fearne* v. *Young*, 7 Ves. 549 (partnership business); *Johnson* v. *Johnson*, 2 Coll. 441 (leaseholds); *Fryer* v. *Bulton*, 8 Sim. 442; and

Rule where a general residue is bequeathed without a trust for conversion.

Doctrine of Constructive Conversion.

*Wightwick* v. *Lord* (annuities charged on wasting or uncertain fund). See also *Pickering* v. *Pickering*, 4 My. & Cr. 289; *Macdonald* v. *Irvine*, 8 Ch. D. 101. The rule in question applies also to property which is not of a wasting nature if it is likely to be subject to fluctuations in value, as railway stock: *Thornton* v. *Ellis*, 15 Beav. 193. As to the right of a tenant for life to require the conversion of reversionary property, see *Hinves* v. *Hinves*, 3 Hare, 611; *Johnson* v. *Routh*, 3 Jur. (N. S.) 1041; *Countess of Harrington* v. *Atherton*, 3 De G. J. & S. 352; *Wilkinson* v. *Duncan*, 23 Beav. 469. And the rule applies where trustees, having a discretion either to convert or to retain existing investments, refuse to act upon it: *Prendergast* v. *Prendergast*, 3 H. L. C. 195.

Rule where there is a trust for conversion and direction that produce be meanwhile accumulated.

2. Where property is given subject to a trust for sale and conversion, and the produce is to be invested for the benefit of legatees for life and ulterior legatees, and until the sale and conversion the income is expressly directed to be accumulated in augmentation of the capital; the trust for accumulation ceases, and the right of the legatee for life commences at the end of a year from the testator's death, though the property remains actually unconverted: *Sitwell* v. *Bernard*, 6 Ves. 520, and cases cited, Ibid. 528; *Kilvington* v. *Gray*, 2 S. & St. 396; *Vickers* v. *Scott*, 3 My. & K. 500.

Rule where there is no disposition of the interim produce.

3. In the case just stated, if there be no direction to accumulate, or any other express disposition of the interim produce of the property to be converted, the right of the legatee for life of the invested fund commences, as regards such part of the property as consists of government or real securities or any investments authorised by the trust, independently of the fact of the actual conversion of the property, or of the greater or less facility or opportunity which existed for the conversion of it, immediately on the death of the testator: *Angerstein* v. *Martin*, T. & R. 232; *Hewitt* v. *Morris*, Ibid. 241; *Dimes* v. *Scott*, 4 Russ. 209; overruling *Stott* v. *Hollingworth*, 3 Madd. 161. See also *Taylor* v. *Hibbert*, 1 J. & W. 308; *La Terrière* v. *Bulmer*, 2

Doctrine of Constructive Conversion.

Sim. 18; *Douglas* v. *Congreve*, 1 Kee. 410; *Macpherson* v. *Macpherson*, 1 Macq. H. L. 243; *Hume* v. *Richardson*, 4 De G. F. & J. 29; *Brown* v. *Gellatly*, L. R. 2 Ch. 751. Where, however, part of the property directed to be converted consists of unauthorised investments, the tenant for life is entitled, not to the actual income of such investments, but only to so much as would have accrued if the fund had been converted and properly invested at the expiration of a year from the death of the testator, such income commencing, not from the end of the year, but immediately from the death. This rule was laid down in *Dimes* v. *Scott*, 4 Russ. 209; and, notwithstanding some decisions in which a different view was taken (2 Sim. 18; 1 Kee. 427; 3 Beav. 72), the rule has in recent times been repeatedly affirmed and may be regarded as established beyond question: *Taylor* v. *Clark*, 1 Hare, 161; *Morgan* v. *Morgan*, 14 Beav. 77; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Allhusen* v. *Whittell*, L. R. 4 Eq. 295.

Remarks upon the case of *Dimes* v. *Scott*.

In order to determine what sum is payable to the legatee for life in respect of any particular fund or property, which formed part of the residuary personal estate of a testator, it would be incumbent on the trustee to ascertain its value at the end of a year from the death of the testator. The mode of ascertaining such value will, of course, depend upon the nature of the property in question. If it be a leasehold house or personal chattel, actual valuation will be requisite. If it be a public transferable security, a reference to the market price of the day will give the required information. The value of some species of property is scarcely ascertainable by any other standard than its actual production; of this nature, it is obvious, are credits and private securities. Suppose, for instance, a sum of 2,000*l.* to be owing to the testator at his decease, which at that time was considered to be a good debt, but on which the executor eventually received only ten shillings in the pound, and that not until two years after the testator's decease. The estimated value of the debt for the present purpose would be the 1,000*l.*

**Doctrine of Constructive Conversion.**

received, less 40*l.* the interest for the second year which elapsed before it was received. The result, therefore, would be the same as if the testator had died possessed of the sum of 960*l.* cash. It should be observed, however, that if the value of property of any description, at the end of the year, can be ascertained to differ from the amount which it subsequently produced, the former, and not the latter, will regulate the sum payable to the legatee.

Rule where part of property is converted within the year.

4. Whether or not the will contains an express trust for conversion, if any part of the testator's property is in fact converted within the year after his death, the tenant for life takes the actual income arising from the proceeds of conversion as from the time of their investment: *La Terrière* v. *Bulmer*, 2 Sim. 18.

Rule where property is retained *in statu quo* after the year.

5. If property liable to conversion is retained in its existing investment after the expiration of a year from the testator's death, the general rule is that the tenant for life will be entitled, either from the end of the year, or from the death (according as there is or is not a direction to accumulate), to an income equal to the dividends of a competent amount of 3*l.* per cent. Stock, such as would have represented the proceeds of conversion if so invested at the end of the year: *Dimes* v. *Scott*, 4 Russ. 209; *Mills* v. *Mills*, 7 Sim. 501; *Hume* v. *Richardson*, 4 De G. F. & J. 29; *Brown* v. *Gellatly*, L. R. 2 Ch. 751. But with regard to property which cannot be converted within the year without serious loss to the estate, the rule seems to be, not to convert the property, but to set a value on it, and to give to the tenant for life 4*l.* per cent. on such value, and the residue (if any) of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainderman; per *Parker*, V.-C., in *Meyer* v. *Simonson*, 5 De G. & S. 723. See *Gibson* v. *Bott*, 7 Ves. 89; *Fearns* v. *Young*, 9 Ves. 549; *Walker* v. *Shore*, 19 Ves. 387; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Re Llewellyn's Trusts*, 29 Beav. 171; *Brown* v. *Gellatly*, L. R. 2 Ch. 751. But see *contra*, *Crawley* v. *Crawley*, 7 Sim. 427; and

Doctrine of Constructive Conversion.

*Mehrtens* v. *Andrews*, 3 Beav. 72, where Lord *Langdale* held that the tenant for life was entitled to an income only equal to dividends on so much Consols as could have been purchased with a sum equal to the value of the property.

What expressions will exclude the operation of the doctrine of conversion.

*Exclusion of the Doctrine of Conversion.*]—Where it is a testator's intention that property of a wasting or fluctuating nature, or reversionary property, should not be converted, but retained and enjoyed in specie, care should be taken to insert in the will a clear and express declaration to that effect. But the Court will give effect to any expressions which indicate an intention of the testator to exclude the operation of the rule as to conversion and to give to his legatees the enjoyment in specie of his property. It will be convenient in this place to consider what will amount to a sufficient indication of such intention.

Trust for conversion on expiration of a life estate.

Where there is an express trust for conversion at the death of the tenant for life, he is entitled to enjoyment in specie. Thus, in *Alcock* v. *Sloper*, 2 My. & K. 699, where a testator devised and bequeathed all the residue of his estate and effects to his executors, upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof for her sole use, her own receipt to be a sufficient discharge for the rents and dividends; and after her decease, upon trust to sell his freehold house in O., and his leasehold houses by auction. Part of the residuary estate consisted of Long Annuities. Sir *J. Leach*, M. R., decided in the affirmative; his Honour considered that the term "dividends" had reference to the Long Annuities; and adverted to the fact that the leasehold property, also a wasting fund, was expressly to be sold after the wife's decease, which showed that he had no general notion of immediately converting the wasting portion of his residuary estate into permanent property. See also *Hunt* v. *Scott*, 1 De G. & S. 219; *Harvey* v. *Harvey*, 5 Beav. 134; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Rowe* v. *Rowe*, 29 Beav. 276. So also where the conversion

**Doctrine of Constructive Conversion.**

of any particular property is expressly postponed for a specified time: *Green* v. *Britten*, 1 De G. J. & S. 649.

Expressions indicating that property shall remain in actual state.

The tenant for life will also be entitled to specific enjoyment, if the terms of the gift over indicate that the property shall then be in the same state as at the testator's death. So in *Collins* v. *Collins*, 2 My. & K. 703, the words of the bequest were, "I give to my wife, S., all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death, the property so left to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage held for a term of twenty-eight years, and *Leach*, M. R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator that his widow should enjoy the leasehold property for her life. See also *Pickering* v. *Pickering*, 4 My. & Cr. 289, where Lord *Cottenham* laid stress on the direction to "divide" the property on the tenant for life's death. See also *Harris* v. *Poyner*, 1 Drew. 174; *House* v. *Way*, 12 Jur. 958; *Daglie* v. *Fryer*, 12 Sim. 1.

Direction that devisee shall take "rents," &c.

A direction that the tenant for life shall take the *rents* of property has in some cases been held to indicate an intention that leaseholds should be enjoyed in specie, where there was no other property capable of producing rents: *Goodenough* v. *Tremanamodo*, 2 Beav. 513; *Cafe* v. *Bent*, 5 Hare, 24; see *Neville* v. *Fortescue*, 16 Sim. 333. But in the case of *Pickup* v. *Atkinson*, 4 Hare, 624, where a testator, after a specific gift, bequeathed the "rents and profits, dividends, and interest," of all the residue of his property to his wife for her life, with a gift over of the whole of the residue, after her decease, to other persons, *Wigram*, V.-C., held, that the widow was not entitled to the enjoyment in specie, during her life, of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. It having been contended that the word "rents" could not be satis-

Doctrine of Constructive Conversion.

fied, if the only property producing rents was to be sold and converted into Consols, his Honor observed:—"If the use of the word 'rents' in one case, with reference to leaseholds not specifically bequeathed, is to be taken as sufficient evidence that the tenant for life of the residue was intended to enjoy the leaseholds in specie, I do not know how to stop short of the conclusion that any other word, by which income may be described, is to have the same effect with reference to the property in respect of which it is paid. The use of the word 'dividends,' for example, in another case, ought to be admitted as sufficient evidence that every portion of the residue, though not specifically bequeathed, the annual profits of which are returned under the name of dividends, was also intended to be enjoyed in its existing state, which would include every species of property yielding dividends, from Consols, which the Court considers a permanent fund, down to the lowest mercantile security: and the same argument, in strictness, would apply to the word 'interest,' where the property yielded income in the form of interest. It appears to me impossible to admit that conclusion."

Use of word "dividends."

In *Vincent* v. *Newcombe*, 1 You. 599, the use of the expression "dividends" was held to indicate an intention that Long Annuities should be enjoyed in specie, the testatrix having no other stock to which the term was properly applicable.

Power to convert with consent of tenant for life.

A tenant for life is entitled to enjoyment in specie where there is a power to convert with his consent: *Hinves* v. *Hinves*, 3 Hare, 609; *Eden* v. *Eden*, 23 Beav. 543; or a power to renew leaseholds: *Crowe* v. *Crisford*, 17 Beav. 507; *Hind* v. *Selby*, 22 Beav. 373; *Thursby* v. *Thursby*, L. R. 19 Eq. 395; or to keep houses in repair: *Crowe* v. *Crisford, supra;* or to discharge incumbrances on leaseholds: *Re Sewell's Estate*, L. R. 11 Eq. 80. Where a testator directed his trustees to sell and convert such part of his residuary estate as should not consist of public funds or government securities, it was held that the tenant for life was entitled to enjoy in specie Long Annuities

**Doctrine of Constructive Conversion.**

of which the testator died possessed: *Wilday* v. *Sandys*, L. R. 7 Eq. 455 (*a*).

Enumeration of items of property.

Where there is an enumeration of particular items of property, together with a general residuary clause, and some of such items are evidently to be enjoyed in specie, it will generally be presumed that the remainder of the property is to be similarly enjoyed.

In the case of *Bethune* v. *Kennedy*, 1 My. & Cr. 114, where a testatrix, after making two specific bequests of sums in the Long Annuities, gave "the residue of her property, all she did or might possess in the funds, copy or leasehold estates," to her sisters during their lives; and at the decease of both, to be divided equally between her cousins; and the testatrix's estate, after satisfying the specific bequests, consisted in part of 150*l.* per annum in the Long Annuities. Sir C. C. *Pepys*, M. R., held that the sisters were entitled to receive the dividends accruing on the Long Annuities as a specific legacy; he said:—"This question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered. After a specific bequest of a part of the stock which the testatrix had, there is here a gift of all she did or might possess in the funds, copy or leasehold estates, to her dear sisters. Now, as to the copyhold or leasehold estates, it is not disputed that the gift is specific. If so, why should it also not be specific with respect to the funds? The intention, it is reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there can be no doubt that a bequest of all that a testator may possess in the funds would be a specific bequest of all his funded property, the rule being that

(*a*) Where investment in public funds, &c., is directed by a will, trustees are not authorised to invest in or retain Long Annuities: *Tickner* v. *Old*, L. R. 48 Eq. 422. See also *Preston* v. *Melville*, 15 Sim. 35; *Re Llewellyn's Trust*, 29 Beav. 171; *Porter* v. *Baddeley*, 5 Ch. D. 542.

Doctrine of Constructive Conversion.

the legacy is not the less specific for being general. See also *Vaughan* v. *Buck*, 1 Phil. 75; *Burton* v. *Mount*, 2 De G. & S. 383; *Bowden* v. *Bowden*, 17 Sim. 65; *House* v. *Way*, 12 Jur. 958; *Howe* v. *Howe*, 14 Jur. 359; *Hood* v. *Clapham*, 19 Beav. 90; *Boys* v. *Boys*, 28 Beav. 436; *Booth* v. *Coulton*, 7 Jur. (N. S.) 207. But a mere enumeration will not of itself exclude the ordinary rule as to conversion: see *Mills* v. *Mills*, 7 Sim. 508; *Sutherland* v. *Cooke*, 1 Coll. 504; *Blann* v. *Bell*, 2 De G. M. & G. 775; *Morgan* v. *Morgan*, 14 Beav. 72; *Re Tootal's Estate*, 2 Ch. D. 628.

Powers of interim management, &c.

The rule as to conversion will not be excluded by powers or directions as to dealing with property which are referable to interim management or which merely regulate the discretion of the trustees as to the mode of carrying out a sale: *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Arnold* v. *Ennis*, 2 Ir. Ch. R. 601. A discretionary power to convert where the trustees think fit does not entitle the tenant for life to enjoyment in specie until conversion: *Walker* v. *Shore*, 19 Ves. 387; *Wilkinson* v. *Duncan*, 23 Beav. 469; *Yates* v. *Yates*, 28 Beav. 637; *Re Llewellyn's Trust*, 29 Beav. 171. Nor does a direction to convert specified parts of personal estate imply that the remainder is not to be converted: *Cafe* v. *Bent*, 5 Hare, 34; *Morgan* v. *Morgan*, 14 Beav. 85; *Hood* v. *Clapham*, 19 Beav. 90. And a direction to convert for payment of debts does not necessarily imply that there is to be no conversion for any other purpose: *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; but see *Re Sewell's Estate*, L. R. 11 Eq. 80.

Even where a tenant for life is entitled to enjoyment of investments in specie, debts owing to the testator must be got in: *Holgate* v. *Jennings*, 24 Beav. 623. See *Caffrey* v. *Darby*, 6 Ves. 488; *Tebbs* v. *Carpenter*, 1 Mad. 298; *Rowley* v. *Adams*, 2 H. L. C. 725; *McGachen* v. *Dew*, 15 Beav. 84; *Wiles* v. *Gresham*, 2 Drew. 258; *Jones* v. *Higgins*, L. R. 2 Eq. 538; *Ex parte Ogle*, L. R. 8 Ch. 711; *Waring* v. *Waring*, 3 Ir. Ch. R. 335: see also *Stone* v. *Stone*, L. R. 5 Ch. 74, where trustees were held

Doctrine of Constructive Conversion.

responsible for allowing a claim to be barred by the Statute of Limitations (*b*).

Duty of executor or trustee as to *actual* conversion (*c*).

*Duties of Trustees, &c., as to actual Conversion.*]—The doctrine discussed in the preceding pages relates to the *constructive* conversion of property, and not to its *actual* conversion; (*i.e.*) it ascertains the period at which, for the purpose of fixing the income of the *cestuis que trust* for life, the property assumes its destined character, but does not prescribe the time and manner of carrying the trust into effect. In short, it simply provides a temporary expedient for preventing the relative rights of the parties beneficially interested from being deranged during the interval which will necessarily elapse before the execution of the trust, leaving the duty of the executor or trustee, in regard to his proceedings in that trust, to be determined by ordinary rules. What degree of activity an executor or trustee is bound to exert, it is not here necessary to inquire, nor indeed would it be easy in any specific propositions to define. Every case must depend upon its particular circumstances; and the Court allows to trustees and executors a large discretion in this respect: *Hughes* v. *Empson*, 22 Beav. 183. An executor or trustee should, of course, always be prepared to show that he has performed this among the other duties of his office with diligence; unreasonable delay would expose him to the risk of becoming personally responsible for any loss which that delay might occasion. He should not consider his fiduciary labours as accomplished, until he has completely converted all the property, and placed it in the state which the testator has directed. In the case of *Buxton* v. *Buxton*, 1 My. & Cr. 80, an exe-

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(*b*) Though trustees are personally answerable for delay in getting in choses in action, there is no objection to their accepting prepayment: *Mills* v. *Osborne*, 7 Sim. 30; *Maskelyne* v. *Russell*, W. N. 1869, p. 184.

(*c*) The observations in the text apply in great measure to the duties of trustees as regards investment. For a consideration of this subject, see Vol. VI., sub tit. SETTLEMENTS.

Doctrine of Constructive Conversion.

cutor who had delayed the sale of Mexican bonds for a year and seven months, when they were sold at a price considerably below what they would have fetched at the testator's decease, was held not to be chargeable with the loss. The trust was to convert with all convenient speed, and there was no purpose requiring an immediate sale, though certain legacies, to the payment of which the produce was applicable, were payable at the expiration of four months, when the price of the bonds was extremely low, even below what was afterwards obtained about six months after the testator's decease. The defendant's co-executrix frequently applied to him to sell; but this, it was held, did not determine or in any manner limit his discretion. It appeared that the defendant had throughout exercised his best care and discretion, and that his delay did not arise from negligence. Sir *C. C. Pepys*, M.R. (afterwards Lord *Cottenham*), said, that if a reasonable discretion were denied to an executor; if it were to be laid down as an inflexible rule that he ought to convert the assets without waiting or considering how far it was for the interest of those who were beneficially entitled, there would, of necessity, be always an immediate sale; the executor would be bound to sell at whatever loss. Such a rule would be in its operation most injurious. So also in *Marsden* v. *Kent*, 5 Ch. D. 598, where executors had retained foreign railway bonds forming part of their testator's estate for more than a year after his death, *James*, L.J., said that "It would be very hard upon executors who have been saddled with property of this speculative kind, and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it was proved by the result, would have been the best course." But it is for the trustees, who retain fluctuating investments, to show some reason for not complying with the ordinary rule that the property ought to be converted within the year: *Grayson* v. *Clarkson*, L. R. 3 Ch. 605; *Scalthorpe* v. *Tipper*, L. R. 13 Eq. 232; except, of course, where an absolute discretion to postpone conversion, in which case they are not

Doctrine of Constructive Conversion.

bound by the rule: *Re Norrington*, 13 Ch. D. 654; see *Edmunds* v. *Edmunds*, 34 L. T. 522.

Suggestion as to the expediency of enlarging the powers of trustees for sale and conversion.

A consideration of the doctrines discussed in the preceding pages will suggest the advisability of making forms of testamentary trusts for sale and investment sufficiently comprehensive. A trust for conversion and investment, for the benefit of particular and ulterior legatees, should (unless the contrary be intended) be accompanied by a power enabling the trustees to suspend or postpone the sale or conversion of any part of the estate, and by a declaration that, in the meantime, the legatee for life shall take the income. This would relieve trustees from a very onerous and troublesome task, and render their duty consistent with their ordinary mode of acting. It certainly gives them a large discretion, and one which is the more liable to abuse, on account of the bias, before hinted at, commonly felt in favour of the interest of a legatee for life, as contradistinguished from that of the ulterior legatees; but persons who cannot be so far trusted ought not to be appointed to an office, every step in the execution of which demands the union of probity and judgment.

As to redemption of annuities.

It may be observed too that where a testator has granted redeemable annuities, an express direction respecting the redemption of them, and providing out of what fund they are to be paid until redeemed, will often be useful in preventing disputes between the persons interested in the annual income and in the capital. The charge clearly ought not to be thrown exclusively upon the annual income, for the same reason that an annuity, which forms part of a testator's estate, is not, we have seen, considered as consisting entirely of annual income, so as to belong to the legatee for life.

### 2. Undisposed-of Interests in Real Estate directed to be Sold under Trusts for Conversion.

As to undisposed-of

Where real estate is directed to be sold for particular purposes, the conversion is considered as made

Undisposed-of Realty Directed to be Sold.

interests in realty directed to be sold.

for those purposes and no farther; and, in the event of their entirely or partially failing, the property, or the unapplied portion of it (as the case may be), retains its original character of real estate, and devolves as such to the real representative. Thus, if a testator devises his lands of inheritance to trustees, upon trust to sell for the payment of debts, in aid of the personal estate, or with a direction to pay the monies arising from the sale to A., and the produce of the sale is not required for payment of debts, the personalty being sufficient, or A. dies in the testator's lifetime, the beneficial interest in the land, if unsold, or the produce thereof, if a sale has taken place, belongs to the heir as real estate undisposed of, and not to the next of kin, the conversion being made for the purposes of the will only, and the claim of the next of kin arising dehors the will: *Ackroyd* v. *Smithson* (*d*), 1 Br. C. C. 503; *Robinson* v. *Taylor*, 2 Br. C. C. 589; *Chitty* v. *Parker*, 4 Id. 411; *S. C.*, 2 Ves. jun. 271; *Collins* v. *Wakeman*, Id. 683; *Hill* v. *Cock*, 1 Ves. & B. 173; *Gibbs* v. *Rumsey*, 2 Ves. & B. 294; *Dixon* v. *Dawson*, 2 S. & St. 327. And the rule is the same where the vacancy in the disposition is occasioned, not by the disappointment or failure of the testator's purpose (as in examples just put), but by the original con-

(*d*) In this case of *Ackroyd* v. *Smithson* (remarkable for the celebrated argument of Mr. Scott (afterwards Lord Eldon) which Lord Thurlow admitted to have changed his opinion) the testator, after giving several pecuniary legacies, devised all his real and personal estate in trust to be sold and converted into money, to pay debts and legacies, and funeral and testamentary expenses, and the surplus to be paid to the legatees in the proportion of these legacies. Two of these legatees died in the testator's lifetime. On the question, whether these lapsed shares belonged to the heir-at-law or next of kin of the testator, Lord Thurlow at first was of opinion that the next of kin were entitled; but, upon hearing Mr. Scott's argument, decided in favour of the heir. He said, "That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that, if all the legatees had died, the heir could, as he certainly might," he said, "prevent a sale; and yet to say, that, because a sale was necessary, the heir should not take the undisposed part of the produce."

Undisposed-of Realty Directed to be Sold.

tractedness of that purpose. As, where lands are devised upon trust for sale, and the proceeds are directed to be invested upon trust for A. for life, and no farther disposition is made of the produce of the sale, the ulterior interest devolves to the heir as real estate: *Wilson* v. *Major*, 11 Ves. 205. See also *Robinson* v. *Taylor*, 2 Br. C. C. 589. And an express declaration that the monies arising from the sale shall be deemed personal estate, will not entitle the next of kin, since the declaration will be construed as intended to apply only to persons claiming under the will, and not to regulate the devolution of the property by virtue of a partial intestacy: *Countess of Bristol* v. *Hungerford*, 2 Vern. 645.

In the case of *Fitch* v. *Weber*, 12 Jur. 645, undisposed-of proceeds of real estate devised for sale were held to belong to the heir-at-law of the testatrix, notwithstanding a direction in the will that the trustees should stand possessed of such proceeds as a fund of personal and not real estate; and that, for such purpose, such proceeds, or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law.

Produce of realty will not pass by residuary bequest.

Even in regard to the will itself, a mere devise in trust for sale, for a particular purpose, does not constitute the produce personalty, for all purposes. For instance, it will not pass under a general or residuary bequest of personal estate. Thus, if a testator devises his real estate to trustees, in trust for sale, for the payment of his debts, or directs the produce to be invested in trust for A. for life, (making no farther disposition), and bequeaths his personal estate to A., the latter bequest would not pass the interest in the real estate not exhausted by the devise: *Berry* v. *Usher*, 11 Ves. 87; *Wilson* v. *Major*, Id. 205; *Halliday* v. *Hudson*, 11 Ves. 205; *Maughan* v. *Mason*, 1 Ves. & Bea. 410. However, a declaration that the moneys arising from the sale shall be considered as part of the personal estate will have the effect of making them pass by a general or residuary bequest of personalty: *Collins* v. *Wakeman*, 2 Ves. jun. 683. And this construction will prevail, whenever, from the whole will, such an intention can be

collected: *Mallabar* v. *Mallabar*, Cas. temp. Talbot, 78; *Kellet* v. *Kellet*, 3 Dow. 248; *Brown* v. *Bigg*, 7 Ves. 280.

**Undisposed-of Realty Directed to be Sold.**

A residuary devise of real estate will, beyond all doubt, carry the undisposed-of produce of particular lands devised to be sold: *Goodtitle* v. *Knot*, Cowp. 43; it would result to the heir, if there were no residuary clause: *Culpepper* v. *Ashton*, 2 Ch. Cas. 115, 221.

Produce of realty passes by residuary devise.

Where a sum of money which is payable out of the produce of lands, unmixed with the produce of the personal estate (*e*), lapses, it either devolves to the heir, as an undisposed portion of a real fund, or falls into the residue of such fund, for the benefit of the devisee. In the case of *Hutcheson* v. *Hammond*, 3 Br. C. C. 128, 148, *Buller*, J., and Lord *Thurlow* successively held, that the lapsed sum belonged to the heir, as real estate; but, in the subsequent case of *Noel* v. *Lord Henley*, 7 Price, 240; *S. C.*, 1 Dan. 212, 322, the House of Lords, without noticing the former decision, determined in favour of the residuary devisee of the fund. See Mr. Jarman's observations on these cases: Jarm. Wills, Vol. I., p. 633 *et seq.* Mr. Jarman thinks (p. 636) that Lord *Brougham's* judgment on the appeal in the case of *Amphlett* v. *Parke*, 2 Russ. & My. 221, affords the strongest possible confirmation of the doctrine of *Hutcheson* v. *Hammond*, in opposition to *Noel* v. *Lord Henley*.

Destination of lapsed legacy out of produce of realty.

The destination of a similar sum, the devise of which, being for an illegal purpose, failed *ab initio*, is equally doubtful, as will appear by the following statement of the leading authorities. In *Page* v. *Leapingwell*, 18 Ves. 463, a testator devised certain real estates to trustees, in trust to sell, and, out of the monies arising therefrom, to pay certain legacies, including two sums of 200*l.* to the poor of two parishes, and to apply the overplus for the benefit of certain persons. There was also a general disposition of the residue of his real and personal estate

Effect where legacy was void *ab initio*.

(*e*) As to the effect of this circumstance, *vide post*, p. 501.

**Undisposed-of Realty Directed to be Sold.**

not thereinbefore disposed of. Sir *Wm. Grant*, M. R., observed, that the disposition as to the 200*l.* was void, as a devise to a charity, and therefore lapsed. According to the decree, however, his Honour appears to have decided, that the 200*l.* went, not to the heir, as might have been expected from his remarks in the judgment, but to the general residuary devisee.

Remark on *Page* v. *Leapingwell.*

It does not appear whether Sir *Wm. Grant* grounded his opinion on the general doctrine, that a residuary devise would take in the subject-matter of particular devises failing from circumstances existing at the time of the execution of the will, or whether he considered that this effect was produced by the words *not thereinbefore disposed of* (see *Doe* v. *Sheffield*, and *Williams* v. *Goodtitle*, *ante*, p. 475). Be that as it may, the effect of the decision was that the void legacies out of the real estates did not go to the residuary devisee of those estates. On this point the decision is confirmed by the subsequent case of *Jones* v. *Mitchell*, 1 S. & St. 293, where A. devised his real estate (after certain limitations) to trustees, in trust to be sold, and, out of the monies to be produced by the sale, to pay certain legacies, and then a legacy of 800*l.* to charities, and to pay the residue to B., Sir *J. Leach*, V.-C., held that the void legacy of 800*l.* belonged to the heir, on the principle *that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.*

There are several other cases corroborative of the principle of *Jones* v. *Mitchell*. Such is the case of *Cruse* v. *Barley*, 3 P. Wms. 20, where a legacy payable out of the produce of real estate, and which failed by the death of the legatee before the vesting age, was held to belong to the heir, in disregard of the doctrine now well established, that real estate, given upon a contingency which does not happen, passes under the residuary clause. The cases of *Collins* v. *Wakeman*, 2 Ves. jun. 683, and *Gibbs* v. *Rumsey*, 2 Ves. & B. 294, are also decisions in favour of the heir, who was held to be entitled to legacies payable out of the produce of

**Undisposed-of Realty Directed to be Sold.**

real estate, which, in the former case, had been reserved for a future disposition that was never made, and, in the latter, was illegally given to charity. But, a circumstance which impairs the authority of these cases is, that the produce of the real was blended with the general personal estate, which has been repeatedly held, even under the old law, to form a ground for giving to the residuary legatee of the mixed fund any sum payable out of the produce of the realty, the devise of which fails by reason either of the decease of the devisee in the testator's lifetime or of the illegality of the purpose to which it is devoted; the intention being, according to the words of Sir *R. P. Arden*, in *Kennell* v. *Abbott*, 4 Ves. 802, "to make the real estate to all intents and purposes personal:" see *Malabar* v. *Malabar*, For. 79; *Durour* v. *Motteux*, 1 Ves. sen. 320, more accurately stated 1 S. & St. 292, n.; *Kennell* v. *Abbott*, 4 Ves. 802; 2 Russ. & My. 221; *Green* v. *Jackson*, 5 Russ. 55.

Rule where produce of realty and personalty were blended.

In *Amphlett* v. *Parke*, 1 Sim. 275, lands were devised on trust for sale with a direction that the proceeds should be considered as personal estate, and should, together with all other the personal estate of the testatrix, be applied in payment of certain legacies; Sir J. *Leach* held that legacies which had lapsed fell into the residue; but this decision was reversed by Lord *Brougham*, who held that the heir was entitled. In *Salt* v. *Chattaway*, 3 Beav. 576, Lord *Langdale*, under somewhat similar circumstances, decided in favour of the residuary legatee.

The state of the authorities leaves the question, as to who is entitled to lapsed legacies where the proceeds of real estate directed to be sold are blended with personalty in a somewhat unsatisfactory and unsettled condition. The establishment of some general doctrine, resting on a basis sufficiently broad to comprehend all these cases, would have been better than the attempts made to draw distinctions between them, which only tended to perpetuate uncertainty, and with it the litigation which that

General remarks.

**Undisposed-of Realty Directed to be Sold.**

uncertainty inevitably invited. See Jarm. Wills, Vol. I., pp. 636 *et seq.*

Effect of residuary devise under the present law.

In the case of wills made since 1837 and containing a residuary devise, such devise obviates all difficulty in regard to this question, as it extends to all interests in real estate comprised in any devise which fails by lapse, or from being contrary to law, or otherwise incapable of taking effect: see sect. 25 of the Wills Act, *ante*, p. 479.

# CHAPTER XI.

## AMBIGUITIES IN WILLS, AND ADMISSIBILITY OF PAROL EVIDENCE.


| | PAGE |
|---|---|
| 1. GIFTS WHEN VOID FOR UNCERTAINTY. | |
| *As to Ambiguities in Wills Generally* | 503 |
| *Uncertainty as to Subject of Gift* | 504 |
| *Uncertainty as to Object of Gift* | 508 |
| *Uncertainty as to Other Matters* | 509 |
| *What Accuracy of Description is Necessary* | 510 |
| *Repugnancy and Contradiction in Wills* | 511 |
| 2. WHAT WORDS ARE SUFFICIENT TO CREATE A TRUST. | |
| *Gift for a Specified Purpose* | 513 |
| *Precatory Trusts* | 516 |
| 3. ADMISSIBILITY OF PAROL EVIDENCE | 523 |


### 1. GIFTS, WHEN VOID FOR UNCERTAINTY.

**Gifts, when Void for Uncertainty.**

Devises fail from uncertainty as to subject or object.

*As to Ambiguities in Wills generally.*]—Uncertainty with respect to any essential particular in a gift necessarily defeats it. Such uncertainty may arise either from the absence of declared intention, or from the obscurity produced by vagueness of expression, or by contradictory declarations. In the former case the general rule is that the Court is not at liberty to supply the omission of the testator by conjecture, or by the admission of extrinsic evidence of intention; for that would be in effect to make a new will for the testator. The persons who are entitled by law to succeed to property in the absence of any other disposition, are not to be deprived of their rights, except upon clear expression of the testator's intention to that effect, according to the well-known maxim that the heir is not to be disinherited unless by express words or necessary implication. And this maxim applies with equal force to the claims of next of kin as regards personalty. But where uncertainty in a will is produced by contradictory or vague expressions, so that

Gifts, when Void for Uncertainty.

an intention to dispose of property is manifest, but the terms of the will do not clearly indicate the nature or amount of the subject-matter, or the identity of the object of the gift, evidence is generally admissible of circumstances from which the Court may elicit what the testator's intention must have been.

Uncertainty as to subject-matter of gift.

*Uncertainty as to Subject of Gift.*]—A simple instance of a devise void for uncertainty, resulting from indefiniteness as to the subject-matter of the gift, occurs in the case of *Bowman* v. *Milbancke*, 1 Lev. 130, Raym. 97; where the expression, "I give all to my mother," was held to be insufficient to pass lands. So, in the case of *Mohun* v. *Mohun*, 1 Swanst. 201, the Court arrived at the same conclusion, on nearly similar words, viz., "I leave and bequeath to all my grandchildren, and share and share alike." On the other hand, such expressions as "I make (or acknowledge) A. B. as my heir" have been held to constitute good devises to A. B. in fee simple of the testator's lands: *Taylor* v. *Webb*, Styles, 301 *et seq.*; *S. C.*, sub nom. *Marrett* v. *Sly*, 2 Sid. 75. And where a testatrix, after giving certain legacies, proceeded thus: "After these legacies and my doctors' bills and funeral expenses are paid, I leave to my sister [M.], without any power or control of her husband, in case of her death to be equally divided amongst her children and grandchildren:" this was held to be a good gift of the residue of personalty to the sister: *Re Basset's Estate*, L. R. 14 Eq. 54.

Uncertainty of the devisees' shares.

In *Jones* v. *Hancock*, 4 Dow, 145, the uncertainty was as to what share the devisee was to take. In that case a testator devised to his daughter A. for life, with remainder to her first and other sons in tail male, with remainder to his daughter B., adding that the devise to A. was upon condition that she married a man possessed of property at least equal to if not greater than the property that he left her; and if she married a man with less property than that, then the testator left her only so much property of his as should be equal to the property of

Gifts, when Void for Uncertainty.

the man she married, and all the remainder of the property should pass over to B. The House of Lords held the devise over to be void for uncertainty. *Gibbs*, C. J., who delivered the opinion of the Judges, rested his arguments principally on technical reasoning, tending to shew that it was essential to a tenancy in common, that it should appear on the face of the instrument creating it what the specific interest of each tenant was, as appeared by the various writs giving remedies to tenants in common, all of which defined the shares intended to be recovered (*a*).

Uncertainty as to quantity.

So, generally speaking, if the amount which the donee is to take is not specified, the gift will fail for uncertainty. Thus a gift of "some of my best linen," or of "a handsome gratuity," is void: *Peck* v. *Halsey*, 2 P. Wms. 387; *Jubber* v. *Jubber*, 9 Sim. 503. So also a gift of the "bulk" of property: *Palmer* v. *Simmonds*, 2 Drew. 221. A distinction, however, is made where the will itself supplies some means of ascertaining how much is to be taken under the gift: in such cases the Court will determine how much is to be given or applied to the specified person or purpose, as where the gift was to executors to remunerate them for their trouble: *Jackson* v. *Hamilton*, 3 J. & L. 702; or for the maintenance, &c., of a person: *Pride* v. *Fooks*, 2 Beav. 430; *Kilvington* v. *Gray*, 10 Sim. 293; *Thorp* v. *Owen*, 2 Hare, 610; *Re Pedrotti's Will*, 27 Beav. 583; or to build and lay out a house and garden: *Edwards* v. *Jones*, 35 Beav. 474; or to build a hospital for a hundred boys "like but less than Heriot's Hospital": *Magistrates of Dundee* v. *Morris*, 3 Macq. 134. See also *Fisk* v. *Att.-Gen.* L. R. 4 Eq. 521; *Re Birkett*, 9 Ch. D. 576.

Gift of sum not exceeding 100*l.*, &c.

A gift of "50*l.* or 100*l.*," or of "a sum not exceeding 100*l.*," is construed in favour of the donee as a valid gift of the whole 100*l.*: *Seale* v. *Seale*, 1 P. Wms. 290; *Thompson* v. *Thompson*, 1

(*a*) An equal division will be made where the shares are to be determined by a person whose name is left in blank: *Robinson* v. *Wheelwright*, 21 Beav. 214; or where a person named for that purpose fails to do so: *Salisbury* v. *Denton*, 3 K. & J. 529; or where the testator declares that the donees are to "participate": *Liddard* v. *Liddard*, 28 Beav. 266.

Gifts, when Void for Uncertainty.

Coll. 395 ; *Cope* v. *Wilmot,* 1 Coll. 396 n.; *Gough* v. *Boult,* 16 Sim. 45 : see *Haggar* v. *Neatby,* Kay, 379. So a gift of "3000*l.* or thereabouts," to be raised by accumulation of income, was held to be good : *Oddie* v. *Brown,* 4 De G. & J. 179.

Gift of so much as donee may select.

A gift of any part, or such parts or so much of property, whether real or personal, as the donee may select, will amount to a gift of the whole property : *Cooke* v. *Farrand,* 7 Taunt. 122 ; *Arthur* v. *Mackinnon,* 11 Ch. D. 385 : but see *contra, Kennedy* v. *Kennedy,* 10 Hare, 438, a case which is not, perhaps, strongly to be relied on. In *Davis* v. *Davis,* 1 H. & M. 255, a donee of a power of distributing plate among certain named objects, including himself, was held to be entitled to allot to himself the largest share. See also *Reid* v. *Reid,* 389.

Gift of part of a specified whole.

A gift of a definite part of a larger whole which is itself capable of being ascertained, is not rendered void by the omission of the testator to point out what identical part the donee is to take; and in such cases the donee is entitled to select what part he will take : *Grace Marshall's Case,* Dy. 281 a ; *Hobson* v. *Blackburn,* 1 My. & K. 574 ; see *Millard* v. *Bailey,* L. R. 1 Eq. 378.

Description applicable to several objects.

If a testator, having two closes called Whiteacre, devises his close called Whiteacre, the devise is void : *Richardson* v. *Watson,* 4 B. & Ad. 798 ; unless the ambiguity can be explained by extrinsic evidence, as to which see *post,* p. 525. So also, if he devises his lands except his close called Whiteacre, there being two closes so called, all his lands will pass by the devise : *Blundell* v. *Gladstone,* 14 Sim. 83; 8 Jur. 301. But in some cases, upon the context of the will or other circumstances, all the items answering the description have been held to pass : see *Richards* v. *Patteson,* 15 Sim. 501 ; *Sampson* v. *Sampson,* L. R. 8 Eq. 479.

Gift of unascertained residue.

Where there is a power of disposition followed by a gift of the undisposed-of residue, then, if the power is not exercised, the whole of the property will pass to the residuary donee : *Surman* v. *Surman,* 5 Mad. 123 ; *Scott* v. *Josselyn,* 26 Beav. 174 ; *Re Sanderson's Trust,* 3 K. & J. 497 ; *Lancashire* v.

Gifts, when Void for Uncertainty.

*Lancashire*, 1 De G. & S. 288. In all these cases the power was in favour of special objects, but the same principle would seem to apply to general powers: see *Cooke* v. *Farrand*, 7 Taunt. 122. But if the gift is of a residue, after deducting a part which is incapable of being ascertained, the residuary gift will be void for uncertainty: see *Boyce* v. *Boyce*, 16 Sim. 476; *Jerningham* v. *Herbert*, 4 Russ. 388.

Gift of what is left at death of prior donee.

A gift of what is left at the death of a prior legatee, or what he does not want, or any gift in similar terms, is void for uncertainty: *Att.-Gen.* v. *Hill*, 1 J. & W. 158 n.; *Pope* v. *Pope*, 10 Sim. 1; *Browne* v. *Gibbs*, 1 Russ. & My. 614; *Watkins* v. *Williams*, 3 Mac. & G. 622; *Re Yalden*, 1 De G. M. & G. 53; *Perry* v. *Merritt*, L. R. 18 Eq. 152.

Gift of residue after providing for illegal purpose.

If there is a gift of the residue of a fund after providing for an illegal or unattainable purpose, then, if the amount to be applied to such purpose is not ascertained, the gift of the residue will be void for uncertainty: *Chapman* v. *Brown*, 2 Ves. 404; *Limbrey* v. *Gurr*, 6 Mad. 151; *Att.-Gen.* v. *Hinxman*, 2 J. & W. 270; *Cramp* v. *Playfoot*, 3 K. & J. 479; *Fowler* v. *Fowler*, 33 Beav. 616. But if the testator has specified, or by his will furnished means of ascertaining, what is the amount required for the intended purpose, the Court will estimate and deduct such amount, and the legatee will be entitled to the surplus, which would thus be rendered certain: *Mitford* v. *Reynolds*, 1 Phil. 185, 706. Where, however, a fund is given to persons being either special trustees or the executors of the will, to be applied to charitable or similar purposes, and an ascertainable part of such fund is to be applied to purposes which fail through illegality, it seems to be now settled that the whole fund will be applicable to such of those purposes as are not illegal: see *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; *Hunter* v. *Bullock*, L. R. 14 Eq. 45; *Dawson* v. *Small*, L. R. 18 Eq. 14; *Re Birkett*, 9 Ch. D. 576; where *Jessel*, M. R., intimated his opinion that if the amount to be applied to the illegal purpose were unascertainable, the whole gift must fail, as the whole might be required for such purpose.

**Gifts, when Void for Uncertainty.**

Gift of fund partly ascertained.

A gift of a mixed fund, part of which is ascertained and the residue not ascertained, will be good as to the part ascertained: *Ford* v. *Fowler*, 3 Beav. 146.

*Uncertainty as to Object of Gift.*]—A gift will be void for uncertainty if the identity of the object of the gift is incapable of being ascertained.

Gift to one of a class.

Thus if a testator devises to one of a class, as to one of the sons of A., evidence cannot be received to show which of the sons was intended; and hence the devise is necessarily void: *Strode* v. *Russell*, 2 Vern. 624, 625; T. Raym. 82; *Re Baylis*, 1 Sw. & T. 613; *Re Blackwell*, 2 P. D. 72. And where a testator gave a legacy of 300*l.* to the children of his late cousin E. B., evidence was rejected of the testator having declared that the bequest should apply exclusively to E. B.'s children by one husband, since it would, by the general rule of construction, extend to both classes of children: *Hampshire* v. *Pierce*, 2 Ves. sen. 216. So a gift to twenty of the poorest of the testator's kindred is void for uncertainty: *Webb's Case*, 1 Roll. Ab. 609 (D). So a gift for the benefit of a "family" will be void if it appears from the context that the term is intended to bear an extended signification, and the testator fails to define what members of the family are to take with sufficient certainty: *Yeap Cheah Neo* v. *Ong Cheah Neo*, L. R. 6 P. C. 381; see *Robinson* v. *Waddelow*, 8 Sim. 134. But a gift to a class with the exception of one or more members not ascertained is not void, but the whole class will take in equal shares: *Illingworth* v. *Cooke*, 9 Hare, 37; see *Hope* v. *Potter*, 3 K. & J. 206.

Omission of donee's name.

If a testator wholly omits the name of the devisee or legatee, it is impossible to supply the omission by parol evidence, and the gift will be void: *Wynne* v. *Littleton*, 2 Ch. Cas. 51; *Baylis* v. *Att.-Gen.*, 2 Atk. 240; see *Greig* v. *Martin*, 5 Jur. (N. S.) 329; *Mason* v. *Bateson*, 26 Beav. 404; *Gill* v. *Bagshaw*, L. R. 2 Eq. 746. See, however, *Re Wyatt*, W. N. 1888, p. 19, where *North*, J., under special circumstances held the name of a legatee, which was so obliterated as to be illegible, might be inferred from the whole will.

Gifts, when Void for Uncertainty.

Other species of uncertainty.

*Uncertainty as to other Matters.*]—Sometimes, the uncertainty arises from indefiniteness and obscurity as to the event on which the devise is to take effect: *Att.-Gen.* v. *Sibthorp*, 2 Russ. & M. 107; or from the devised estate being directed to go in the same manner as the testator's other estates, of which there are several, variously disposed of, and it does not appear which is intended: *Leslie* v. *Duke of Devonshire*, 2 Br. C. C. 187; or from the donees being mentioned alternatively, as where the gift is to A. or B., or to the testator's heir at law or next of kin: see *Beal* v. *Wyman*, Styles, 240; *Lowndes* v. *Stone*, 2 Ves. 649 (but see *Re Thompson's Trusts*, 9 Ch. D. 607, where the testator's statutory next of kin were held to be entitled to the property which was personalty); or by the gift being to several successively without saying in what order: *Winchmore* v. *Hobard*, Hob. 313; *Thomason* v. *Moses*, 5 Beav. 77; but in the latter case, if the donees belong to a class where the testator may be presumed to have intended them to take according to priority of birth as sons, brothers, &c., they will take in order of seniority: *Ongley* v. *Peale*, 2 Ld. Raym. 1312; *Young* v. *Sheppard*, 10 Beav. 207.

As to the admission of parol evidence to explain ambiguities in wills, see *post*, pp. 523 *et seq.*

Judicial anxiety to effect a devise.

It would be useless to multiply examples of gifts void for uncertainty, which more frequently occur in the early than in the later cases; for latterly the Courts have preferred acting upon very faint glimpses and slight indications of the testator's intention to holding the gift to be absolutely void for uncertainty, freely supplying, transposing, rejecting, and sometimes even changing words, to prevent the total failure of the devise: *Dent* v. *Pepys*, 6 Mad. 350; *Langston* v. *Pole*, 2 Moo. & P. 490 (*b*). An illustration of the leaning to

(*b*) To the subject of "supplying, transposing, and changing words," Mr. Jarman has devoted a whole chapter in his Treatise on Wills. See 1 Jarm. Wills, 427. See also the chapter on "Gifts when void for uncertainty," 1 Jarm. Wills, 315, where the subject is more fully developed than was consistent with the learned

Gifts, when Void for Uncertainty.

such a construction occurs in an early case, where the devise was to one of A.'s daughters that should marry with a Norton within fifteen years; it was contended that the devise was void for uncertainty, as two might marry with a Norton. But the Court agreed that the devise was good; for, that though the words were not who should *first* marry with a Norton, yet it was all one, because the law supplied these words: *Bate* v. *Norton,* Raym. 82.

Description need not be correct in all parts.

*What Accuracy of Description is Necessary.*]—It is not necessary that all the parts of a testator's description of the subject of a gift should be accurate. It is only requisite that enough of correspondence should exist in some one particular, to remove all doubt of identity. Thus a reference to occupancy will cure an error in local description, and *vice versâ: Parker* v. *Ayres,* 3 Keb. 637; *Halstead* v. *Searle,* 1 Lord Raym. 778; and an agreement in locality, an error in the tenure, as where leasehold is described as freehold, or freehold as leasehold: *Day* v. *Trig,* 1 P. Wms. 286; *Denn* v. *Kemeys,* 9 East, 366. And the same principle of construction applies to the respective parts of a description. Thus, in regard to locality, if the parish is right and the county wrong, the error is immaterial, provided the identity of the parish is not thereby brought into question: *Brown* v. *Longley,* 2 Eq. Ca. Ab. 416, pl. 14; *Langenew* v. *Bean,* Finch, 395.

And the same rule, of course, obtains in regard to the objects of gift. Thus, if a testator devises to John, the son of his brother William, and William's only son is named Samuel, the claim of Samuel would be unquestionable, notwithstanding the misnomer: *Brown* v. *Langley,* 2 Eq. Ca. Ab. 416, pl. 14; *Rivers's Case,* 1 Atk. 410; *Still* v. *Hoste,* 6 Mad. 192. So, where the testator gives to Thomas, the second son of his brother John, the

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author's plan in the present work, or compatible with the space at the disposal of the present editor. See also the chapter on "The Admissibility of Parol Evidence," Id. 349.

second son, though not named Thomas, will take, the brother having no son of that name : *Stockdale* v. *Bushby*, G. Coop. 229 ; *Dowset* v. *Sweet*, Amb. 175.

Gifts, when Void for Uncertainty.

*Repugnancy and Contradiction in Wills.*]—Where the uncertainty arises from repugnancy, the expounding Judge is not so absolutely destitute of resources for rendering the devise effective as where it arises from a defect of expression ; for, if any principle can be discovered warranting the preference of either of the discordant parts, the uncertainty is removed. Such a principle is supplied by the general doctrine, which discards the prior and gives effect to the posterior of two wills, which doctrine, applied to several parts of the same will, obviously suggests the prevalence of the latter part ; and, accordingly, it has been held, that if two parts of a will are absolutely irreconcileable, the latter shall prevail : *Ulrich* v. *Litchfield*, 2 Atk. 372 ; *Sims* v. *Doughty*, 5 Ves. 243 ; *Constantine* v. *Constantine*, 6 Ves. 100 ; *Doe* v. *Biggs*, 2 Taunt. 109 ; *Sherratt* v. *Bentley*, 2 My. & K. 149 ; *Re Brooks' Will*, 2 Dr. & Sm. 362 ; *Gravenor* v. *Watkins*, L. R. 6 C. P. 500. But the prior devise will not be disturbed further than is absolutely necessary to give effect to the posterior disposition : *Doe* d. *Amlot* v. *Davies*, 4 M. & W. 599 ; *Crossman* v. *Brown*, 27 Beav. 502 (*c*). See the chapter on the "Effect of repugnancy or contradiction in wills," Jarm. Wills, Vol. I., pp. 472 *et seq.*

Latter of two repugnant clauses preferred.

Resort, however, is never had to this unsatisfactory rule until the complete failure of every attempt to give the will such a construction as will render all its clauses consistent and operative, in attaining which object the local order and arrangement of the various parts will be disregarded. Thus, if a testator devises all his property to A., and afterwards gives a specific part to B., the will will be read as giving part to B. and the

But to be reconciled if possible.

(*c*) The repugnancy must, however, be between separate clauses in the will, not between different words in the same clause : *Carpenter* v. *Dunsmure*, 1 Jur. N. S. 41.

Gifts, when Void for Uncertainty.

remainder to A. : *Cuthbert* v. *Lemprière,* 3 M. & S. 158 : see *Allum* v. *Fryer,* 3 Q. B. 442 ; *Doe* d. *Snape* v. *Nevill,* 11 Q. B. 466. And if a testator gives Whiteacre to A. in fee, and afterwards gives the same lands to B. for life, the will will be read as a devise to B. for life, with remainder to A. in fee : *Anon.* Cro. El. 9 ; *Ridout* v. *Dowding,* 1 Atk. 419. See also *Holdfast* v. *Pardoe,* 2 W. Bl. 976 ; *Woolcomb* v. *Woolcomb,* 3 P. Wms. 112 ; *Bettison* v. *Rickards,* 7 Taunt. 105 ; *Plenty* v. *West,* 6 C. B. 201 ; *Usticke* v. *Peters,* 4 K. & J. 437. And even where, in different parts of the will, the same property is given to two persons in fee, it seems to be the better opinion that they will be held to take as joint tenants : see *Anon.* 3 Leon. 11, pl. 27 ; arg. *Fane* v. *Fane,* 1 Vern. 30 ; and not the whole to the posterior devisee, which is the alternative construction, and has had some powerful advocates : Co. Litt. 112 b. See also *Ulrich* v. *Litchfield,* 2 Atk. 374 ; *Doe* d. *Snape* v. *Nevill,* 11 Q. B. 466 ; *Sherratt* v. *Bentley,* 2 My. & K. 165 ; 12 Jur. 181. The liberty taken by the Courts in transposing the clauses of a will, in order to render the whole consistent, might be illustrated by a great variety of cases, and is, indeed, one of the most familiar doctrines of testamentary construction.

Repugnant words rejected.

The rule which prefers the posterior of two inconsistent clauses, must not be so applied as to give undue weight to words of mere repugnancy, engrafted on a preceding, clear, and definite devise, and which ought, according to the authorities, to be rejected : see *Clavering* v. *Ellison,* 3 Drew. 451 ; *Davis* v. *Bennet,* 30 Beav. 226 ; *Kerr* v. *Clinton,* L. R. 8 Eq. 462 ; *Crozier* v. *Crozier,* L. R. 15 Eq. 282 ; *Re Parry and Daggs,* 31 Ch. D. 130. As to clearness in the gift see the remarks of Lord *Campbell* in *Randfield* v. *Randfield,* 8 H. L. C. 225. Thus, where a testator devises to A. and his heirs *for their lives,* the devisee has been held to take a fee in spite of the added inconsistent words : *Doe* v. *Stenlake,* 12 East, 515 ; see *Hugo* v. *Williams,* L. R. 14 Eq. 224. So, where a testator bequeathed an annuity to be equally divided between A., B.,

and C., adding "to them and their heirs, or the survivor of them, *in the order they are now mentioned,*" the latter words were disregarded as being of uncertain meaning, and inconsistent with the plain preceding expressions denoting equality of division: *Smith* v. *Pybus*, 9 Ves. 566; *Townley* v. *Bolton*, 1 My. & K. 148; *Harvey* v. *Harvey*, 5 Beav. 134. See also Jarm. Wills, Vol. I., p. 481.

Gifts, when Void for Uncertainty.

A clear and distinct devise will not be controlled by a general devise in another part of the will. So, where a testator gave his property to C. and D. upon trust for sale, and subsequently appointed his wife and C. and D. "trustees and executors" of his will, it was held that this appointment did not make the wife a co-trustee with C. and D. under the specific trusts of the will: *Sidebotham* v. *Watson*, 11 Hare, 170.

Specific devise not controlled by general devise.

So, a devise unambiguously expressed, will not be cut down by the reason assigned, which does not support its whole extent: *Cole* v. *Wade*, 16 Ves. 27.

Upon the same principle, it has been held that a devise to a person and the heirs of his body is not controlled or modified by the addition of words pointing at equality of division, as "equally to be divided," "share and share alike," &c., which merely show that the testator had an erroneous impression of the course of devolution under an estate tail, or had conceived the impracticable project of changing such course: *Jesson* v. *Wright*, 2 Bli. 1; *Doe* v. *Featherstone*, 1 B. & Ad. 944.

Still it is not to be denied that words ambiguous in themselves will yield to subsequent expressions clearly intended to have an explanatory or modifying effect: *Crone* v. *Odell*, 3 Dow, 61. See also *Roe* v. *Avis*, 4 T. R. 605. See Jarm. Wills, Vol. I., p. 412.

### 2. What Words are sufficient to Create a Trust.

*Gift for specified Purpose.*]—Where a testator expresses or clearly indicates an intention that a gift of the whole or of part of his property shall be

Words denoting the purpose of a gift.

**What Words Sufficient to Create a Trust.**

applied for a particular purpose other than the sole benefit of the devisee or legatee, a trust will be created, which may be in terms, obligatory or discretionary, and which will accordingly be enforced or controlled, as the case may be, by the Court.

Cases where an absolute trust is created.

Thus, where a testator gave 1500*l.* to trustees, and directed them to pay the interest to his son's wife "*for the benefit*" of his son, of herself, and of their children during his life, and after his decease the 1500*l.* to remain in trust for the benefit of the wife and her children during her life, and on her decease to be divided equally among the children, it was held that the wife took the income as a trustee for herself, her husband and children: *Taylor* v. *Bacon,* 8 Sim. 101; see also *Jubber* v. *Jubber*, 9 Sim. 503; *Chambers* v. *Atkins*, 1 Sim. & St. 382; *Fowler* v. *Hunter*, 3 Y. & J. 506; *Bibby* v. *Thompson,* 32 Beav. 646.

Under a gift of residue to the testator's sister "*to dispose of amongst her children* as she may think proper," it was held that the sister took no beneficial interest, but that a complete trust for the children was created: *Blakeney* v. *Blakeney*, 6 Sim. 52. So also where the gift was to A. for bringing up her children: *Pilcher* v. *Randall,* 6 W. R. 251. So where trustees were directed to pay the income of a fund to A., "*the better to enable him to maintain and educate*" his child, it was held that A. was a trustee for the child, and took no beneficial interest himself: *Wetherell* v. *Wilson,* 1 Kee. 80; see also *Wilson* v. *Maddison,* 2 Y. & C. C. C. 372. But see *Brown* v. *Casamajor,* 4 Ves. 498, where the gift was to A. "the better to enable him to *provide*" for his children, and it was held that A. was beneficially entitled to a life interest in the fund: see *infra,* p. 516, note (*e*).

Cases where trust fails for uncertainty of object.

But if the object of the gift cannot be ascertained, the gift will fail for uncertainty: *Mayor, &c., of Gloucester* v. *Wood,* 1 H. L. C. 272. So, where a testator gave a sum to trustees, the money to be appropriated according to a statement hereto appended, and no statement was appended to the will, it was held that the trustees did not take beneficially,

**What Words Sufficient to Create a Trust.**

but that the object was so indefinite that the gift must fail: *Aston* v. *Wood*, L. R. 6 Eq. 419 (*d*).

Cases where there is a discretion liable to be controlled.

In *Raikes* v. *Ward*, 1 Hare, 445, there was a gift of residuary personal estate to the testator's wife "*to the intent* that she may dispose of the same for the benefit of herself and our children in such manner as she may deem most advisable": it was held that the wife did not take an absolute interest, but that the Court would not deprive her of the honest exercise of her discretion, or refuse to sanction any reasonable arrangements which she might desire to make: see also *Conolly* v. *Farrell*, 8 Beav. 347; *Woods* v. *Woods*, 1 My. & Cr. 401; *Costabadie* v. *Costabadie*, 6 Hare, 410; see also *Godfrey* v. *Godfrey*, 2 N. R. 16; *Dixon* v. *Dixon*, W. N. 1876, p. 225. Where a testator directed the income of his property to be paid to his wife "for the *education* and support" of his children, it was held that the intention was that the whole of the income should be paid to the wife, and to impose on her the burden of maintaining and educating the children out of it. See *Hadow* v. *Hadow*, 9 Sim. 438; *Leach* v. *Leach*, 13 Sim. 304; *Bowden* v. *Laing*, 14 Sim. 113; *Browne* v. *Paull*, 1 Sim. (N. S.) 92; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 363. See also *Hamley* v. *Gilbert*, Jac. 354, where it was held that the legatee was absolutely entitled, subject to such a burden, and an inquiry was directed as to what would be a sufficient sum to set apart for the purpose.

Absolute gift followed by words denoting purpose.

Where property is in the first instance given absolutely, and the gift is followed by words indicating a purpose to which the property is to be applied, the donee will be allowed to receive his legacy without any trust or obligation being declared: *Lambe* v. *Eames*, L. R. 6 Ch. 597; *Mackett* v. *Mackett*, L. R. 14 Eq. 19.

For other instances in which the donee has been held to be beneficially entitled, notwithstanding that the will contained words indicating the cause or

(*d*) See as to incorporation in a will of informal documents, *post*, p. 537.

**What Words Sufficient to Create a Trust.**

motive of the gift, see *Brown* v. *Casamajor*, *supra* (*e*); *Benson* v. *Whittam*, 5 Sim. 22; *Thorpe* v. *Owen*, 2 Hare, 607; *Biddles* v. *Biddles*, 16 Sim. 1; *Leigh* v. *Leigh*, 12 Jur. 907; *Jones* v. *Greatwood*, 16 Beav. 528; *Hart* v. *Tribe*, 18 Beav. 215; *Wheeler* v. *Smith*, 1 Gif. 300; *Byne* v. *Blackburn*, 26 Beav. 41; *Howarth* v. *Dewell*, 29 Beav. 18.

Cases where the purpose is for the sole benefit of the donee.

Where a gift is solely for the benefit of the donee, he is entitled to receive it, discharged from any obligation to apply it to a purpose expressed or indicated by the testator, however precise the terms of the will may be. So, a legatee may claim money bequeathed for the purchase of a ring: *Apreece* v. *Apreece*, 1 Ves. & B. 364; or of a life annuity: *Dawson* v. *Hearn*, 1 Russ. & My. 606; *Ford* v. *Batley*, 17 Beav. 303; *Re Browne's Will*, 27 Beav. 324; or of a house: *Knox* v. *Hotham*, 15 Beav. 82; or to pay off a mortgage: *Lockhart* v. *Hardy*, 9 Beav. 379; or for maintenance, &c.: *Webb* v. *Kelly*, 9 Sim. 472; see *Bayne* v. *Crowther*, 20 Beav. 400; *Attwood* v. *Alford*, L. R. 2 Eq. 479.

Precatory words creating a trust.

*Precatory Trusts.*]—Words of confidence, request, entreaty, wish, or even expectation or recommendation, addressed to a devisee or legatee, will create a trust for the person or persons in whose favour the testator's intention is expressed, provided he has pointed out, with sufficient precision and certainty, both the subject-matter and the objects of the intended trust.

Words of confidence.

Thus, in *Massey* v. *Sherman*, Amb. 520, where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please, this was held to be a trust for the children as she should appoint. So a bequest to A., "*well-knowing*" that she would dispose of the property in accordance with the testator's wishes, was held to create a trust: *Briggs* v.

(*e*) In that case the father consented to settle the property on himself for life, and, subject thereto, for the benefit of his children, otherwise it would apparently have been held that he was absolutely entitled.

*Penay*, 3 Mac. & G. 546; *Bernard* v. *Minshall*, Johns. 276; but see *Stead* v. *Mellor*, 5 Ch. D. 225. And a trust has been held to be created by the use of the words "confiding:" *Griffiths* v. *Evans*, 5 Beav. 241; see *Alexander* v. *Alexander*, 2 Jur. (N. S.) 898; "under the conviction that:" *Barnes* v. *Grant*, 2 Jur. (N. S.) 1127; "trusting that:" *Pilkington* v. *Boughey*, 12 Sim. 114; *Baker* v. *Mosely*, 12 Jur. 740. **What Words Sufficient to Create a Trust.**

So, in the case of *Pierson* v. *Garnet*, 2 Br. C. C. 38, 226, where a testator gave his residuary personal estate, in trust for A. for life, subject to certain annuities, and after payment of the annuities the testator gave the residue to A., his executors, administrators, and assigns, adding, "and it is my dying *request* to the said A., that if he shall die without leaving issue living at his death, the said A. to dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, A. C., his grandmother, in such manner and proportion as he shall think proper:" it was held by Sir *L. Kenyon*, M.R., and afterwards by Lord *Thurlow*, C., that the effect of the will was to create a trust for the descendants in the described event. The words "I hereby request" were held to create a trust in *Nowlan* v. *Nelligan*, 1 Br. C. C. 489, and *Shelley* v. *Shelley*, L. R. 6 Eq. 540; so also the words "I require and entreat:" *Taylor* v. *George*, 2 Ves. & B. 378; "wish and desire:" *Liddard* v. *Liddard*, 28 Beav. 266; "this is my last wish that, &c.:" *Hinxman* v. *Poynder*, 5 Sim. 546; "I desire him to give:" *Mason* v. *Limbery*, cit. Amb. 4; "wish and request:" *Foley* v. *Parry*, 2 My. & K. 138; "entreat:" *Prevost* v. *Clarke*, 2 Mod. 458. Words of request, &c.

So, in the case of *Birch* v. *Wade*, 3 Ves. & B. 198, where a testator, after giving the residue of his real and personal estate in trust for his wife for life, and then in trust for other persons for life, and after disposing of two-thirds absolutely, added: "It is my will and desire that the other third part of the principal of my estate and effects be left entirely at the disposal of my dear and loving wife among such of her relations as she may think proper." The wife

What Words Sufficient to Create a Trust.

died without making any disposition, and Sir *W. Grant*, M.R., considered it to be clear that the testator intended that his wife's relations should have the benefit of the disposition. Her next of kin at her death, therefore, were held to be entitled. See also *Brest* v. *Offley*, 1 Ch. Rep. 246; *Eales* v. *England*, Pre. Ch. 202; *Harding* v. *Glyn*, 1 Atk. 469; *Earl of Bute* v. *Stuart*, 2 Eden, 87; *Paul* v. *Compton*, 8 Ves. 380; *Wright* v. *Atkins*, 19 Ves. 299; *Cary* v. *Cary*, 2 Sch. & L. 189; *Forbes* v. *Ball*, 3 Mer. 441; *Horwood* v. *West*, 1 S. & St. 387.

Words of recommendation.

In *Malim* v. *Keighley*, 2 Ves. jun. 333, where a testator, in certain events and subject to certain trusts, bequeathed the residue of her personal estate to her surviving daughter, and such bequest was followed by these words, "hereby *recommending* it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter A., and my nephew I., desiring that his reputed daughter C. may be considered as one of his children." The surviving daughter died without exercising the power, and Sir *R. P. Arden*, M.R., held that a trust was created in favour of the children of the daughter and nephew. So, also, when the words were, "I advise him to settle:" *Parker* v. *Bolton*, 5 L. J. (N. S.) 98. A recommendation made by a testator in a devise to his son, "to continue his cousins A. and B. in the occupation of their respective farms in the county of W. as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," was held to be a trust for the cousins, who had been tenants at will: *Tibbits* v. *Tibbits*, 19 Ves. 656.

Recommendation to permit tenant to continue in occupation.

Where the testator ordered and directed his son Joseph (to whom he gave all his real and personal estate) to take care of and provide for his (the testator's) daughter Anne, during her life, Sir *T. Plumer*, M.R., was of opinion that the daughter was entitled to have a provision made for her out of the residue, in addition to an annuity of 5*l.*, which was bequeathed to her: *Broad* v. *Bevan*, 1 Russ. 511 n.

What Words Sufficient to Create a Trust.

Later cases, however, suggest a doubt whether a similar decision would now be made on such words; for the Courts seem to be sensible that they have gone far enough in investing with the obligatory efficacy of a trust loose expressions of this nature, which, in all probability, are rarely, if ever, intended to have such an operation. Accordingly, we find in recent times a more positive requisition of definiteness in regard to the testator's intention to create a trust, and also in regard to the subject and objects in the testator's contemplation, than appears in some of the earlier adjudications.

Mere expressions of kindness.

If the testator's language amounts merely to an expression of general kindness towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds—"I have no doubt that my wife (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest: *Buggins* v. *Yeates*, 8 Vin. Ab. 72, pl. 27; see also *Re Bond*, 4 Ch. D. 238. And the same construction has prevailed in some instances in which the indefiniteness was of a less palpable character, as where a testator gave leasehold estates at S. to his brother, J. H., for ever, "hoping he will continue them in the family:" *Harland* v. *Trigg*, 1 Br. C. C. 142.

Absolute gifts followed by precatory words.

So, where a will contains a gift in absolute terms, followed by expressions of confidence, desire, or recommendation, &c., such words are construed as indicating merely the cause or motive of the gift, and not as imposing any trust (*f*).

So, the following words added to a residuary gift to the testator's wife, "not doubting but that she will dispose of *what shall be left* at her death to our two grandchildren," were held by Lord *Thurlow* not to create a trust, on account of the uncertainty to what extent, if at all, the testator intended to control the absolute property of the wife: *Wynne* v. *Hawkins*, 1 Br. C. C. 179. So in *Johnston* v. *Row-*

(*f*) Of course, imperative words of trust following a gift which is itself in terms absolute will create a trust: *Bonser* v. *Kinnear*, 2 Gif. 195; *Evans* v. *Evans*, 12 W. R. 508.

What Words Sufficient to Create a Trust.

*lands*, 12 Jur. 769, *Knight Bruce*, V.-C., held that the word "recommend," following a gift to be disposed of in such way as the donee should think proper, did not create a trust. His Honour observed:—"That the word 'recommend' may amount to as much as the word 'command' in a particular instrument, and may create a binding trust, is certain. It is equally certain that the word is susceptible of a different interpretation, and is susceptible of an interpretation consistent with the legal and equitable power of the person recommended to depart from the recommendation. But it must depend upon the words and the language of each particular instrument in which it is found, in which of the two senses that word is used in a particular case."

Where a testator gave all his real and personal estate to his wife, trusting that she would, in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor—Sir *J. Leach*, V.-C., held the wife to be absolutely entitled, the testator's intention evidently being to leave the children dependent on her: *Curtis* v. *Rippon*, 5 Mad. 434.

So, where a will contained the following passage—"I do likewise will and bequeath to my only son, J., the sum of 60*l.* sterling per year for ever; also to provide for the two daughters of my child, H. E., namely, S. E. and E. E.; and the remainder of my property to the two children of my daughter, S. A."—Lord *Gifford*, M.R., held, that the words in question did not create a trust on the 60*l.* a year, or the remainder of the property bequeathed to the children of S. A., the former being a distinct, independent bequest; and in regard to the latter, though the testator no doubt intended to make a provision for the daughters of H. E., yet the Court had no means of determining what that provision was to be: *Abraham* v. *Alman*, 1 Russ. 509.

Again, where a testator bequeathed the remainder of what he should die possessed of, after payment of debts and legacies, to his dear wife, adding, "recom

What Words Sufficient to Create a Trust.

mending to her, and not doubting, as she has no relations of her own family, but that *she will consider my near relations,* should she survive me, as I should consider them myself in case I should survive her." In a preceding part of the will, the testator had assigned as a reason for his not leaving his brother and sister anything, that they were provided for, and that he could not do so without taking from his wife's property, who was more in need of it—Sir *A. Hart,* V.-C., held, that the effect of the whole was, that no trust for the relations was created: *Sale* v. *Moore,* 1 Sim. 534; see also *Hoy* v. *Master,* 6 Sim. 568.

So, where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, *unfettered and unlimited,* in full confidence and with the firmest persuasion, that, in her future disposition and distribution thereof, she would distinguish the heirs of his late father, by devising and bequeathing the whole of his said estate, together and entire, to such of his said father's heirs as she might think best deserved her preference—it was held in the House of Lords, confirming a decree in the Exchequer, that the wife was absolutely entitled for her own benefit, Lord *Eldon* considering that the testator intended to impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord *Redesdale*) on the words "unfettered and unlimited." Lord *Eldon* also adverted to the great difficulty of reconciling the testator's direction, that the estate should go "entire," with his direction respecting its distribution: *Meredith* v. *Heneage,* 1 Sim. 542. See also *Wood* v. *Cox,* 2 My. & Cr. 684; *Irvine* v. *Sullivan,* L. R. 8 Eq. 673.

And, where a testatrix made a codicil to her will in the following words—"I hope none of my children will accuse me of partiality in having left the largest share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but in case of their marrying, I have divided it

**What Words Sufficient to Create a Trust.**

amongst all my children. If they die single, of course *they will leave what they have amongst their brothers and sisters, or their children:*" Sir *J. Leach*, M.R., considered that these words were not intended to create an obligation upon the two eldest daughters; as they applied not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gave by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount: *Lechmere* v. *Lavie*, 2 My. & K. 197.

Words too indefinite to create a trust.

For other instances in which the Courts have refused to hold that the use of precatory words was sufficiently definite to create a trust, see *Knight* v. *Boughton*, 12 Cl. & F. 513; *Webb* v. *Wools*, 12 Jur. 492; *Horwood* v. *West*, 1 Sim. & St. 387; *Reeves* v. *Baker*, 18 Beav. 373; *Gully* v. *Cregoe*, 24 Beav. 185; *Maud* v. *Maud*, 27 Beav. 615; *Shovelton* v. *Shovelton*, 32 Beav. 143; *Scott* v. *Key*, 35 Beav. 291; *Curnick* v. *Tucker*, L. R. 17 Eq. 320; *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414; *Re Hutchinson and Tennant*, 6 Ch. D. 597; *Re Moore*, W. N., 1886, p. 25.

Where there is considered to be sufficient indication of the testator's intention to create a trust, but the objects of it are uncertain, that is, are not indicated with sufficient clearness, the effect is, that the devisees or legatees in trust held the property for the benefit of the heir or next of kin: *Stubbs* v. *Sargon*, 2 Kee. 255. See also *Bernard* v. *Minshull*, Johns. 276.

Where the amount to be applied is left to discretion of trustees.

Where the amount to be applied for a specified purpose, or for the benefit of a person, is left to the discretion of trustees, the Court will not interfere with such discretion: see *Beevor* v. *Partridge*, 11 Sim. 229; *Re Sanderson's Trust*, 3 K. & J. 497; *Cowper* v. *Mantill*, 22 Beav. 231. Secus, if the whole fund is required for the purpose specified: *Rudland* v. *Crozier*, 2 De G. & J. 143. But where the discretion has been exercised, the thing purchased, or the money required for the purpose,

becomes the absolute property of the person for whose benefit it is given: *Lawrie* v. *Bankes*, 4 K. & J. 142; *Messeena* v. *Carr*, L. R. 9 Eq. 260; *Palmer* v. *Flower*, L. R. 13 Eq. 250.

What Words Sufficient to Create a Trust.

So also, where the object to be benefited is left to the selection of trustees: see *Stead* v. *Mellor*, 5 Ch. D. 225.

Object to be selected by trustees.

Such is the long train of decisions which have been produced by the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation on the devisee or legatee to whom they are addressed, and those which are intended merely to onerate him with a moral or conscientious duty. After such a statement, it may appear superfluous to enjoin caution in the use of words, which have occasioned so much litigation. If a trust is intended to be created, this should be done in plain and unequivocal terms; and, if not, any expressions of request or exhortation, which the testator may wish to introduce, should be invariably accompanied by an express and unambiguous declaration, that no trust or obligation is intended to be imposed.

Remarks on the cases.

A direction to a devisee to employ a particular steward has been held to be imperative: *Lawless* v. *Shaw*, Ll. & G. 154. An auditor, also, appointed by a testator to audit the trustees' accounts during the execution of certain trusts, was held not to be removable arbitrarily by the trustees: *Williams* v. *Contest*, 8 Sim. 349.

Direction to employ steward held to be imperative.

Auditor appointed by testator not removable

### 3. Admissibility of Parol Evidence.

Where the uncertainty is palpable on the face of the will, it is styled an ambiguity patent, and is, as a general rule, irremoveable by parol evidence; because, to admit such evidence for the purpose of explaining what the will itself has left uncertain, would be to set up a nuncupative will, in disregard of the enactment in the Statute of Frauds, which has subjected such wills to special regulations, and would be no less repugnant to general principles of

Patent ambiguities not removable by parol evidence.

Admissibility of Parol Evidence.

law governing the construction of written instruments. In regard to no doctrine, therefore, have the Courts evinced more steadiness and consistency of determination than in the rejection of parol evidence to clear up ambiguities apparent on the face of the will, in relation as well to personal as to real estate, whether offered to supply omissions, remove redundancies, or induce the transposition or change of words or clauses, or the giving to them a strained signification: *Lord Cheney's Case*, 5 Rep. 68; *Strode* v. *Lady Falkland*, 3 Ch. Rep. 98; *Bertie* v. *Falkland*, 1 Salk. 232; *Lord Walpole* v. *Earl of Cholmondeley*, 7 T. R. 138; *Doe* v. *Oxenden*, 3 Taunt. 147, 4 Dow, 65; *Doe* v. *Greening*, 3 M. & S. 171; *Doe* v. *Lyford*, 4 M. & S. 550; *Miller* v. *Travers*, 1 Moo. & Sc. 342; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Mounsey* v. *Blamire*, 4 Russ. 384. And see as to devises inadvertently omitted, *Earl of Newburgh* v. *Countess of Newburgh*, 5 Mad. 364; *Langston* v. *Langston*, 8 Bli. 167; 2 Cl. & F. 194.

Introduction of words per *incuriam*.

This rule is, however, not of universal application. So a distinction is sometimes taken where it is alleged that clauses or words have been inserted in a will by another person, contrary to the testator's wishes or instructions: in such cases, it seems that parol evidence is admissible, that such expressions were introduced by mistake, or, in other words, that they do not form part of the will, and ought to be omitted from the probate: *Hippesley* v. *Homer*, T. & R. 48 n.; *Lord Trimleston* v. *D'Alton*, 1 Dow & C. 85; *Lord Guillamore* v. *O'Grady*, 2 J. & L. 210; *Re Duane*, 2 Sw. & Tr. 590; *Re Oswald*, L. R. 2 P. & D. 162. So evidence is admissible to show that the testator executed by mistake an instrument not intended to operate as his will: *Re Hunt*, L. R. 3 P. & D. 250; see also *Lister* v. *Smith*, 3 Sw. & Tr. 282; so, it may be proved that one of two codicils in identical terms but with different dates is a duplicate of the other and not a separate instrument, so as to repeat a legacy: *Hubbard* v. *Alexander*, 3 Ch. D. 738.

Fraud.

Parol evidence is also admissible to support or rebut an allegation that part of a will was intro-

duced, or that the execution of the will was obtained by fraud: *Doe* d. *Small* v. *Allen*, 8 Tr. 147; *Doe* v. *Hardy*, 1 Moo. & R. 525; but probate of the will is conclusive on this point: *Allen* v. *M'Pherson*, 1 H. L. C. 191; *Meluish* v. *Milton*, 3 Ch. D. 27. **Admissibility of Parol Evidence.**

And a resulting trust may be proved or rebutted by parol evidence: see *Stickland* v. *Aldridge*, 9 Ves. 519; *Chester* v. *Urwick*, 23 Beav. 407; *Proby* v. *Landor*, 28 Beav. 504; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82; *Norris* v. *Frazer*, L. R. 15 Eq. 318. Resulting trust.

It has been seen (*ante*, p. 508) that if a donee's name is left in blank the rule is that no evidence of intention is admissible, but that the gift is void for uncertainty.

But in some instances of personal legacies, Courts of equity have gone very far in admitting such evidence in aid of defective descriptions, as where the Christian name was omitted, the bequest being to —— Price, son of —— Price (*g*): *Price* v. *Page*, 4 Ves. 680; or the initial letters only of both Christian and surname were given, the bequest being to W. G. and Mr. S. G.: *Abbott* v. *Massie*, 3 Ves. 148; but a bequest to Lady —— has been held to be too defective to be supplied: *Hunt* v. *Hort*, 3 Br. C. C. 311. See *Phillips* v. *Barker*, 1 Sm. & G. 582; *Re Gregson's Trusts*, 12 W. R. 935; *Re De Rosaz*, 2 P. D. 66; and see *Re Wyatt*, W. N. 1888, p. 19. Defective descriptions aided by parol evidence.

Where, however, the ambiguity is not apparent on the face of the will, but wholly arises out of the circumstances disclosed by the extrinsic evidence, it may be removed by evidence of the same nature; which, in effect, is merely to say that the *whole* of the parol evidence, and not part only, is to be received. Thus, if a testator devises Blackacre to his grandson John, and, upon investigation, it turns out Latent ambiguities may be removed by parol evidence.

(*g*) In *Colpoys* v. *Colpoys*, Jac. 465, Sir *T. Plumer*, M. R., referred to this case as contradicting the position, that parol evidence is not admissible to explain a patent ambiguity. It is submitted, however, that the ambiguity is latent; for, until the extrinsic evidence has ascertained whether more persons than one of that surname were known to the testator, it cannot be pronounced whether the gift is ambiguous or not.

Admissibility of Parol Evidence.

that the testator has two closes called Blackacre, or two grandsons named John, evidence may be adduced to show which of the closes or which of the grandsons is intended: *Jones* v. *Newman*, 1 W. B. 60. In *Doe* d. *Gord* v. *Needs*, 2 M. & W. 129, there was a devise to "George Gord the son of Gord;" by other devises in the same will it appeared that there was a George Gord, son of George Cord, and another George Gord, son of John Gord, and evidence of the testator's intention was admitted. See also *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235; *Doe* d. *Allen* v. *Allen*, 12 A. & E. 451. See other cases cited, 1 Jarm. Wills, 370—374. And if it turned out that the testator had no grandson John, but two grandsons, respectively named Robert and William, it seems that either of these might support his claims by parol evidence; for, where some particulars in the testator's description apply to both, and some to neither, extrinsic evidence will be let in for the purpose of aiding the discovery of the actual intention. See *Careless* v. *Careless*, 1 Mer. 384; *Still* v. *Hoste*, 6 Mad. 192. See *Re Brake*, 6 P. D. 217 (*h*). But such evidence will not be admitted if there appear on the face of the will grounds for inferring that the testator intended one of several persons to whom the description is applicable to take: *Doe* d. *Westlake* v. *Westlake*, 4 B. & Al. 57; *Douglas* v. *Fellows*, Kay, 114.

Uncertainty produced by plurality of objects of equal pretensions.

Where there are two objects of exactly equal pretensions, whether more or less nearly answering to the description, as where the gift is to the testator's cousin John, and there are two cousins John, or two cousins named William and Samuel, and no John, and the evidence fails to establish any superiority of claim in either, such equality is necessarily fatal to

(*h*) In one instance, by the help of such evidence, a person named "Gertrude Yardley" was allowed to take a legacy bequeathed to "Catherine Earnley": *Beaumont* v. *Fell*, 2 P. W. 141; see also *Masters* v. *Masters*, 1 P. Wms. 425, where an inquiry was directed as to whether a person named Swapper was entitled to take under a legacy to "Sawyer." But these decisions must be regarded as overruled.

**Admissibility of Parol Evidence.**

the pretensions of both: *Dowset* v. *Sweet*, Amb. 175; *Doe* v. *Joinville*, 3 East, 172.

Exception as to charities.

An exception to this rule is, however, allowed in the case of charitable gifts, and where there are two charities both or neither of which, in an equal degree, completely answer the description, the gift will be equally divided between the claimants, unless it can be ascertained by extrinsic evidence (see *infra*) which was the intended object of the testator's bounty: *Waller* v. *Childs*, Amb. 524; *Bennett* v. *Hayter*, 2 Beav. 81; *Re Clergy Society*, 2 K. & J. 615; *Re Maguire*, L. R. 9 Eq. 632; *Re Alchin's Trusts*, L. R. 14 Eq. 230. If no charity answers the description at all, the legacy will be applied to other charitable purposes under the doctrine of *cy près*: *Loscombe* v. *Wintringham*, 13 Beav. 87. See also *Simon* v. *Barber*, 5 Russ. 112.

Evidence not admitted where no doubt is raised as to the intention.

It should be observed, that, in these cases, evidence of circumstances throwing light on the testator's intention is always to be preferred to that of his oral declarations; and, where they leave no doubt of the intention, evidence of such declarations is not admissible. And therefore, where a testator gave a legacy to a public charity, the title of which applied to one institution and the locality to another, the Court, in deciding on their conflicting claims, admitted evidence of one having received the support and patronage of the testator at and subsequently to the making of his will, but rejected the evidence of the drawer of the will, as to the testator's oral intimation of his actual intention: *Capel* v. *Robarts*, 3 Hagg. 156. For other instances where the Court has admitted evidence of circumstances tending to show which of several misdescribed charities was intended to take, see *Wilson* v. *Squire*, 1 Y. & C. C. C. 654; *Bunting* v. *Marriott*, 19 Beav. 163; *Caldwell* v. *Holme*, 2 Sm. & G. 31; *Re Kilvert's Trusts*, L. R. 7 Ch. 170.

The principle on which the evidence was rejected in the case of *Capel* v. *Robarts* seems to be, that, coupling the will and the circumstances together, there was no ambiguity warranting the admission of parol evidence; and hence it agrees with and illus-

**Admissibility of Parol Evidence.**

trates the point next to be noticed, namely, that where there is a subject or object of the devise answering to the description in the will, it is not allowed to be shown that another subject or object not so completely answering to it was intended, the effect of which would be to contradict the will.

Evidence rejected to exclude object sufficiently described.

This rule is founded on the well-known maxim that "*Non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram.*" Thus, evidence will not be admitted to exclude a person who is described with more or less completeness and certainty in order to establish a claim of a person who less nearly answers the description : *Delmare* v. *Robello*, 1 Ves. jun. 412 ; *Holmes* v. *Custance*, 12 Ves. 279 ; *Doe* v. *Westlake*, 4 B. & Al. 57 ; *Re Ingle's Trust*, L. R. 11 Eq. 578.

Evidence inadmissible where subject sufficiently described.

And the rule applies equally to the subject-matter of a gift. So, where a testator devised his "Arkley Hall Farm in the parish of Ridge," it was held that lands in other parishes which formed part of the same farm did not pass : *Pedley* v. *Dodds*, L. R. 2 Eq. 819 ; see *Webber* v. *Stanley*, 16 C. B. (N. S.) 698 (*i*). Similarly a devise of lands in the occupation of A. will not pass lands not in such occupation : *Doe* d. *Parkin* v. *Parkin*, 5 Taunt. 321 ; *Morrell* v. *Fisher*, 8 Ch. D. 758 ; *Homer* v. *Homer*, 8 Ch. D. 758. So with regard to devises of lands purchased from a particular person or otherwise derived under a particular title : *Doe* d. *Tyrell* v. *Lyford*, 4 M. & S. 550 ; *Doe* d. *Conolly* v. *Vernon*, 5 East, 51 ; *Doe* d. *Newton* v. *Taylor*, 7 B. & C. 384. And it has been held that a description of a farm as "freehold" will prevent any leaseholds forming part of the farm from passing : *Stone* v. *Greening*, 13 Sim. 390 ; *Hall* v. *Fisher*, 1 Coll. 47 ; but these decisions have been somewhat questioned by Lord *Selborne* in *Hardwicke* v. *Hardwicke*, L. R. 16 Eq. at p. 177. See further as to the application of this rule to the subject-matter of testamentary gifts, *West* v. *Lawday*, 11

(*i*) A gift of lands at A. is apparently not of necessity restricted to lands in the parish of A. : see *Homer* v. *Homer*, 8 Ch. D. 758.

H. L. C. 375; *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331; *Tapley* v. *Eagleton*, 12 Ch. D. 683.

**Admissibility of Parol Evidence.**

Evidence not admissible where part of a description applies to one object or subject, and part to another.

Where part of a description applies to one object or subject, and part to another, no evidence of intention is admissible. In such cases the name will generally prevail if there is an error in the description, according to the maxim, "*Veritas nominis tollit errorem demonstrationis:*" *Doe* d. *Gains* v. *Rouse*, 5 C. B. 442; *Re Blackman*, 16 Beav. 377; *Re Ingle's Trusts*, L. R. 11 Eq. 578; and if there is no one bearing the name, a person answering the description will take: *Dowset* v. *Sweet*, Amb. 175; *Parsons* v. *Parsons*, 1 Ves. jun. 266; *Doe* d. *Cook* v. *Danvers*, 7 East, 229. See *ante*, p. 510. But if it is not clear whether the error is in the name or description, one or other will prevail according as it appears from the context of the will, or from evidence of *facts* which might have influenced the testator in making his gift that the description or the name was inserted in error: *Doe* d. *Chevalier* v. *Huthwaite*, 8 Taunt. 306; *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72; *Pryce* v. *Newbolt*, 14 Sim. 354; *Bernasconi* v. *Atkinson*, 10 Hare, 345; *Re Gregory's Will*, 34 Beav. 601; *Garland* v. *Beverley*, 9 Ch. D. 213. Sometimes the description itself may supply the motive for the gift: see *Re Nunn's Trusts*, L. R. 19 Eq. 331. In *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363, the testator devised land to his son John Hiscocks for life, and after his decease devised the same land to his grandson *John* Hiscocks, *eldest son* of the said John Hiscocks, for life, with remainder to his children in strict settlement. At the time of making the will, the testator's son John had issue by a first marriage, Simon Hiscocks, the lessor of the plaintiff; and by a second marriage John Hiscocks, the defendant, and other younger children. Evidence of intention was rejected. Lord *Abinger*, C.B., in delivering the judgment of the Court said, "Where the description is partly true as to both applicants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see

Admissibility of Parol Evidence.

how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the bequest void for uncertainty; but the cases of *Doe* v. *Huthwaite*, *Bradshaw* v. *Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding *facts* to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that for this purpose they cannot receive the declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will indeed, for the present, succeed; but the claim of the heir-at-law will probably prevail ultimately on the ground that the devise is void for uncertainty." See also *Charter* v. *Charter*, L. R. 7 H. L. 364; *Re Wolverton Mortgaged Estates*, 7 Ch. D. 197.

If no part of the description applies, the gift fails for uncertainty.

And even if there is no competition, yet if no part of the description applies to the object, or to the subject-matter of the gift (as the case may be), it is clear that parol evidence cannot be admitted to show what must have been the testator's intention, but the gift will fail for uncertainty. So where a legacy was given to the four children of B., who had living two children by her first husband and four by a second, evidence was admitted that the latter were intended to take: *Hampshire* v. *Peirce*, 2 Ves. sen. 216. So in the case of *Miller* v. *Travers*, 8 Bing. 244, the question arose on a devise to trustees of the testator's "freehold and copyhold estates in the County of Limerick and in the City of Limerick;" the testator had, at the date of his will, a small real estate in the county of Limerick. The plaintiff offered parol evidence, to show, from the smallness of the estate in the city of Limerick in proportion to the nature of the charges laid on it, and the trusts declared, the probability that the estates in Clare were intended to pass; and further, from a draft of the will approved by the testator, that he had actually intended them to pass; and that

Admissibility of Parol Evidence.

the words "county of Clare" were omitted by mistake by the conveyancer. *Tindal*, C.J., in delivering the joint opinion of the Court, said, "There are no words in the will which contain an imperfect, or indeed any description whatever, of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found upon inquiry, that the testator has property in the city of Limerick, which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, nor any difficulty in the application of the words of the will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which the testator has in the city of Limerick, but passes no estate in the county of Limerick, where he had no estate to answer that description. The plaintiff, however, contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of, or in addition to that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property, but it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evi-

**Admissibility of Parol Evidence.**

dence, to the making of a new devise for the testator, which he is supposed to have omitted."

Evidence of extrinsic facts, for what purposes admissible.

It is to be observed, that though evidence is not admissible of the testator having attached any peculiar or extraordinary meaning to words of description, yet, where they refer (as indeed almost every description necessarily does) to some extrinsic fact, evidence may be resorted to for the purpose of ascertaining whether any given subject or object is within the words; in short (to adopt the pithy language of Lord *Thurlow*, in *Jeacock* v. *Falkener*, 1 Br. C. C. 295), "although evidence cannot be read to prove what the testator meant by the words used in his will, yet it may as to facts upon which the testator made his will:" *Doe* v. *Collins*, 2 T. R. 498; *Goodtitle* v. *Southern*, 1 M. & S. 299; *Sanford* v. *Raikes*, 1 Mer. 646; *Doe* v. *Earl of Jersey*, 1 B. & Al. 550; 3 B. & C. 870; *Ongley* v. *Chambers*, 8 J. B. Moore, 665. Thus, where a person devises his estate at Ashton, though parol evidence is inadmissible to show that he intended more or less to pass under this denomination than the words properly embrace, yet resort may, and indeed must, be had to such evidence, for the purpose of ascertaining whether any particular field composes part of the testator's Ashton estate: *Doe* d. *Chichester* v. *Oxenden*, 4 Dow, 65; see *Doe* d. *Browne* v. *Greening*, 3 M. & S. 171.

So, if a testator bequeaths a legacy to a servant, if in his service at the time of his decease, evidence may be adduced to show that the claimant was in his service at that time; and for this purpose the testator's conduct towards the claimant, and even his declarations respecting the legacy, might be material as elucidating the fact, that the testator considered the legatee to be in his service: *Herbert* v. *Reid*, 16 Ves. 481 (*k*).

In the case of *Ryall* v. *Hannam*, 10 Beav. 537; 11 Jur. 762, a testator devised a copyhold estate to his nephew W. B. for life, with remainder "to E.

(*k*) As to who will take under gifts to servants, see *post*, p. 794, note.

Admissibility of Parol Evidence.

A., a natural daughter of E. A., of the parish of G., single woman, who formerly lived in my service." It appeared by extrinsic evidence, that there was no one at the date of the will who answered the description, but that a person of the name of E. A. did live in the testator's service, and soon after leaving it had a son J. A., of whom W. B., the testator's nephew, was the putative father; that E. A. never had any other illegitimate child; and that she afterwards married J. C., by whom she had, at the date of the will, one daughter, M. A. Lord *Langdale*, M. R., held that the will was not void for uncertainty, but that J. A. was the party who answered the description. See also *Doe* d. *Gaines* v. *Rouse*, 12 Jur. 99; *Camoys* v. *Blundell*, 11 Sim. 467; *Stringer* v. *Gardiner*, 4 De G. & J. 468: *Douglas* v. *Fellows*, Kay, 114; *Patching* v. *Barnett*, 28 W. R. 886.

Again, it has been held, that where a testator bequeaths a specific legacy of stock, in terms which do not accurately designate any of the existing public stocks, the state of his property in the funds when he made the will is admissible, as throwing light on his probable intention: *Selwood* v. *Mildmay*, 3 Ves. 306; *Penticost* v. *Ley*, 2 J. & W. 207. Of these cases Sir James Wigram observes (Extrinsic Evidence in Aid of the Interpretation of Wills, 106, 3rd ed.), "It is (at least) doubtful whether they can be explained upon strict principles of exposition. It may, however, be said of the cases of *Selwood* v. *Mildmay*, *Doe* d. *Le Chevalier* v. *Huthwaite*, and the other cases just referred to, that, inasmuch as of *facts* collateral to the question of intention, no qualification of the rule, *by which direct proof of intention* is excluded, is, in those cases, judicially recognised." See also *Stafford* v. *Horton*, 1 Br. C. C. 482; *Lindgren* v. *Lindgren*, 9 Beav. 358. And such inquiries have been sometimes directed with more doubtful propriety in elucidation of general stock legacies: *Fonnereau* v. *Poyntz*, 1 B. C. C. 473; *Colpoys* v. *Colpoys*, Jac. 451.

It is to be borne in mind that since the Wills Act a will speaks both as to real and personal estate from the death of the testator, and therefore everything

Admissibility of Parol Evidence.

included under an appropriate description will pass, although the testator may not have possessed any property answering the description at the date of his will: see *Re Midland Rail. Co.*, 34 Beav. 525; *Castle* v. *Fox*, L. R. 11 Eq. 542.

Terms of art, &c.

Evidence is admissible to explain terms of art, and foreign words, or to decipher peculiar characters: *Masters* v. *Masters*, 1 P. Wms. 421; *Goblet* v. *Beechey*, 3 Sim. 24; *Kell* v. *Charmer*, 23 Beav. 195; *Clayton* v. *Lord Nugent*, 13 M. & W. 206. See, as to abbreviations, *Anstee* v. *Nelms*, 1 H. & N. 225.

Local customs and usage of trade.

So it may be shown that by the custom of the locality in which the testator resided, or by the usage of the trade or profession to which he belonged, words having an ordinary meaning, according to which there is no object or subject answering the description, must have been used by the testator in a peculiar or technical sense: *Clayton* v. *Gregson*, 5 A. & E. 302; *Shore* v. *Wilson*, 9 Cl. & F. 545; *Richardson* v. *Watson*, 1 N. & M. 575; *Smith* v. *Wilson*, 3 B. & Ad. 728 (*l*). But not so, if there is any person or thing to which the words will in their ordinary acceptation apply: see *Millard* v. *Bailey*, L. R. 1 Eq. 378.

Nick-names, &c.

And evidence is admissible that the testator habitually called a person by a nick-name or other peculiar name occurring in the will: *Lee* v. *Pain*, 4 Hare, 251. And the same rule applies to the subject matter of a gift. So where a testatrix devised "All that messuage or tenement, barn and lands thereunto belonging, situate in the parish of B. . . ." called by the name of "*Claggetts and Sievelands*," to the use of J. W., his heirs and assigns; this description was identical in terms with a description in a schedule to the settlement; and it was followed in the same schedule by descriptions of six other pieces of land. Extrinsic evidence was admitted to prove that at the date of the will, and for many years before and after, all seven pieces of land were in one occupation, and known as "*Clay-*

(*l*) Where a weight or measure is defined by statute, evidence is not admissible that it bears a different meaning by local custom: *O'Donnell* v. *O'Donnell*, 1 L. R. Ir. 284.

Admissibility of Parol Evidence.

*gate Farm*": it was held that all seven pieces of land passed by the devise: *Whitfield* v. *Langdale*, 1 Ch. D. 61. See also *Doe* d. *Beach* v. *Lord Jersey*, 3 B. & C. 870; *Ricketts* v. *Turquand*, 1 H. L. C. 472; *Webb* v. *Byng*, 1 K. & J. 580.

In conclusion, the principles considered in the foregoing pages may be conveniently summed up by stating the seven propositions which Sir James Wigram has established in his elaborate and valuable work on the admission of extrinsic evidence in aid of the interpretation of wills. Those propositions are as follows:—

I. "A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will, it appears that he has used them in different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

II. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

III. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

IV. "Where the characters in which a will is

Admissibility of Parol Evidence.

written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

V. "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

"The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

Evidence of intention excluded;

VI. "Where the words of a will, aided by evidence of the material facts of the case, are sufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Prop. VII.) will be void for uncertainty.

except in certain special cases.

VII. "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning —Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition, (*i. e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible

to prove which of the persons or things so described was intended by the testator."

Admissibility of Parol Evidence.

However, Sir James Wigram observes (pl. 168), after a minute examination of the cases and authorities: "The decisions, then, in the excepted cases, must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determinate principle. They appear to be decisions in which a general principle has been sacrificed to meet the hardship of particular cases." The conclusion which Sir James Wigram draws from the cases of *Miller* v. *Travers*, *Doe* d. *Gord* v. *Needs*, and *Doe* d. *Hiscocks* v. *Hiscocks* (*supra*), is, "that the only cases in which *evidence to prove intention* is admissible, are those in which the description in the will is *unambiguous* in its application to each of several subjects."

Reference may also usefully be made to an earlier part of this work, where the general question of the admissibility of parol evidence to explain or control written instruments is discussed at considerable length, *ante*, Vol. I., pp. 344, *et seq.*, sub tit. "AGREEMENTS."

Rule as to incorporation.

*Incorporation of Unattested Documents.*] — The question of incorporating in wills other documents relating to property intended to be disposed of. The general rule on this point is that any document may be referred to for the purposes of ascertaining or explaining the intentions of the testator, provided that such document is in existence at the date of the execution of the will and is therein expressly referred to, and provided that the identity of the document produced with that referred to in the will can be proved by the description in the will. Such document is then said to be incorporated in the will, and may be admitted to probate.

Document must be in existence.

First, the document must be in existence at the date of the will. This was one of the points raised in the case of *Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468 (*m*). Lord Hertford, by a will

(*m*) The point as to the unattested codicils will be further referred to, *infra*, p. 541.

Admissibility of Parol Evidence.

dated in 1823, directed that future codicils signed by him should be considered as part of his will, whether such codicils were witnessed or not. The testator had also made several codicils to the said will, some duly executed, others only signed by him. Subsequently to the 1st January, 1838, he made and signed a codicil (B.), but the same was not duly executed. Subsequently to this, by a codicil (C.), duly executed and attested, he ratified and confirmed his will and "*codicils*." It was held that the codicil (B.) was not so identified with (C.) as to be ratified by or incorporated with (C.), the word "*codicils*" being more completely and properly applicable to the codicils made previously to the 1st of January, 1838. In this case the Court observed, that an instrument confirming by reference a will and codicils can have no *prospective* operation; that is, can only apply to papers already in existence. See also *Kirk* v. *Eddowes*, 3 Hare, 509; *Smith* v. *Conder*, 9 Ch. D. 170. The marginal note in the report of *Whateley* v. *Spooner*, 3 K. & J. 542, is to the contrary, but does not seem to be borne out by the judgment of *Wood*, V.-C., in that case.

What words will incorporate a document.

Where a testator devises all lands which were conveyed to him by certain indentures (describing them), or devises to the uses expressed by a particular indenture of settlement, it is clear that the indentures so referred to might be consulted for this purpose, without any evasion of the enactment respecting wills in the Statute of Frauds; the testator's intention being manifested by a will duly attested, though in such a manner as to involve a reference to a circumstance dehors the will. See *Habergham* v. *Vincent*, 2 Ves. jun. 204; also *Molineux* v. *Molineux*, Cro. Jac. 144. So, a clause "ratifying and confirming," a deed described in the will sufficiently indicates the intention of the testator to make the deed a part of his will, and will incorporate it accordingly in the will: *Sheldon* v. *Sheldon*, 1 Rob. 81; *Bizzey* v. *Flight*, 3 Ch. D. 269. In *Quihampton* v. *Going*, 24 W. R. 917; W. N. 1876, p. 209, entries in a ledger referred to in a will and made previously to the date thereof

Admissibility of Parol Evidence.

were read as incorporated in the will: see also *Aaron* v. *Aaron*, 2 De G. & S. 475; *Re Sunderland*, L. R. 1 P. & D. 198; *Re Pascall*, L. R. 1 P. & D. 606; *Re Gill*, L. R. 2 P. & D. 6; *Re Mercer*, L. R. 2 P. & D. 91.

As to reference in the will to the unattested document, as being in existence.

But the document must not only be actually in existence at the date of the execution of the will but it must be referred to in terms which expressly state, or, at all events, necessarily imply that it was then in existence: *Van Straubenzee* v. *Monk*, 3 Sw. & Tr. 6; *Re Sunderland*, L. R. 1 P. & D. 198; *Re Lady Truro*, L. R. 1 P. & D. at p. 204. See *Singleton* v. *Tomlinson*, 3 App. Ca. 404; *Smith* v. *Conder*, 9 Ch. D. 170; *Re Coyte*, 56 L. T. 510. And in this respect the reference must be free from ambiguity: see *Re Skair*, 5 No. Cas. 57; *Re Hakewill*, 3 Jur. (N. S.) 168; *Re Watkins*, L. R. 1 P. & D. 19; *Re Dallow*, L. R. 1 P. & D. 189. In *Re Daniell*, 8 P. D. 14, a testator in a codicil altered a legacy referred to as being in a list of legacies previously deposited with his brother; it was held that the whole list was incorporated by the reference, and must be included in the probate.

But a document not in existence at the date of a will may be incorporated if it exists at the date of a codicil to the will, provided such document is sufficiently described in either the will or the codicil, inasmuch as the codicil republishes the will, and makes it speak from the date of the codicil: see *Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468; *Re Hunt*, 2 Rob. 622; *Re Stewart*, 3 Sw. & Tr. 192, 4 Sw. & Tr. 211; *Re Lady Truro*, L. R. 1 P. & D. 201.

Document must be identified by description in will.

On the second point, viz., that the document must be sufficiently identified by the description in the will, the following cases are authorities. In *Re Countess of Durham*, 3 Curt. 57, probate was granted of two instruments, as together containing the will of the deceased; a duly executed will referring to the revoked will of her husband deceased (not in her possession at the time) so particularly that there could be no mistake as to its identity. In *Re Dickens*, 3 Curt. 60, reference being made in

Admissibility of Parol Evidence.

a will to a deed, the Court, upon the principle upon which it acted in the last case, held this deed to be part of the testator's will. In *Re Willesford*, 3 Curt. 77, probate was granted of an unexecuted paper referred to in the will as "the paper hereunto annexed," and attached thereto by a pin. See *Dillon* v. *Harris*, 4 Bli. (N. S.) 329, where the document sought to be incorporated was rejected for want of sufficient identification. See also *Steele* v. *Pidsley*, 6 No. Cas. 190.

As to admission of parol evidence to identify document.

In *Sheldon* v. *Sheldon*, 1 Rob. 81, Dr. *Lushington*, in his judgment, after pointing out that, before the Wills Act, all papers proved by parol evidence to be intended to be final after death were admitted to probate, said: "This was the state of things in law and practice prior to the present Statute of Wills, which has made most essential alterations in one respect. It is no longer allowed to declare by parol evidence any deed or paper to be part of a will; but it is still possible to incorporate into a duly executed will or codicil any written document then in existence: but it must be borne in mind that this incorporation is totally different from declaring an instrument to be testamentary; the validity of the incorporation does not depend on parol evidence (which is no longer permitted), but the paper to be incorporated is protected by exactly the same evidence, as renders valid the instrument by which the incorporation is effected, namely, the signature of the testator, and the subscriptions of two witnesses."

But when the reference in the will is not absolutely distinct, yet, if it be sufficient to render the document referred to capable of identification, parol evidence may be admitted to assist in supplying the necessary proof. Thus, in *Re Mercer*, L. R. 2 P. & D. 91, a testator executed a will in India, which was deposited in a bank in that country; afterwards, when residing in the United Kingdom, he executed a codicil containing these words: "Of which will, I, along with this codicil thereto, execute a copy, and homologate and confirm the same in all particulars, except in so far as altered or revoked by this

codicil;" evidence was admitted that at the time of the execution of the codicil, the deceased produced and showed to the witnesses a document which he stated was a copy of his will, and that subsequently he gave to J. S. a copy of his will and codicil, and informed him that the original will was deposited at the bank in India, and that the copy given was a correct copy thereof; on this evidence it was held that the copy was incorporated in the codicil.

Admissibility of Parol Evidence.

So a duly attested codicil will incorporate a will not duly executed, if it be shown that there is only one document in existence to which the reference is applicable: *Barnes* v. *Crowe*, 1 Ves. jun. 485; *Doe* d. *Williams* v. *Evans*, 1 Cr. & M. 42; *Re Heathcote*, 6 P. D. 30; *Allen* v. *Maddock*, 11 Moo. P. C. 427; *Re Countess of Durham*, 3 Curt. 57; see *Dillon* v. *Harris*, 4 Bli. (N. S.) 329, and *Re Greves*, 1 Sw. & Tr. 250, where the proof of identification was insufficient; and see *Re Gill*, L. R. 2 P. & D. 6, *Re Heathcote*, 6 P. D. 30, and the cases collected in Jarm. Wills, Vol. I., p. 91, notes (*d*) and (*e*). And a reference in a codicil to a prior unattested codicil will incorporate it: *Ingoldby* v. *Ingoldby*, 4 No. Cas. 493; *Smith's Case*, 2 Curt. 796. But a general reference in a codicil to a will and prior codicils will not incorporate unattested codicils, if there are any codicils in existence which were duly attested: see *Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468, stated *ante*, p. 537 (*n*). Nor, as it would seem, if the will alone was duly attested: *Utterton* v. *Robins*, 1 A. & E. 423; *Re Phelps*, 6 No. Cas. 695; *Haynes* v. *Hill*, 7 No. Cas. 256. It seems that a codicil expressed to be "a fourth codicil to my will" does not incorporate a document intituled "A third codicil of my will," which is not duly attested: *Stockil* v. *Punshon*, 6 P. D. 9.

As to incorporation of unattested wills and codicils by subsequent attested codicil.

It has been seen that a testator cannot reserve to himself by a duly attested will power to dispose of

(*n*) In this case (stated *ante*, pp. 537, 538) the codicils held to be incorporated, though not attested, did not require attestation, having been executed before 1838, so that the principle of the decision seems to be as stated in the text.

Admissibility of Parol Evidence.

his property by unattested codicils or other documents: *Countess Ferraris* v. *Marquis of Hertford*, 3 Curt. 468, stated *ante*, p. 537: see *Habergham* v. *Vincent*, 2 Ves. jun. 204.

But it is competent for a testator to make a gift to persons to be ascertained by some subsequent act, provided the supplementary act is not testamentary in its nature. So where a testatrix devised freehold property on which she carried on a trade to trustees, on trust to sell, and divide the proceeds among the persons who should be in partnership with her at the time of her decease, the devise was held to be good: *Stubbs* v. *Sargon*, 3 My. & Cr. 507.

Probate of incorporated documents.

An incorporated document is entitled to probate, and, as a general rule, the Court will order probate to issue of such a document: *Re Harris*, L. R. 2 P. & D. 83; and will require the deposit of the original document, if possible: *Re Pewtner*, 4 No. Cas. 479; or, if that cannot be produced, then of an authenticated copy: *Re Dickens*, 3 Curt. 60; *Re Howden*, 43 L. J. Pr. 26. Probate has, however, been dispensed with under special circumstances; as where the document was in the hands of strangers, and production could not be obtained: *Re Battersbee*, 2 Rob. 439; *Re Sibthorp*, L. R. 1 P. D. 106; or where the document was of inordinate length, in order to avoid the inconvenience and expense of setting it out in full: *Re Marquis of Lansdowne*, 3 Sw. & Tr. 194. See also *Re Countess of Limerick*, 2 Rob. 313, where immaterial parts were ordered to be omitted from the probate. Where a testator executed two wills, one disposing of his property in this country, and the other disposing of his property abroad, it will as a general rule be necessary to take out probate only of the former: *Re Aston*, 1 P. D. 150; but if the latter is expressly referred to, and confirmed by, so as to be incorporated in the former, both must be included in the probate: *Re Harris*, L. R. 2 P. & D. 83; *Re Howden*, 43 L. J. Pr. 26. The incorporation in English wills of foreign testamentary dispositions should, therefore, be avoided, unless rendered necessary, or advisable, on special grounds.

Admissibility of Parol Evidence.

Probate of an incorporated document is not however necessary, in order to empower a Court of construction to take cognizance of it. "If a will confirms an instrument which is sufficiently identified, and probate passes, leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate:" per *Hall*, V.-C., in *Bizzy* v. *Flight*, 3 Ch. D. 269; see also *Quhampton* v. *Going*, 24 W. R. 917; W. N. 1876, p. 209.

Bequest upon trusts not disclosed by will.

*Incorporation of trusts not disclosed by the Will.*]— Where it appears on the face of a will that property is given to a person, to be held by him as a trustee, but the nature of the trusts is not disclosed by the will, the trustee cannot of course take beneficially, and extrinsic evidence of the trust will be admitted, whether the nature of the trusts was communicated to the trustee prior to or after the execution of the will. The first point is settled, beyond doubt, by numerous decisions: see *Crook* v. *Brooking*, 2 Vern. 60; *Pring* v. *Pring*, 2 Vern. 99; *Smith* v. *Attersoll*, 1 Russ. 266; *Podmore* v. *Gunning*, 7 Sim. 644 (where the terms were precatory, and a trust was not held to be proved); *Johnson* v. *Ball*, 5 De G. & S. 85; *Irime* v. *Sullivan*, L. R. 8 Eq. 673; *Riordan* v. *Banon*, 10 Ir. Eq. Rep. 649; and the latter point seems to be settled by the decisions in *Moss* v. *Cooper*, 1 J. & H. 352; *Re Fleetwood, Sidgreaves* v. *Brewer*, 15 Ch. D. 594.

Secret trusts.

Where a gift is in terms absolute, but the testator, before or after the execution of the will, communicates to the legatee his intention that the property shall be held upon him on a secret trust, evidence of the nature of the trust is admissible and the trust will be enforced, if it is for a lawful purpose, and if the legatee has accepted or acquiesced in the trust: see *Smith* v. *Attersoll*, 1 Russ. 266; *Moss* v. *Cooper*, 1 J. & H. 352; *Waldegrave* v. *Tebbs*, 5 K. & J. 313. So if a testator devises an estate, or suffers it to descend upon the faith of a promise by the devisee or heir that he will apply it upon certain trusts, or that he will make out of his own moneys provision

Admissibility of Parol Evidence.

for any other person, the Court will enforce performance of the promise: see *Strickland* v. *Aldridge*, 9 Ves. 519; *Drakeford* v. *Wilkes*, 3 Atk. 539; and if the devisee or heir deny the promise, extrinsic evidence is admissible to prove it: *Oldham* v. *Litchfield*, 2 Vern. 506; *Chester* v. *Urwick*, 23 Beav. 407; *Proby* v. *Landor*, 28 Beav. 504; *M'Cormack* v. *Grogan*, L. R. 4 H. L. 82; *Norris* v. *Frazer*, L. R. 15 Eq. 318.

Effect of communication of secret trust to one only of several co-legatees.

The ground of the rule with regard to secret trusts is that unless evidence of the trust or promise were admitted the legatee would be enabled to commit a fraud; and, therefore, if a testator makes a gift absolute in its terms to several legatees with an intimation made *previously to*, or *contemporaneously with* the execution of the will, to one of the legatees, of his intention that the property shall be held on a secret trust, the other legatees will not take beneficially, but will be bound by the trust, even though they may not have been aware of it: *Russell* v. *Jackson*, 10 Hare, 204. But where such a trust is communicated to and accepted by one only of several tenants in common *subsequently to* the execution of the will the share of the assenting legatee will *alone be bound: Tee* v. *Ferris*, 2 K. & J. 357; *Rowbotham* v. *Dunnett*, 8 Ch. D. 430. If the legatees are joint tenants, apparently all would be bound by such assent: see *Jones* v. *Bedley*, L. R. 3 Eq. 635; *S. C.* (reversed on appeal on the ground that the assent was not proved), L. R. 3 Ch. 362; *Rowbotham* v. *Dunnett*, 8 Ch. D. 430.

Illegal purpose.

If property is given upon a secret trust for an illegal purpose, disclosure of the nature of the trust will be enforced, and the gift will be void: see *Jones* v. *Badley, supra; McCormick* v. *Grogan*, L. R. 4 H. L. 82. See further on this point, *ante*, sub tit. MORTMAIN, Vol. IV., pp. 27, *et seq.*

# CHAPTER XII.

## ESTATES ARISING BY IMPLICATION.


| | PAGE | | PAGE |
|---|---|---|---|
| *Implication of Estates for Life in Realty* | 545 | *Implication of Life Interest in Personalty* | 552 |
| *Implication of Estates Tail* | 549 | *Implication of Absolute Estates and Interests* | 553 |


Estates by Implication.

*Implication of Estates for Life.*]—As to the effect of recitals, see Jarm. Wills, Vol. I., pp. 525 *et seq.*

Estate for life implied from future devise to the heir.

An heir-at-law can only be disinherited by express devise, or by necessary implication, which has been defined to be—so strong a probability that the contrary cannot be supposed; as, where the testator devises to his heir after the death of his wife, it being impossible to suppose that he would do anything so absurd as the making a devise of lands to take effect at a future period to him who would by law take them in the mean time, the wife is held to have an estate for life by implication: see *City of London* v. *Garway*, 2 Vern. 571; *Dyer* v. *Dyer*, 1 Mer. 414. See also the subject fully treated in the notes to the leading case of *Gardner* v. *Sheldon* (Vaugh. 259), in Tud. L. C. 541. And it is immaterial whether the devise to the heir is in fee, or for life, or in tail: see *Philips* v. *Philips*, 1 P. Wms. 34. But, if the devise is to any person other than the heir, no such irresistible inference arises, because a testator may *possibly* intend to postpone a devise to a stranger, in order that the property in the mean time may devolve to the heir. Accordingly, it is well settled, that if lands are devised after the decease of A. to B., not being the testator's heir-at-law, an estate for life to A. cannot be implied, but the lands descend to the heir during the life of A.: *Faulkner* v. *Faulkner*, 1 Vern. 20; *Aspinall* v.

**Estates by Implication.**

*Petvin*, 1 S. & St. 544. See also Jarm. Wills, Vol. I., pp. 532, 533.

Devise to one or several co-heiresses.

The same implication is said to arise from a devise to one of several co-heiresses; as where a man, having two daughters, but no son, devises to one of his daughters after the death of his wife, in which case the wife, according to an early dictum, takes an estate for life by implication: *Hutton* v. *Simpson*, 2 Vern. 723; see also arg. *Willis* v. *Lucas*, 1 P. W. 472. But this position seems to carry the doctrine of implication beyond the scope of the reasoning on which it is founded, since there is no incongruity in a person devising *in futuro* to *one* of several co-heiresses, intending the property in the interim to descend to *all*. And it is observable, that, in *Willis* v. *Lucas*, 1 P. Wms. 475, Lord Chancellor *Parker* avoided expressing any opinion on the point, whether a devise of gavelkind lands to one of several co-heirs raised an implied estate; though he considered it clear, in regard to *other* lands, that the testator had, by giving to the eldest son (*i.e.* the heir) an immediate annuity out of the land, plainly shown that he was not to have the land itself.

Gift of annuity to heir.

Whether devisee must be heir at date of will.

It is conceived that the state of the devisor's family at the time of the making of the will, and not its state at the testator's decease, must regulate the application of the doctrine in question. Thus, if a man having two sons devises freehold lands to his younger son in fee, after the decease of his wife, the latter would not take an estate by implication, although in event (*i.e.* by the decease of the elder son without issue in the testator's lifetime), such younger son might happen to become heir at the testator's death. See on this point, *Aspinall* v. *Petvin*, *supra*.

Devise on death of A., to heir and others.

It may now be regarded as settled that a devise to the heir-at-law and others, after the death of A., will raise no implication that A. shall take a life estate. This view is consistent with the principles and grounds of the doctrine under consideration, insomuch as the testator may well have intended the heir to take the income of the whole property until the decease of A., and thereafter to take a share of

Estates by Implication.

the corpus. And the point has been expressly so decided by the Court of Appeal in the recent case of *Ralph* v. *Carrick*, 11 Ch. D. 873. The decision to the contrary in *Blackwell* v. *Bull*, 1 Kee. 176, can no longer be regarded as law.

Distinction where there is an express devise of part.

If the person, at whose decease the devise to the heir is expressed to arise, is an express devisee for life of part of the lands, the words referring to the devise as taking effect at his decease, will be considered to point to that devise, and not as inserted for the purpose of postponing the devisee's enjoyment of the residue. As, where a testator devises Blackacre to his wife for life, and afterwards devises all his lands to his eldest son after the death of his wife, the words will be marshalled, the expression referring to the decease of the wife being taken to apply exclusively to Blackacre; and consequently the ground for raising an implied estate in the wife in the residue of the land fails: *Simpson* v. *Hornsby*, Pre. Ch. 439, 452; 2 Vern. 722; *Boon* v. *Cornforth*, 2 Ves. sen. 277; *Dyer* v. *Dyer*, 1 Mer. 414; *Doe* d. *Annandale* v. *Brazier*, 5 B. & Al. 64; but see *Aspinall* v. *Petvin*, 1 S. & St. 544 (*a*). In the case of *King* v. *Inhabitants of Ringstead*, 9 B. & C. 218, all the cases in favour of this, which may be called, for sake of convenience, the distributive construction, were treated as standing on special grounds, and as constituting an exception to the general rule. See *Drew* v. *Killich*, 1 De G. & Sm. 226; *Attwater* v. *Attwater*, 18 Beav. 330.

Also where there is a residuary devise.

The doctrine which raises, from a future devise to the heir, an implied gift of the lands intermediately, supposes that the will does not contain a residuary clause capable of comprehending such intermediate estate, which clause, by disposing of that estate, would, of course, completely exclude the implication. See *Horton* v. *Horton*, Cro. Jac. 74. Thus, if a testator devises Blackacre to his heir after the death of his wife, and in the same will

(*a*) The cases bearing on this distinction will be found fully stated and considered in Jarm. Wills, Vol. I., pp. 536 *et seq.*

**Estates by Implication.**

devises the residue of his real estate to a stranger, since the estate for life not included in the devise to the heir would, if no implied gift were raised, pass to the residuary devisee, which might possibly be intended, it should seem, that the residuary devisee, and not the wife, would take the estate during her life. See per *Kindersley*, V.-C., in *Stevens* v. *Hale*, 2 Dr. & Sm. 28.

Estate for life implied from future devise to residuary devisee.

And it is further observable, that where the will contains a residuary devise, a devise of particular lands to the residuary devisee, to take effect *in futuro*, gives rise to precisely the same argument in favour of the implication, as a devise to the heir; for instance, where a testator devises Blackacre to his youngest son after the death of his wife, and then devises all the residue of his real estate to his youngest son, to suppose that he intends Blackacre, which he has devised to the youngest son at the death of the wife, to go to him in the meantime under the residuary clause, involves the same absurdity, as to suppose that an heir is to take immediately, what is expressly given to him at a future period, and therefore the wife would undoubtedly take an estate for life by implication.

Implication from gift to survivors.

A devise to the survivors of several persons, although giving rise to a strong suspicion that the testator must have meant that all should take during their joint lives, seems scarcely to afford that irresistible inference which the law calls a necessary implication; but the Courts have shown a tendency in such cases to construe liberally any expressions in the context of a will, from which an implication may be raised that the testator did not intend that the persons indicated should take no provision until the death of the survivor: see *Saunders* v. *Lowe*, 2 W. Bl. 1014; *Brown* v. *De Laet*, 4 Br. C. C. 527; *Crowder* v. *Clowes*, 2 Ves. jun. 449; *Wainewright* v. *Wainewright*, 3 Ves. 558.

Whether cross remainders are implied by gift to tenants in common for life with

Whether a gift to several persons as tenants in common for life, with a remainder over of the entirety after the death of the survivor, would raise cross remainders by implication for the purpose of filling up the vacancy between the death

of the pre-deceasing devisees and of the survivor, has never been decided. The result, sometimes, has been attained by rejecting the words which create the tenancy in common: *Tuckerman* v. *Jeffries*, 3 Bac. Ab. 681; *Armstrong* v. *Eldridge*, 3 Br. C. C. 215; *Pearce* v. *Edwardes*, 3 Y. & C. 246; *Cranswick* v. *Pearson*, 31 Beav. 624.

gift over, on death of survivor.

As to the implication of cross executory limitations to supply a *hiatus*, which the context of the will indicates to have been unintentional, see *Re Hudson*, 20 Ch. D. 406.

Cross executory limitations.

So, a gift of an annuity to several persons for their lives, and the life of the survivor, has been held not to create a gift to the survivor, but merely to prolong the endurance of the interests of the legatees and their representatives, to the decease of such survivor: *Jones* v. *Randall*, 1 J. & W. 100. See *Eales* v. *Earl of Cardigan*, 9 Sim. 384; *Bryan* v. *Twig*, L. R. 3 Ch. 183. Where a testator gave an annuity to his sister and her husband during their joint lives, and after their decease to go to his nephew, it was held that the husband, having survived the testator's sister, was entitled to the annuity: *Townley* v. *Bolton*, 1 My. & K. 148; see also *McDermott* v. *Wallace*, 5 Beav. 142; *Day* v. *Day*, Kay, 703.

Effect of gift of life annuity to several and the survivor.

*Implication as to Estates Tail.*]—Applying to estates tail the principle which governs the implication of estates for life, it is not to be doubted, that, if under the old law lands were devised to the heir in fee, in case A. should die without issue, this would have made A. tenant in tail with reversion in fee to the heir. The reports, however, do not present such a case, the implied gifts of estates tail which they supply being of a different nature. According to those cases, if lands were devised by a man to A. in fee in case *his* (the testator's) *eldest son and heir apparent* should die without issue, such son would have taken an estate tail by implication: *Newton* v. *Barnardine*, Moore, 127, pl. 275; *Roe* v. *Vernon*, 5 East, 51; but if the person, in default of whose issue the devise over was to take effect, were *a*

Implication of estates tail under the old law.

Estates by Implication.

*stranger*, and the devise over was not to the heir, an implied entail was raised, and the devise in question consequently was void as an executory devise to take effect after an indefinite failure of issue: *Gardner* v. *Sheldon*, Vaugh. 259; *S. C.* Tud. L. C. 541.

Cases, however, are not wanting in which estates tail have been implied from a devise to take effect on the indefinite failure of issue of a stranger; but they are not to be relied on as establishing any general rule to this effect, inconsistent as it appears to be with sound principles of construction: *Tenny* v. *Agar*, 12 East, 253; *Romilly* v. *James*, 6 Taunt. 263. See also *Daintry* v. *Daintry*, 6 T. R. 307; *Parker* v. *Tootal*, 11 H. L. C. 143. See this subject further discussed, Jarm. Wills, Vol. I., pp. 553 *et seq.*

Effect of stat. 1 Vict. c. 26, upon the implication of estates tail.

No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since 1837, unless the intention to denote an indefinite failure of issue be clearly made to appear; for by the 29th section of the stat. 1 Vict. c. 26, it is enacted:—

"That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Mr. Jarman's remarks as to the effect of the Wills Act.

The following are some of Mr. Jarman's observations (Jarm. Wills, Vol. I., pp. 560, 562), upon this important alteration of the law:—"Under this

Estates by Implication.

clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee-simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the Legislature. A different and less desirable result, however, will occur where the prior devise, being expressly for life, will not be enlarged by the statute to a fee-simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted."

"The chief advantage attending the newly enacted mode of construing words importing a failure of issue are,—1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes *in esse* within twenty-one years afterwards), which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir-at-law of the testator; and, secondly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express devisee happens to be the heir-at-law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that, instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which of course

Estates by Implication.

the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee-simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event. Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee-simple; in which case the existence of issue at his death produces, as already shown, a vacancy in the disposition."

Implication of gifts of personalty.

*Implication of Life Interests in Personalty.*]—The same general doctrines which govern the implication of gifts of real estate apply in relation to personal bequests; for, though the rejection of vague and conjectural implications is frequently stated as if it were the result of favour shown to the *heir*, yet it is clear that equal protection would be afforded to *all* persons, on whom the law casts property of any kind which is not disposed of, that protection being nothing more than what is involved in an adherence to the sound axiom, that the disposition of the law shall be defeated only by the unequivocal disposition of the party. Accordingly, in an early case, where a man gave a term to his son after the death of his wife, and made other persons his executors, it was laid down that this was but a demonstration when the estate of the son should commence, and in the interim the executors might well have it: *Horton* v. *Horton*, Cro. Jac. 74: and see *Rayman* v. *Gold*, Moore, 635, pl. 871.

In direct and avowed opposition to these authorities, however, the Court of King's Bench, of a later day, held, that where A., possessed of a term determinable with the lives of B. & C., bequeathed the same to his daughter A., after the death of his daughter B., during the life of C., B. took an estate for life by implication: *Roe* v. *Summerset*, 5 Burr. 2608; but this decision (which is prominently

Estates by Implication.

brought forward whenever a case of implication is attempted to be raised) cannot safely be considered as taking bequests of personalty out of the general doctrine.

In some cases of a more recent date a tendency has been manifested towards construing generally a bequest of personalty, at the death of A., to give to A. a prior life interest by implication; and this construction prevailed in one instance where there was an express gift to the same legatee determinable during her life: *Bird* v. *Hunsdon*, 2 Swanst. 342; see also *Blackwell* v. *Bull*, 1 Kee. 176; *Humphreys* v. *Humphreys*, L. R. 3 Eq. 475. But such decisions must now be regarded as being of doubtful authority: see *Ralph* v. *Carrick*, 11 Ch. D. 873.

In several cases where there has been a gift of a life interest to A., and after his death of a life estate to B. in certain events, with a gift over after the deaths of both A. and B., an intention has been implied to give a life interest to B., though the events did not happen: *Re Betty Smith's Trusts*, L. R. 1 Eq. 79; *Re Blake's Trust*, L. R. 3 Eq. 799; *Isaacson* v. *Van Goor*, 21 W. R. 156.

Gifts implied from powers of selection and distribution.

*Implication of Absolute Estates and Interests.*]— Implied gifts may be created by powers of selection or distribution in favour of a defined class of objects; for, where a fund is given (*b*) to a person for life, and, after his or her decease, to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over in default of appointment, a gift will be implied; the presumption being, that the testator could not have intended that the objects of the power should be disappointed of his bounty by the neglect of the donee to exercise it in their favour: *Harding* v. *Glyn*, 1 Atk. 469; *Cruwys* v. *Colman*, 9 Ves. 319; *Forbes* v. *Ball*, 3 Mer. 437; *Walsh* v. *Wallinger*, 2

(*b*) The same rule applies to an appointment under a general power to this effect: *Wilson* v. *Wilson*, 1 Drew. 298.

Estates by Implication.

Russ. & M. 78; *Brown* v. *Biggs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; *Martin* v. *Scannell*, 2 Beav. 249; *Fordyce* v. *Bridges*, 10 Beav. 90; *Penny* v. *Turner*, 15 Sim. 368; *Burrough* v. *Philcox*, 5 My. & Cr. 73; *Salusbury* v. *Denton*, 3 K. & J. 535; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Reid* v. *Reid*, 25 Beav. 469; *Izod* v. *Izod*, 32 Beav. 242. And the presumption will of course be strengthened if there is a gift over in default of objects of the power: *Butler* v. *Gray*, L. R. 5 Ch. 26; see *Kellett* v. *Kellett*, I. R. 5 Eq. 298. The circumstance that the testator has expressly given the property to the objects of the power in a certain event (as that of the donee dying before him), has been held not to negative the implication: *Kennedy* v. *Kingston*, 2 J. & W. 431.

No implication will arise if there is a gift over in default of appointment: *Pattison* v. *Pattison*, 19 Beav. 638; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823; *Richardson* v. *Harrison*, 16 Q. B. D. 85; see *Re Jeffery's Trusts*, L. R. 14 Eq. 136.

Where the power is to select one or more members out of a class, there is apparently no implication of a gift to the class if the power is not exercised: *Carthew* v. *Euraglat*, 20 W. R. 743.

A mere power of appointment in favour of a particular individual will not give to him any interest by implication if the power is not exercised, though there is no gift over in default of appointment: *Bull* v. *Vardy*, 1 Ves. jun. 270.

No implication from gift over in default of children.

A few other points respecting implied gifts should be noticed. It was formerly doubted whether a legacy to a person, with a bequest over, if he die without having or leaving children, raised an implied gift in the children. The negative is now clear, as the hypothesis in favour of the children amounts only to conjecture, and not to necessary implication; and, therefore, the effect of the *having or leaving* a child (*c*) is no more than to render the interest of the legatee absolute: *Weakley* v. *Rugg*, 7

(*c*) As to the meaning of the words "having" and "leaving" children, see *post*, Chap. XVI., p. 627.

Estates by Implication.

T. R. 322 ; *Doe* v. *Wetton*, 2 B. & P. 324 ; *Addison* v. *Busk*, 2 De G. M. & G. 810 ; *Dowling* v. *Dowling*, L. R. 1 Ch. 612. When the gift is to the parent for life with a gift over in default of children, no implication in favour of the children will generally be held to arise either as regards real estate : *Moneypenny* v. *Dering*, 7 Hare, 568 ; or personalty : *Green* v. *Ward*, 1 Russ. 262 ; *Ranelagh* v. *Ranelagh*, 12 Beav. 200 : *Sparks* v. *Restal*, 24 Beav. 218 ; *Neighbour* v. *Thurlow*, 28 Beav. 33 ; *Seymour* v. *Kilbee*, 3 L. R. Ir. 33. But the Court will, in such cases, apparently lean strongly in favour of an implied gift to the children, if expressions in the will afford any indication of the testator to that effect : see *Ex parte Rogers*, 2 Mad. 449, followed in *Kinsella* v. *Caffrey*, 11 Ir. Ch. R. 154. But this decision has been much questioned, see *Lee* v. *Busk*, 2 De G. M. & G. 812 ; *Neighbour* v. *Thurlow*, 28 Beav. 33 ; see also *Dowling* v. *Dowling*, L. R. 1 Ch. 615.

Gift on death combined with a contingency.

The same considerations would seem to apply, where a gift is made to A. during the minority of his son B., and, in case B. shall die under twenty-one, then over to the other sons of A., without any alternative gift in the event of B. attaining the prescribed age. Though every suggestion of probability is in favour of an intention to give the property to B. at his majority, yet there is some difficulty in obtaining such a result, without trenching upon the rules which exclude conjectural interpretations. But, in such a case, the Courts lay hold of every slight circumstance as a foundation for the implication : *Goodright* v. *Hoskins*, 9 East, 306. See also *Davis* v. *Davis*, 1 Russ. & My. 645. The presumption in favour of implication will be strengthened where there is a gift until the donee attains twenty-one, and if he die before that age, then over : *Tomkins* v. *Tomkins*, cit. in *Goodtitle* d. *Hayward* v. *Whitby*, 1 Burr. 234 ; *Wilks* v. *Williams*, 2 J. & H. 125 ; *Cropton* v. *Davies*, L. R. 4 C. P. 159. But the implication will fail altogether, if, in the event specified, the donee takes a less interest under the will : *Savage* v. *Tyers*, L. R. 7 Ch. 356 ; or if the gift over depends on a further contingency besides

Estates by Implication.

the death of the donee under twenty-one : *ibid.*, and see *Fitzhenry* v. *Bonner*, 2 Drew. 36.

Implication as to time for ascertaining a class.

Where a testator gave the income of a fund to a widow for her life, or till she should marry again, and, after her death or re-marriage, he gave the fund equally among her children living at her death, it was held that the class entitled must be ascertained upon the re-marriage of the widow : *Re Tucker*, W. N., 1887, p. 37.

Implication of cross remainders between devisees in tail.

And here we must briefly notice the well-known doctrine respecting the implication of cross remainders between devisees in tail. By this doctrine, where lands are devised to several persons as tenants in common in tail, and the testator has evinced an intention that the estate shall not go over to the ulterior devisee, until failure of the issue of *all* the tenants in tail, cross remainders are implied between them : *Doe* v. *Webb*, 1 Taunt. 234 ; *Powell* v. *Howells*, L. R. 3 Q. B. 655 ; *Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116 ; and, to this end, nothing more is requisite than the ordinary words used to connect an estate tail and the ulterior devise, as in the instance of a devise to A., B., and C., as tenants in common in tail, and, *in default of such issue*, or *in case they shall die without issue*, then over : *Maden* v. *Taylor*, 45 L. J. Ch. 569 ; and it has even been held, that the mere word *remainder* will raise cross remainders : *Doe* v. *Burville*, 2 East, 47, n. Modern authorities have delivered the doctrine from several unmeaning distinctions which formerly embarrassed its application, such as a difference between devises to two, and to a larger number, and between devises to the tenants in tail simply, and a devise to them *severally* or *respectively : Wright* v. *Holford*, Cowp. 31; *Phipard* v. *Mansfield*, Id. 797; *Watson* v. *Foxon*, 2 East, 36 ; *Doe* v. *Webb*, 1 Taunt. 237; *Green* v. *Stephens*, 12 Ves. 419, 17 Ves. 64 ; *Mortimer* v. *West*, 2 Sim. 274 ; *Doe* v. *Jenkins*, 3 Moo. & P. 59 ; *Livesey* v. *Harding*, 1 Russ. & My. 636.

# CHAPTER XIII.

## OPERATION OF A GENERAL DEVISE OF REAL ESTATE.


| | PAGE | | PAGE |
|---|---|---|---|
| *Trust and Mortgage Estates* ..... | 557 | *Copyholds*..... | 563 |
| *Remainders and Reversions* ..... | 559 | *Powers* ..... | 563 |
| *Leaseholds* ..... ..... ..... | 562 | | |


**Construction of a General Devise.**

Trust estates pass by a general devise, when.

*Trust and Mortgage Estates.*]—A general devise, contained in the will of a testator who died before 1882, will pass trust estates (*a*), provided there be nothing in the purposes and objects of the devise to raise an inference of a contrary intention. Thus, if such a testator devised all his hereditaments or real estate simply to one or more persons in fee, for his, her, or their own use and benefit, such devise would carry freeholds or copyholds, of which the inheritance is in the testator in the character of trustee or mortgagee. See *Littleton's Case*, 2 Vent. 351; *Ex parte Sergison*, 4 Ves. 147; *Att.-Gen.* v. *Buller*, 5 Ves. 339; *Lord Braybroke* v. *Inskip*, 8 Ves. 417; *Sharpe* v. *Sharpe*, 12 Jur. 598. See Jarm. Wills. Vol. I., pp. 693 *et seq.*

But the trust or mortgage estates do not pass if the devise be to uses in strict settlement: *Thompson* v. *Grant*, 4 Mad. 438; see *Att.-Gen.* v. *Vigor*, 8 Ves. 276; or subject to executory limitations: see *Lord Braybroke* v. *Inskip*, 8 Ves. 417; or creates a general trust or charge for the payment of the testator's debts, legacies or any other monies: *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Roe* v. *Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Re Horsfall*, M'Cl. & Y. 292; *Doe* v. *Lightfoot*, 8 M. & W. 553; *Hope*

(*a*) Throughout this section, a *general* devise means a devise not expressly including, or excluding property of the particular description, in regard to which the question is raised.

Construction of a General Devise.

v. *Liddell*, 21 Beav. 183; *Re Parkman and Moss*, 1 Ch. D. 214; *Re Bellis' Trusts*, 3 Ch. D. 504. See *Re Stevens' Will*, L. R. 6 Eq. 597, where the legal estate was held to pass by a general devise, the testator being mortgagee, beneficially entitled to the mortgage money. And of course the same negative doctrine would apply to a devise in trust for sale: *Ex parte Marshall*, 9 Sim. 555; *Re Morley's Will*, 10 Hare, 293; *Re Smith's Estate*, 4 Ch. D. 70. But such a devise passes lands contracted to be sold, if there is no express devise of trust estates: *Wall* v. *Bright*, 1 J. & W. 494; *Lysaght* v. *Edwards*, 2 Ch. D. 499. Trust and mortgage estates will also be excluded from a general devise for the separate use of a married woman: see *Lindsell* v. *Thacker*, 12 Sim. 178 (but see the remarks of *Kindersley*, V.-C., in *Lewis* v. *Matthews*, L. R. 2 Eq. 181); so also, if the devise is to a charity: *Att.-Gen.* v. *Vigor*, 8 Ves. 276; or to an unascertained class: *Re Finney's Estate*, 3 Gif. 465. It seems that the circumstance of the dvisees being made tenants in common would alone exclude trust estates, this being an unusual and inconvenient mode of devising such estates: see per *Malins*, V.-C., in *Martin* v. *Laverton*, L. R. 9 Eq. 568. *Ex parte Whiteacre*, 1 Sand. Us. 359 n., is sometimes cited as an authority to the contrary, but in that case there was an express devise of "mortgages and securities for money," words which were formerly sufficient to pass mortgage estates.

As to estates contracted to be sold.

Tenancy in common.

It has never been decided, whether the infancy, or coverture of the devisee at the time of the making of the will, would have an excluding effect. Some of Lord *Eldon's* reasoning in the case of *Lord Braybroke* v. *Inskip*, 8 Ves. 417, might seem to favour the affirmative conclusion; but there is much objection to allowing the construction to be influenced by extrinsic circumstances; and in the case of *King* v. *Denison*, 1 Ves. & B. 275, the same learned judge declined to make the coverture and infancy of the devisees a ground for holding them to take beneficially. This case seems to furnish an analogous principle.

Construction of a General Devise.

Express devises of estates held as trustee or mortgagee were until lately inserted almost as a matter of course in every regularly drawn will. But by the operation of sect. 30 of the Conveyancing and Law of Real Property Act, 1881 (44 & 45 Vict. c. 41), such devises were rendered nugatory, and trust and mortgage estates were made to pass no longer by a general devise, but to the personal representatives of the deceased. This is still the case with regard to freeholds; but by the Copyhold Act, 1887 (50 & 51 Vict. c. 73), sect. 45, the enactment above referred to is rendered not applicable to copyholds or customary lands vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage: see *post*, p. 756, note (*u*). See further as to devolution of trusts and mortgage estates, *ante*, sub tit. MORTGAGES, Vol. III., p. 965, and sub tit. PURCHASE DEEDS, Vol. V., p. 465, note.

Remainders and reversions pass by a general devise, when.

*Remainders and Reversions.*]—Remainders or reversions in realty, whether vested in the testator at the time of his will, or left in him after the limitations contained in the will are exhausted, will pass under a general devise of lands: *Chester* v. *Chester*, 3 P. Wms. 56; *Doe* v. *Fossick*, 1 B. & Ad. 186; *Mostyn* v. *Champneys*, 1 Bing. N. C. 341; and the inapplicability of *some* of the limitations of the devise to a remainder or reversion, forms no ground for its exclusion. Thus, if lands are settled to the use of A. for life, with remainder to his first and other sons in tail male, with remainder to A. in fee; and A., by his will, devises all his lands to his first and other sons in tail male, with remainder to his daughters in tail, the remainder in fee will pass by the will; for, though the devise to the sons could not operate on it, the devise to the daughters might: *Church* v. *Mundy*, 15 Ves. 396; *Doe* v. *Bartle*, 5 B. & Al. 492; which have overruled *Roe* v. *Avis*, 4 T. R. 605. See *Strong* v. *Teat*, 2 Burr. 912; 3 Br. P. C. Toml. ed. 219; *Goodtitle* v. *Miles*, 6 East, 494; 2 Ves. & B. 187. And the effect would be the same if the devise was of the testator's lands "not settled": *Cooke* v. *Gerrard*, 1 Lev. 212, or lands not in settlement; because these words are construed to

Construction of a General Devise.

refer to the estates affected by the settlement, and not to the corpus of the lands, *i.e.* as if the testator had said, I give all my lands, except the estates therein which are vested in other persons by settlement: *Strode* v. *Lady Falkland*, 2 Vern. 621; *S. C.*, nom. *Falkland* v. *Litton*, 3 Br. P. C. Toml. ed. 24. See also *Chester* v. *Chester*, 3 P. Wms. 56; *Glover* v. *Spendlove*, 4 Br. C. C. 337; *Att.-Gen.* v. *Vigor*, 8 Ves. 256.

Violence done to manifest intentions of testator.

Sir *J. Mansfield*, in *Morgan* v. *Surman*, 1 Taunt. 292, characterised *Chester* v. *Chester* as "a shocking decision." Mr. Jarman (Wills, Vol. I., p. 654) says, "the rule of construction established by these cases has been much condemned, as savouring of extreme technicality, and inimical to popular notions and probable intention." That, however, this rule is open to rather stronger animadversion than that of being merely "inimical to popular notions and *probable* intention" may, it is submitted, be shown from the consideration of the case of the *Incorporated Society* v. *Richards*, 1 Dr. & W. 258, decided by Lord Chancellor *Sugden*. In that case T. M., by articles entered into before his marriage, covenanted to convey the said lands to trustees to the use of himself for life, remainder to secure a jointure for his wife, remainder in strict settlement to his issue in tail, and, in default of such issue, to his right heirs. By his will he devised his "*unsettled* real estate" to his wife for life, and, after her death, to the Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland; T. M. died without altering or revoking his will, and without issue. It was held, in assumed accordance with the rule established by the cases of *Chester* v. *Chester* and the others, that the reversion in the lands comprised in the marriage articles passed by the devise. This decision affords a striking instance of the violence which may be done, by the rule in *Chester* v. *Chester*, to the evident intention of the testator (*b*). The

(*b*) The conflict arises from the different meanings attached by lawyers, and those who are not lawyers, to the word *estate;* the former using the word to denote *an interest in the land*, the latter *the land itself*. This consideration renders it advisable always to

Construction of a General Devise.

cases above referred to, however, seem to establish the rule under consideration beyond possibility of question. See also *Kelly* v. *Duffy*, 4 L. R. Ir. 601.

Immediate charges inoperative to exclude reversions.

Where a testator, having a reversion or remainder in fee, makes a general devise of his lands, giving thereout a life annuity to a person who is already tenant for life of such lands, this annuity will not prevent the reversion or remainder from passing by the devise: *Doe* v. *Weatherby*, 11 East, 322; *Doe* v. *Fossick*, 1 B. & Ad. 186. So, also, the reversion will pass by a general devise, though the testator has expressly given to the devisee a life estate in the lands: *Rooke* v. *Rooke*, 2 Vern. 461; *Willows* v. *Lydcot*, 3 Mod. 229; see *Taafe* v. *Ferrall*, 10 Ir. Ch. Rep. 183.

Immaterial whether the testator has other lands.

The circumstance of the testator having or not having other lands on which the limitations or charges, inapplicable to the remainder or reversion, may operate, does not exert any influence on the rule of construction in question. If he had other lands, then *all* the limitations will take effect as to such other lands, and the applicable limitations only in regard to the remainder or reversion, *reddendo singula singulis*: *Doe* v. *Weatherby*, 11 East, 322; *Freeman* v. *Duke of Chandos*, Cowp. 363; *Doe* v. *Bartle*, 5 B. & Al. 492 (*c*); if he had no other lands, the argument for including the remainder or reversion acquires increased force, for, as observed by Lord *Eldon* in *Church* v. *Mundy*, 12 Ves. 426 (on which case see Mr. Jarman's remarks, Jarm. Wills, Vol. I., p. 661), "since there is no other subject to which the words can be applied, the testator must, if he does not mean that, be considered as having

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use the words *lands* or *lands and hereditaments*, instead of *estate* or *real estate*, when the land itself, and not the interest in it, is intended to be spoken of. What rendered this case a still stronger instance of violence done to the manifest intention of the testator, was the fact that the lands comprised in the articles above mentioned, had been for a great many years a settled estate in the family, and were very distinct from lands not comprised in such articles, which had subsequently descended to the testator upon the death of an uncle.

(*c*) This rule will apply to all wills made since the Wills Act.

Construction of a General Devise.

no meaning." See also *Tennent* v. *Tennent*, 1 J. & Lat. 379; *Ford* v. *Ford*, 6 Hare, 486.

Leaseholds for lives.

*Leaseholds.*]—Leaseholds for lives will pass under a general devise, though some of the terms of the devise are inapplicable: *Fitzroy* v. *Howard*, 3 Russ. 225; *Weigall* v. *Broome*, 6 Sim. 99.

Leaseholds for years.

Leaseholds for years did not pass under a general devise of lands (*d*), if the testator had freeholds when he made his will, on the ground, it should seem, that the words were to be taken in the first instance *in digniori sensu*, and were not to be extended to any inferior or less appropriate subject, unless the devise, if not so extended, would be wholly inoperative: *Rose* v. *Bartlett*, Cro. Car. 292; *Davis* v. *Gibbs*, 3 P. Wms. 26; *Knotsford* v. *Gardiner*, 2 Atk. 450; *Thompson* v. *Lady Lawley*, 2 B. & P. 303, where the anterior cases are fully commented upon by Lord *Eldon*; see also *Gully* v. *Davis*, L. R. 10 Eq. 562 (*e*).

Now however, by sect. 26 of the Wills Act, leaseholds pass as well as freeholds and copyholds by a general devise, unless a contrary intention appears by the will. As to "contrary intention," see *Wilson* v. *Eden*, 11 Beav. 237; 5 Exch. 752; 14 Beav. 317;

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Immaterial whether devise is of messuages or lands, &c.

(*d*) It is immaterial, in regard to the application of the doctrine in question, whether the words of the devise are more or less comprehensive; for instance, the question, whether a leasehold messuage pass under a devise of all the testator's messuages, will be governed by precisely the same principle as the question, whether a leasehold close of land passes under a devise of all the testator's lands, and so with respect to local limits. Thus, a devise of lands at F. will pass leaseholds at F., if the testator has no freeholds there, but not if he has: *Ross* v. *Ross*, 1 Eq. Ca. Ab. 124, pl. 14; *Chapman* v. *Hart*, 1 Ves. sen. 271. But it has been decided, that where a testator devises all his *farms*, lands, &c., a farm composed of freehold and leasehold lands let at an integral rent, will pass: *Lane* v. *Stanhope*, 6 T. R. 345. See also *Doe* v. *Lucan*, 9 East, 448; *Arkell* v. *Fletcher*, 10 Sim. 299.

(*e*) It is a general rule, not limited to this class of cases, that where there are two subjects, one more precisely answering to the terms of a given description than the other, the devise will be confined to the former, though it might have embraced the latter if it had been the only subject, *ut res magis valeat quam pereat*: *Roe* v. *Bell*, 8 D. & R. 579; *Wills* v. *Sayers*, 4 Mad. 409; *Doe* v. *Roberts*, 5 B. & Al. 407.

18 Q. B. 474 ; 16 Beav. 153 ; and *Prescott* v. *Barker*, L. R. 9 Ch. 174. Construction of a General Devise.

*Copyholds.*]—Copyholds not surrendered to the use of the will, which were subject to a similar rule before the stat. of 55 Geo. 3, c. 192, which, by dispensing with such surrenders, placed copyholds on an equal footing with freeholds : *Doe* v. *Ludlam*, 7 Bing. 275.

By sect. 3 of the Wills Act it is provided that copyholds may be disposed of by will, without surrender and before admittance ; and by sect. 26 it is expressly provided that copyholds shall pass, as well as freeholds, by a general devise. As to the operation of a general devise on copyholds, see *Dand* v. *Thompson*, 7 Q. B. 897 ; and see Jarm. Wills, Vol. I., pp. 663 *et seq.*

*Powers.*]—The remaining question is, whether a general devise or bequest operates as an execution of powers over real or personal estate. This depended, under the old law, on the same fact which determined the applicability of such a devise to leaseholds, namely, whether there was any other subject for its operation. Thus, if a testator devised all his lands, and it turned out that he had no real estate at the time, but that he had a testamentary power over real estate, the devise operated as an appointment under the power, notwithstanding that the testator had, by the same will, expressly exercised other powers vested in him : *Att.-Gen.* v. *Vigor*, 8 Ves. 256. See also *Standen* v. *Macnab*, 6 Br. P. C. Toml. ed. 193. The devise must however have been of lands or real estate, and not in such general terms as "estate" or property : *Jones* v. *Curry*, 1 Swanst. 66. On the other hand, if the testator had real estate upon which the will operated (or rather upon which it might have operated, for, of course, the failure of the devise from circumstances subsequent to the execution did not vary the construction), it was presumed that the devise was made with a view to that property, and not as an exercise of the power : *Sir Edward Clere's Case*, 6 Co. 17 b ; *Ex parte Cas-* Powers exercised by a general devise under the old law.

Construction of a General Devise.

*wall*, 1 Atk. 559; see also *Hoste* v. *Blackman*. 6 Mad. 190; *Lewis* v. *Llewellyn*, T. & R. 104; *Adams* v. *Austen*, 3 Russ. 461. And the principle applicable to general devises extended to devises of land restricted as to locality: see *Napier* v. *Napier*, 1 Sim. 28; *Rooke* v. *Denn*, 4 Bli. (N. S.) 1; *Wildbore* v. *Gregory*, L. R. 12 Eq. 482.

Rule not applicable to personalty.

The ground for reading a general devise as an appointment was confined to real estate (every devise of which, expressed in terms either general or particular, was specific), and did not apply to personalty; for, as a will of personal estate always comprised whatever a testator *died* possessed of, it was not necessarily to be presumed that he had any specific property in his view when he made it (*f*); and therefore, even if it appeared that the testator had no other disposable property at the time of the making of his will or at his death: *Molton* v. *Hutchinson*, 1 Atk. 558; *Buckland* v. *Barton*, 2 H. Bl. 136; *Langham* v. *Nenny*, 3 Ves. 467; *Croft* v. *Slee*, 4 Ves. 60; *Bradley* v. *Westcott*, 13 Ves. 445; or that the exclusion of the subject of the power would leave the residuary clause nothing to operate upon, or render the personal estate inadequate to the payment of pecuniary legacies, still the will did not operate as an exercise of the power: *Andrews* v. *Emmot*, 2 Br. C. C. 297; *Bennett* v. *Aburrow*, 8 Ves. 609. And the circumstance that the donee, being a married woman, had no general testamentary capacity, but who had separate estate disposable by will, has been held to form no ground for varying the construction: *Lovell* v. *Knight*, 3 Sim. 275; see *Lempriere* v. *Valpy*, 5 Sim. 108; *Evans* v. *Evans*, 23 Beav. 1. But unless it is shown that the testatrix had such separate estate, it would seem that

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Rule as to leaseholds.

(*f*) The consideration that the testator, in designating a particular species of property, may have contemplated its future acquisition, applied no less to leaseholds than to any other subject of personal property; the reasoning by which the principles governing devises of freeholds was sought to be applied to leaseholds by Sir *J. Leach*, M. R., in *Grant* v. *Lynam*, 4 Russ. 296, seems quite untenable; but see *Lovell* v. *Knight*, 3 Sim. 275, and *Tanner* v. *Elworthy*, 4 Beav. 487.

Construction of a General Devise.

the general bequest would operate as an appointment: see *Shelford* v. *Acland,* 23 Beav. 10; *Att.-Gen.* v. *Wilkinson,* L. R. 2 Eq. 816. All property of a woman married on or after the 1st of January, 1883, or married before that date, if her title has accrued subsequently thereto, is held by her as her separate property: see the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sects. 2, 5.

Words denoting intention to exercise power over personalty.

And though an intention to exercise the power might be collected by implication from the whole instrument: *Hunloke* v. *Gell,* 1 Russ. & My. 515; yet the bequest of a sum of money, corresponding in amount with that over which the power extends, raised no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment, as he might have calculated on future accessions: *Jones* v. *Tucker,* 2 Mer. 533; *Davies* v. *Thorns,* 3 De G. & S. 347. For the same reason, a general bequest of personal estate, described as consisting of "money in the funds," &c., did not operate as an appointment of stock, though the testator had no stock of his own at the time: *Webb* v. *Honnor,* 1 J. & W. 352. On the other hand, the excepting of a definite portion of stock out of a particular fund (as "50*l.* out of my Bank Stock"), has been considered to mark an intention to include the residue of such stock in the general bequest: *Walker* v. *Mackie,* 4 Russ. 76; *Re Davies' Trusts,* Johns. 495.

Peculiarities of execution do not vary the construction.

It ought to be observed, that any peculiarity of execution, not requisite in the case of an ordinary will, would not show an intention to execute the power, unless accompanied by some internal evidence of such intention. See *Jones* v. *Curry,* 1 Swanst. 66. This rule agrees with the doctrine well established, that a will expressed in terms applicable to personalty was not to be strained into a devise of freehold estate, because attested by three witnesses. Nor, on the other hand, would a general devise, which, by the ordinary rules of construction, would embrace real estate, be diverted to less appropriate subjects on account of the will not being attested so as to pass freehold estates: *Chapman* v. *Hart,* 1 Ves. sen.

Construction of a General Devise.

270 ; *Sampson* v. *Sampson*, 2 Ves. & B. 337 ; which class of cases seems to establish the general principle, that the construction of an instrument is not to be in any manner influenced or affected by the circumstances of its execution.

What amounts to an appointment in wills made or republished since 1837.

By the 27th section of the stat. 1 Vict. c. 26, it is enacted :—

"That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Appointments by will to be executed like other wills, and to be valid though other required solemnities are not observed.

It is also to be borne in mind that all peculiarities in the execution of testamentary appointments are abolished by section 10 of the same statute, which enacts :—

"That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required ; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

The effect of sect. 27 is to shift the burden of proof with regard to the intention of testators to exercise general powers of appointment. Under the old law, the presumption of law was against the exercise of testamentary powers, though the Courts, as has been seen above, were generally not unwilling to give a favourable consideration to evidence indicating

Construction of a General Devise.

an intention to exercise such powers. Now, however, the presumption is reversed, and it is for those who seek to exclude the operation of a residuary gift as an exercise of a general power to show a contrary intention from expressions in the will: *Walker* v. *Banks*, 1 Jur. (N. S.) 606. The doctrines above considered, so far as they relate to *general* powers, are thus rendered inapplicable to wills made or republished since the year 1837.

A power which is testamentary only, if unrestricted in regard to the objects, is a "power to appoint in any manner" the testator may think proper: *Hawthorn* v. *Shedden*, 3 Sm. & G. 303; *Lefevre* v. *Freeland*, 24 Beav. 403.

What amounts to an appointment.

General pecuniary legacies operate as appointments under this section: *Wilday* v. *Barnett*, L. R. 6 Eq. 193; *Re Wilkinson*, L. R. 4 Ch. 587; also directions to pay debts: *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782; *Laing* v. *Cowan*, 24 Beav. 112; and this appears to be so, even if there is no appointment of executors, but a mere appointment of an executor would apparently not be sufficient: see *Re Davies' Trusts*, L. R. 13 Eq. 166.

A general legacy will, however, operate only *pro tanto* as an execution of a power, so far as recourse to the property subject to the power is necessary for payment of the debts: *Laing* v. *Cowan*, 24 Beav. 112.

Where a testator has a power of appointing a sum to be charged of land, and also a power of appointing the fee of the lands charged, a general devise in a will, whether made before or after the passing of the Wills Act, will not operate as an appointment of the sum charged: *Clifford* v. *Clifford*, 9 Hare, 675.

Proceeds of sale of land.

Under a settlement A. had a general power of appointment over certain settled lands, which the trustees had power to sell with his consent; during A.'s lifetime part of the lands were sold by the trustees, and the proceeds were invested by them in East India Stock; by his will, A. appointed the settled lands to his son in fee, and subject to the appointment he devised and bequeathed all his real

Construction of a General Devise.

and personal estate to which he was entitled, or over which he had any power of appointment, to his wife: it was held that the East India Stock passed to the wife under the residuary gift, and not to the son under the appointment: *Blake* v. *Blake*, 15 Ch. D. 481; see *Gale* v. *Gale*, 21 Beav. 349; *Re Greaves' Settlement Trusts*, 23 Ch. D. 313. See also as to uninvested proceeds of sale of lands sold under powers of sale and reinvested in land, *Chandler* v. *Pocock*, 15 Ch. D. 591.

Special powers not exercised by general gift.

A general devise will not of course operate under sect. 27 as an exercise of a special power: *Wildbore* v. *Gregory*, L. R. 12 Eq. 482; *Humphery* v. *Humphery*, 36 L. T. (N. S.) 90. And a special power of appointing real estate among children is not exercised, since the Wills Act, by a mere general devise of real estate, though the testator has no real estate of his own, and notwithstanding that the devisees happen to be objects of the power: *Re Mills*, 34 Ch. D. 186. A will now speaks from the death, and the testator might have acquired real estate of his own after the date of the will which would pass by the devise. It is purely a question of intention; did the testator intend to exercise his power? Formerly, where the testator had no real estate at the time of his will, the will was read as though it contained a specific devise of the real estate which was the subject of the power, and that specific devise of course could not pass any other estate, and it was therefore presumed that he must have intended to exercise the power; but no such presumption can arise under the present law.

Contrary intention.

No intention, that a testator does not intend to execute a general power of appointment by a residuary gift, is afforded by reason of the settlement creating the power having been made by the testator himself: *Re Clark's Estate*, 14 Ch. D. 422. Nor will a contrary intention be indicated by the fact that the power of appointment is of a specified amount; in such a case a residuary devise or bequest will operate as an exercise to the extent of the specified amount of the power: *Re Jones, Green* v. *Gordon*, 34 Ch. D. 65. And the operation of a residuary

Construction of a General Devise.

bequest as an execution of a power will not be excluded though the will is made before the instrument creating the power: *Boyes* v. *Cook*, 14 Ch. D. 53; *Airly* v. *Bower*, 12 App. Ca. 263; see *Patch* v. *Shore*, 2 Dr. & Sm. 589, where the testator expressly gave all property over which he had any power. And the fact that the power is only contingent makes no difference, if the contingency occurs which makes the power exerciseable: *Thomas* v. *Jones*, 1 De G. J. & S. 63. An intention that a general residuary gift shall not operate as an execution of a power is not indicated by the fact that an express appointment has been made which has lapsed, or which is void for uncertainty: *Re Spooner's Trusts*, 2 Sim. (N. S.) 129; *Bernard* v. *Minshull*, Johns. 276.

In *Pettinger* v. *Ambler*, L. R. 1 Eq. 510, a testator, by a will made in 1858, gave all his freehold, copyhold, and leasehold property, and all other his real and personal estate, upon certain trusts; in 1862 he made a voluntary settlement, whereby he conveyed his freehold property to such uses as he should by will appoint; subsequently he made another will, purporting to be his last will, whereby he appointed under the power in the settlement an annuity to be raised out of his freehold property, and devised his copyholds, but made no further disposition of the freeholds; both wills were admitted to probate: it was held that the reference to the power in the latter will indicated an intention that the general devise in the former will should not operate as an execution of the power.

Failure of gift through death of donee.

Where a residuary bequest given directly to the legatee, and operating as a power of appointment, fails by the death of the legatee in the testator's lifetime, the donee, in default of appointment, will be entitled to the property subject to the power: *Re Davies' Trusts*, L. R. 13 Eq. 163; see *Re Ickeringill's Estate*, 17 Ch. D. 151. But an appointment of a fund to executors will take away the fund altogether from the donee in default of appointment, so that if the trusts declared of the appointed fund fail, the fund is made part of the testator's general estate, and passes by the residuary gift of his per-

Construction of a General Devise.

sonal property : *Chamberlain* v. *Hutchinson,* 22 Beav. 444 ; *Brickenden* v. *Williams,* L. R. 7 Eq. 310 ; *Wilkinson* v. *Schneider,* L. R. 9 Eq. 423 ; *Re Pinède's Settlement,* 12 Ch. D. 667. And there is no distinction in this respect between real and personal estate, so that if an appointment of real estate is made to trustees upon trusts which fail, the property will pass by the residuary devise, if any, or otherwise to the testator's heir at law : *Re Van Hagan,* 16 Ch. D. 18 ; see *Freme* v. *Clement,* 18 Ch. D. 499 ; *Willoughby Osborne* v. *Holyoake,* 22 Ch. D. 238.

# CHAPTER XIV.

## VESTING OF DEVISES AND BEQUESTS.


| | PAGE |
|---|---|
| 1. VESTING OF INTERESTS IN REAL ESTATE. | |
| *General Rule as to Vesting* | 571 |
| *Devises Vested, notwithstanding Expressions of Contingency* | 574 |
| *Effect of Express Terms of Contingency* | 576 |
| *Whether Contingency Extends to Successive Limitations* | 577 |
| 2. VESTING OF PECUNIARY CHARGES ON LAND | 579 |
| 3. VESTING OF LEGACIES OF PERSONALTY | 581 |
| 4. VESTING OF RESIDUARY BEQUESTS | 587 |


### 1. AS TO THE VESTING OF INTERESTS IN REAL ESTATE.

Vesting of Realty.

General doctrine respecting vesting.

*General Rule.*]—The law is said to favour the vesting of estates; the effect of which principle seems to be, that property, which is the subject of any disposition by deed or will, will belong to the object of gift immediately on the instrument of conveyance taking effect, or so soon afterwards as the terms thereof will admit of. As a will takes effect at the death of the testator, it follows that an estate devised to a person then *in esse* simply (*i.e.* without any expression of an intention to suspend or postpone its operation), vests in the devisee immediately on the death of the testator. Where words of futurity are introduced into the gift, it becomes necessary to determine whether they are inserted for the purpose of protracting the vesting, or point to the deferred possession or enjoyment only.

Where the testator creates a particular estate, and afterwards disposes of the ulterior property in the event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring to the possession or enjoyment only, which the ante-

Vesting of Realty.

cedent gift has pre-occupied, and not as designed to postpone the vesting. Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective estates of A. and B., between whom the entire fee simple is parcelled out, are alike vested at the death of the testator, the only difference being, that the estate of the one is in possession and that of the other is in remainder.

Remainder in default of object of prior estate not contingent.

It may be stated as a general rule, that where a remainder is created *in default* or *for want* of the object of the preceding estate, these words do not render the remainder contingent, and thereby subject it to be defeated in the event of the prior devisee coming into existence; but such remainder is a vested interest absolutely expectant on the determination of the prior estate. See Jarm. Wills, Vol. I. p. 800, n. (*d*). Thus it has been held that where lands are devised to the first and other sons successively of A. in tail, *and in default of such sons* to the daughters in tail, the devise to the daughters takes effect although A. has sons, they dying without issue: *Doe* v. *Dacre*, 1 B. & P. 250; *S. C.* 8 T. R. 112.

Again, where a testator devised to E. for life, and after her decease to the first and every other son of her body lawfully begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held that the devise to M. was a vested remainder expectant on the determination of the prior life estates to E. and her sons and daughters, and those estates having failed *by the death of E.'s only daughter*, it fell into possession: *Goodright* v. *Jones*, 4 M. & S. 88.

So, where a testator devised certain lands to D. for life, remainder to a trustee to preserve contingent remainders; remainder to the first and other sons of D., and their heirs, *and for want of such issue* to J. for life; with remainders over: it was held that the effect of the devises to the sons of D. was to give them successive estates tail, with a

vested remainder over: *Lewis* v. *Waters,* 6 East, 336. Vesting of Realty.

Where the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift takes effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails. See Jarm. Wills, Vol. I. p. 802. Where prior estate takes effect, but is determined in a different manner.

However, where a testator makes a devise to his widow for life, if she shall so long continue a widow, and if she shall marry, then over, the devise over takes effect, at all events, on the determination of her estate, whether by marriage or death: *Luxford* v. *Cheeke,* 3 Lev. 125; *Gordon* v. *Adolphus,* 3 B. P. C. Toml. 306; *Foster* v. *Lord Romney,* 11 East, 594; *Bainbridge* v. *Cream,* 16 Beav. 25; *Meads* v. *Wood,* 19 Beav. 215; *Eaton* v. *Hewitt,* 2 Dr. & Sm. 184; see *Underhill* v. *Roden,* 6 Ch. D. 494; *Stanford* v. *Stanford,* 34 Ch. D. 362; *Re Tucker,* W. N., 1887, p. 37; 35 W. R. 344; 56 L. T. 118. See also Jarm. Wills, Vol. I. pp. 802, 803. Devise during widowhood, with devise over on marriage.

And here it may be noticed, that where a person, who is entitled to a reversion or remainder in fee expectant on an estate tail in himself, by his will devises the lands after his decease, or in the event of his dying without issue, this is construed as an immediate gift of the testator's reversion or remainder; though upon the face of the will the devise presents the aspect of an executory gift to arise on a failure of issue (*a*); *Badger* v. *Lloyd,* 1 Lord Raym. 523; 1 Salk. 232. Devises of reversions and remainders.

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(*a*) In the case of a will made before the Wills Act failure of issue meant general failure, and the gift would therefore clearly have been void. Under the present law the words would refer only to issue living at the testator's death. Failure of issue.

If the contingency described in the text precisely corresponds with the event which determines the existing estate tail, no difficulty can arise in applying this rule of construction; but it frequently happens, that the terms used by the testator are not quite in unison with the event in question, as where the testator refers to issue generally, and the subsisting estates are restricted to issue of a particular marriage or sex. In such cases there might seem to be a strong ground to contend, that the want of correspondence amounts merely to an inaccuracy in the description Whether the words refer to determination of existing estates tail.

**Vesting of Realty.**

Devises seemingly contingent construed to be vested.

*Devises Vested, notwithstanding Expressions of Contingency.*]—We now proceed to consider devises creative of an interest expectant on the determination of a prior estate, for the sake of which, and not with the design of postponing the vesting, the gift is made to assume the form of a future disposition. This construction obtains, in some instances, where the terms in which the posterior gift is framed import contingency, and would, if unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if or when he shall attain that age to A. in fee, this is construed as conferring on A. a vested estate in fee-simple, subject to the prior chattel interest given to the trustees; and, consequently, on A.'s death under the prescribed age, the property descends to his heir at law (cases from *Boraston's Case*, 3 Rep. 19, down to *Smith* v. *Spencer*, 6 De G. M. & G. 631 (*b*) ); and it is not

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of the reversion or remainder, and does not indicate that a different interest was in the testator's contemplation; and some well-known cases have been decided on this principle: *Wellington* v. *Wellington*, 1 W. Bl. 645; 4 Burr. 2165; *French* v. *Caddell*, 3 B. P. C. Toml. ed. 257; *Jones* v. *Morgan*, Fea. C. R. 329; *Lytton* v. *Lytton*, 4 B. C. C. 441; *Egerton* v. *Jones*, 3 Sim. 409; yet a decision in the House of Lords favours a more rigid construction: *Banks* v. *Holme*, 1 Russ. 394, n. Lord *Eldon's* strictures upon this case in *Morse* v. *Lord Ormonde*, 1 Russ. 405, lead to the inference, that the decision of the House did not coincide with his own opinion. It certainly exacts from testators more of technical correctness than it has been usual to require.

(*b*) See the cases collected in 1 Jarm. Wills, Vol. I., p. 805, n. (*x*); see also *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 663, in which case a testator devised his real estate to trustees, upon trust for his wife during her life and widowhood, and after her decease or marriage again, upon trusts to apply the rents towards the maintenance of his daughter, until she should attain the age of twenty-five, and from and after her attaining that age, then upon trust for his said daughter, her heirs and assigns, for ever; but in case his said daughter should depart this life without leaving issue, then he devised his said real estate over. The testator's wife died in his lifetime. The daughter survived the testator, but died under twenty-five, leaving no issue, but having suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee simple, she having a *vested* estate tail in equity at the time.

Vesting of Realty.

essential that the estate of the trustees should have been (though commonly it has happened to be) created for the benefit of the ulterior devisee: *Manfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, pl. 4.

Words of contingency explained by the context.

Another instance of words of contingency introduced into a devise in remainder being referred to the possession or enjoyment only, occurs where such words, being literally construed, would seem to require that the prior estates should have determined in a given order; as, where lands were devised to A. in tail, with remainder to B. for life, and the testator subsequently declared, that, if A. died without issue, "*and B. be then deceased*," he devised to C. and his heirs, it was held that these words were merely put in to express the testator's meaning that B. should be sure to have it for life, and not to defeat the devise over in the event (which happened) of B. surviving A.: *Anon.* 2 Vent. 363. See also *King* v. *Rumball*, Cro. Jac. 448; *Chadock* v. *Cowley*, ibid. 695; *Fortescue* v. *Abbott*, Pollex. 479; *Pearsall* v. *Simpson*, 15 Ves. 29; *Massey* v. *Hudson*, 2 Mer. 138; which compare with *Holmes* v. *Cradock*, 3 Ves. 314; *Parkin* v. *Hodgkinson*, 15 Sim. 293.

Devise if A. shall attain twenty-one, contingent; otherwise, if a limitation over in alternative event.

It seems clear that a devise to a person, if he shall live to attain a particular age, standing alone would be contingent: see *Grant's Case*, cit. 10 Rep. 50; *Alexander* v. *Alexander*, 16 C. B. 59; *Browne* v. *Browne*, 3 Sm. & G. 587; *Andrew* v. *Andrew*, 1 Ch. D. 417; *Jull* v. *Jacobs*, 3 Ch. D. 303; Sugd. Law of Prop. 291; Jarm. Wills., Vol. I., p. 809; Fearne Post. Works, 191. However, if this devise be followed by a gift over in the event of the devisee dying under such age, the gift over is considered as showing the meaning of the testator to have been that the attaining the prescribed age is not a condition precedent, but that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which gives him the immediate interest, subject only to the chance of its being divested on a future contingency: *Edwards* v. *Hammond*, 3 Lev. 132; *Bromfield* v. *Crowder*, 1 B. & P., N. R. 313; *Doe* d. *Hunt* v. *Moore*, 14 East, 601; *Doe* v. *Nowell*, 1 M. & S. 327; 5 Dow. 202;

Vesting of Realty.

*Phipps* v. *Ackers*, 3 Cl. & F. 691; 9 Cl. & F. 583; *Whitter* v. *Bremridge*, L. R. 2 Eq. 736. *A fortiori* if the gift over is upon death under the age without issue: *Finch* v. *Lane*, L. R. 10 Eq. 501. So also if there is an immediate gift followed by a clause providing that the subject shall become the property of the donee on attaining a specified age: *Attwater* v. *Attwater*, 18 Beav. 330; see *Snow* v. *Poulden*, 1 Kee. 186.

And the principle is not varied by the circumstance of another event being combined in the divesting clause with those which are introduced into the original gift, as in the case of a devise to A. if he shall attain the age of twenty-one years, and in case he shall die before he attains such age, and his brother shall survive him, then over: *Bromfield* v. *Crowder*, 1 B. & P. N. R. 313.

Application of doctrine to executory trusts.

This doctrine is applicable to executory trusts. Thus, in the case of *Phipps* v. *Ackers*, 9 Cl. & F. 583, a testator devised his lands to W., in trust to convey the same to G. H. A., "when and so soon as he should attain his age of twenty-one years;" but in case he should die before he attained that age, without leaving issue of his body, then that the said lands should form part of the residue of the testator's real and personal estate, which he devised to another person. At the testator's death, G. H. A. was only twelve years of age. It was held, that an equitable estate in fee in the lands at W. vested in G. H. A. immediately on the testator's death, liable to be divested in the event of his dying under twenty-one without leaving issue of his body.

Words of contingency must generally have their full effect.

*Effect of Express Terms of Contingency.*]—If, however, there is an express declaration that a devisee shall not take a vested interest until he attains a certain age (*Russel* v. *Buchanan*, 7 Sim. 628; 2 Cr. & M. 561), or that the devisee shall take a vested interest at a future date, impliedly negativing an earlier period of vesting (*Glanville* v. *Glanville*, 2 Mer. 381), or other clear expressions which make the devise contingent, such expressions, like every other part of a will, must be allowed their

Vesting of Realty.

full effect, and the devisee or legatee can take nothing unless the prescribed event happens, however plausible may be the conjecture that the testator did not rightly apprehend the import or operation of the words he has used: *Denn* v. *Bagshaw*, 6 T. R. 512; *Holmes* v. *Cradock*, 3 Ves. 317; *Shuldam* v. *Smith*, 6 Dow, 22; *Madison* v. *Chapman*, 3 De G. & J. 536; see *Coulthurst* v. *Carter*, 15 Beav. 421; *Pride* v. *Fooks*, 3 De G. & J. 252. The foregoing cases suggest the precaution, that persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age, or living to a given period, should carefully ascertain that the possibility of his dying in the mean time, *leaving issue*, is in the testator's contemplation: Jarm. Wills, Vol. I., p. 821, n. (*u*).

So, where a testator, reciting that he has a power of disposition in a certain event, exercises such power accordingly; if it should turn out that the event described does not happen, the gift will not take effect, though it should appear that the testator's power was larger than he imagined, and would have enabled him to dispose of the property in the event which did happen: *Doe* v. *Wilkinson*, 2 T. R. 209; see *Archbold* v. *Austin Gourlay*, 5 L. R. Ir. 214. But where a literal adherence to the contingent terms of a gift will defeat a purpose not merely conjectured but actually expressed by the testator, the gift will be moulded into a consistency with such expressed purpose: *Bradford* v. *Foley*, Doug. 63. So, where a literal adherence to the recited terms of a gift (*i. e.*, to their technical meaning) would defeat the actually expressed purpose of the testator, the words will not be construed according to the technical meaning. See the judgment of Sir *C. Pepys*, M. R., in *Berkley* v. *Swinburne*, 12 Jur. 571. See also *Quicke* v. *Leach*, 13 M. & W. 218.

Whether contingency affects one or more estates.

*Whether Contingency Extends to Successive Limitations.*]—In framing a series of limitations in a will, one of which is clearly made contingent, it should be explicitly shewn whether the contingency extends to all the after-limited estates, or is confined to the

Vesting of Realty.

estate with which it is immediately associated ; more especially, if the intention does not coincide with the rule, that, if no purpose is expressed distinguishing the estate in question from those which follow, the whole series will be considered as hinging on the contingency : *Davis* v. *Norton*, 2 P. Wms. 390 ; *Doe* v. *Shipphard*, Doug. 75 ; *Moody* v. *Walters*, 16 Ves. 283 ; *Lenox* v. *Lenox*, 10 Sim. 487. In order to confine the contingency to the proximate estate, either the testator must have expressed a purpose concerning that estate which does not apply to the others : *Napper* v. *Sanders*, Hutt. 119 ; *Bradford* v. *Foley*, Doug. 63 ; *Horton* v. *Whittaker*, 1 T. R. 346 ; or the subsequent estates must be detached from the contingent limitation, in a manner evidently denoting a different intention with respect to those estates : *Lethieullier* v. *Tracey*, 3 Atk. 774 ; Amb. 204 ; and see *Aislaby* v. *Rice*, 3 Madd. 265 ; 3 Moo. 358. Compare these cases with *Doe* v. *Wilkinson*, 2 T. R. 209.

But with regard to successive limitations if there is a limitation in terms contingent, but it can be collected from the will that the contingency is only intended by the testator to imply that the subsequent gift is not to take effect in derogation of the preceding estate, the Court will give effect to such intention : *Re Betty Smith's Trusts*, L. R. 1 Eq. 79 ; see also *Avelyn* v. *Ward*, 1 Ves. sen. 420 ; *Pearsall* v. *Simpson*, 15 Ves. 29 ; *Key* v. *Key*, 4 De G. M. & G. 73 ; *Edgworth* v. *Edgworth*, L. R. 4 H. L. 35 ; *Leadbeater* v. *Cross*, 2 Q. B. D. 18.

Estate not divested unless all the prescribed events happen.

Where a gift originally vested is to be divested in favour of another devisee on the happening of several events, or rather of an event composed of several circumstances, the original gift will remain undivested, unless all the prescribed circumstances concur. Thus, if lands are devised to A. and his heirs, and if he shall die under the age of twenty-one years *and* without issue, then to B. in fee ; if A. attains twenty-one, though he dies without issue, the lands devolve to his heir or devisee, his estate being undivested : *Walsh* v. *Peterson*, 3 Atk. 193. And this rule of construction applies in relation as

Vesting of Realty.

well to circumstances which are personal to the substituted objects as to collateral events. Thus, where a fund was bequeathed to A. for life, and after her decease to B. and C. in equal moieties, and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at A.'s decease;* B. and C. both died in A.'s lifetime, and it was held that the original gift was not defeated: *Harrison* v. *Foreman*, 5 Ves. 207. Upon the same principle, it has been held that where a gift is made to A. for life, and after his death to his three children, *or such of them as shall be living* at A.'s decease, this is an immediately vested interest in the three children, subject only to be divested in favour of such of them as may happen to be living at the prescribed period (*Howes* v. *Herring*, M'C. & Y. 295); and if none of the legatees shall be then in existence, (*i. e.*, if all the three children of A. happen to die in his lifetime), the original gift to the whole remains undivested: *Sturgess* v. *Pearson*, 4 Mad. 411. See also *Bromhead* v. *Hunt*, 2 J. & W. 459. And the construction has been sometimes adopted where the will was less explicit on the point: *Browne* v. *Lord Kenyon*, 3 Mad. 410. See Jarm. Wills, Vol. I., pp. 827–829.

## 2. As to the Vesting of Pecuniary Charges on Land.

Where payment is postponed for the convenience of the estate.

The same general principles which govern the vesting of real estates apply to pecuniary charges upon land payable *in futuro*, with respect to which one leading rule is, that, where the payment is postponed with a view merely to the circumstances of the estate, the vesting is immediate. As where lands are devised to A. for life, with remainder to B. in fee, charged with the payment to C. of 100*l.* within three months after the decease of A., the legacy to C., notwithstanding the postponement of payment, vests immediately at the testator's decease. Indeed, the reasoning which proves the estate of B. to be vested, would apply with exactly equal force

Vesting of Pecuniary Charges on Land.

to C.'s legacy, which was evidently postponed for the purpose of creating an exemption from the charge in favour of the prior life estate, and not in order to render the ulterior gift contingent: *Lowther* v. *Condon*, 2 Atk. 127; *Dawson* v. *Killett*, 1 Br. C. C. 119; *Poole* v. *Terry*, 4 Sim. 294. See the cases on this point collected, Jarm. Wills, Vol. I., p. 834, n. (*g*). And the same construction prevails where lands are devised to A. for life, with remainder to trustees upon trust to sell, and out of the produce to pay certain sums of money; for, though the fund out of which the payment is to be made has no existence until the death of A., a circumstance on which undue stress has been sometimes laid, yet, as the sale is obviously deferred for the sake of letting in the prior life estate, both the remainder of the trustees and the beneficial interests in the produce of the sale vest instantly on the testator's decease: *Bayley* v. *Bishop*, 9 Ves. 6.

Where payment is postponed from the circumstances of the legatee.

If, however, the postponement be connected with and dependent on an event or circumstance personal to the object of the pecuniary gift, as where a testator charges his lands with the payment of 100*l.* to B., if or when he attains the age of twenty-one years, or gives to B. 100*l.* to be paid to him out of Blackacre upon his attaining the age of twenty-one years, (for such variations of expression, however important, as hereafter shewn in regard to personal legacies, are quite immaterial in reference to pecuniary charges on *real* estate), the legacy is contingent; and if B. dies before he attains his majority, the charge becomes extinguished in the land: *Lady Pawlett* v. *Lord Pawlett*, 1 Vern. 204; *Smith* v. *Smith*, 2 Vern. 92; *Jennings* v. *Looks*, 2 P. Wms. 276; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; *Parker* v. *Hodgson*, 1 Dr. & Sm. 568; *Brown* v. *Wooller*, 2 Y. & C. C. C. 134.

So, a legacy charged on land and directed to be paid upon an event which may never happen, is contingent, and will fail if the event does not happen: *Taylor* v. *Lambert*, 2 Ch. D. 177.

A legacy, however, to be paid out of land when the devisee *of the land* attains a particular age, is

Vesting of Pecuniary Charges on Land.

evidently postponed for the convenience of the estate, in order that such devisee may, in the meantime, be free from the burthen; and therefore the death of the devisee of the money before the time of payment does not affect the charge: *Sherman* v. *Collins*, 3 Atk. 319; see *Evans* v. *Scott*, 1 H. L. C. 57; *Re Brabazon*, 13 Ir. Eq. Rep. 156. And the same considerations obviously apply to a legacy out of land, which is directed to be paid within twelve months, or any other such definite period after the testator's decease: *Wilson* v. *Spencer*, 3 P. Wms. 173; *Cowper* v. *Scott*, Id. 119.

### 3. As to the Vesting of Legacies of Personalty.

The vesting of personal legacies admits of some distinctions borrowed from the civil law, which have not obtained a reception in regard to real estate, being the result of doctrines introduced by the Ecclesiastical Courts, who formerly possessed, concurrently with Courts of Equity, a jurisdiction for the recovery of legacies, and distributive shares of personal estate.

Leading distinction.

One principal distinction applicable to pecuniary legacies is, that, where futurity is annexed to the *substance* of the gift, the vesting is in the meantime suspended; but, where the *time of payment* only is future, the legacy vests *instanter*. Thus, where a legacy is given to a person at the age of twenty-one years: *Onslow* v. *South*, 1 Eq. Ca. Ab. 295, pl. 6; *Cruse* v. *Barley*, 3 P. Wms. 20; or at the expiration of ten years from the decease of the testator: *Snell* v. *Dee*, 2 Salk. 415; the vesting, and not the payment merely, is deferred; and, consequently, if the legatee dies before the arrival of the period in question, the legacy fails. But, if the legacy is given to the legatee *to be paid* at the age of twenty-one years, or within ten years after the testator's decease, the legacy vests immediately, and the death of the legatee before the time of payment will not affect his title: *Cloberry* v. *Lampen*, 2 Ch. Cas. 155; 2 Freem. 24; *Stapleton* v. *Cheele*, 2 Vern. 673; *Harvey*

Vesting of Personal Legacies.

v. *Harvey*, 2 P. Wms. 21 ; *Jackson* v. *Jackson*, 1 Ves. sen. 217 (*c*). So, in *Sidney* v. *Vaughan*, 2 Br. P. C. Toml. ed. 254, where a testatrix bequeathed to A. 100*l.*, *to be paid* to him within six months after he should have served his apprenticeship, to which he was then bound; A. did not serve out his apprenticeship, but ran away from his master, and after the expiration of the term died intestate. It was held, by the House of Lords, that A.'s administratrix was entitled to the legacy, with interest from the expiration of the six months.

In *Chaffers* v. *Abel*, 3 Jur. 577, where a testator bequeathed certain sums of stock to trustees to pay 40*l.* per annum to his daughter for life, and after her decease "to pay, assign, and transfer the sum of 1000*l.* stock equally amongst all and every the child and children of his said daughter, share and share alike, to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years;" and directed that the dividends should, after the decease of his daughter, be applied for the maintenance and education of her children. At the death of the testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived the daughter; Sir *L. Shadwell*, V.-C., held, that the four children took vested interests in the stock.

Words of future division or distribution.

Words directing future division or distribution between two or more objects would seem to fall under the same consideration as a direction to pay; and therefore, where following a gift which would otherwise confer an immediate interest, do not postpone the vesting. Thus, a bequest to A. and B. of 3000*l.* Navy 5*l.* per Cent. Annuities, and all dividends and proceeds arising therefrom, *to be equally divided between them when they shall arrive at twenty-*

(*c*) If no interest were payable on the legacy, the representative would be bound to wait until the legatee, if living, would have attained his majority; but, if it carried interest, he would be entitled immediately. See *Crickett* v. *Dolby*, 3 Ves. 13; *Feltham* v. *Feltham*, 2 P. Wms. 271.

Vesting of Personal Legacies.

*four years* of age, has been held to vest the stock immediately in the legatees: *May* v. *Wood*, 3 Br. C. C. 478. So, where a fund set apart to meet an annuity, was directed, after the death of the annuitant, to be paid and divided among her children, as and when they should attain twenty-one, it was held that the children took vested interests: *Partridge* v. *Baylis*, 17 Ch. D. 835.

Legacy on uncertain event.

It seems, however, that even where the futurity is annexed to the payment or distribution only, yet, if such payment or distribution is deferred, not (as in the cases just noticed) until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may not happen, the effect is to render the legacy itself contingent. Thus, where a sum of 200*l.* was given to A., *to be paid* at her marriage, or three months afterwards, provided she married with consent, Lord *Hardwicke* held that A., having died unmarried, her representative could not claim the legacy: *Atkins* v. *Hiccocks*, 1 Atk. 500. But see *Booth* v. *Booth*, 4 Ves. 399; *post*, p. 587.

Rule where the only gift is in the direction to pay, &c.

It is to be observed, that, where the only gift is in the direction to pay or distribute, the case is not to be ranked with those in which the payment or distribution only is deferred, but is to be regarded as one in which time is annexed to the substance of the gift.

Thus, in a leading case, where a testator gave certain real and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of W. R. R., share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters at such age, or marriage with consent; and the trustees were authorised to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the mean time; Sir *W. Grant*, M. R., held, that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five: *Leake* v. *Robinson*, 2 Mer. 363.

Vesting of Personal Legacies.

So, where a testator left for his wife's use certain furniture, &c., adding, "which I desire may be distributed amongst our children, *on the youngest attaining twenty-one years*, at her and my executor's discretion, such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed;" Sir *J. Leach*, V.-C., on the principle above stated, held, that children who died before the youngest attained twenty-one took no interest: *Ford* v. *Rawlins*, 1 S. & St. 328.

It is clear, that, where personal property is bequeathed to A. for life, and after his decease to B., B. takes an immediate vested interest: *Monkhouse* v. *Holme*, 1 Br. C. C. 198; *Blamire* v. *Geldart*, 16 Ves. 314.

Occurrence of new words of gift.

And the occurrence of new words of gift in the ulterior disposition does not vary the construction. Thus, where a testator bequeaths personalty to trustees in trust for A. for life, adding, "and after her decease *then* I give," &c., this seeming postponement of the gift until the decease of A. does not prevent the immediate vesting: *Benyon* v. *Maddison*, 2 Br. C. C. 75. See *Rhodes* v. *Rhodes*, 7 App. Ca. 192; *Re Gilbert*, W. N., 1886, p. 96.

Words seemingly contingent referred to the determination of a prior interest.

So, it is well established, that where a legacy is given to a legatee, *if*, or *provided*, or *in case*, or *when* (for it seems not to be very material which of these words is used, see 6 Ves. 243), he attains the age of twenty-one years: *Atkinson* v. *Turner*, 2 Atk. 41; *Knight* v. *Cameron*, 14 Ves. 389; or marries: *Elton* v. *Elton*, 3 Atk. 504; such a legacy, standing alone and unexplained, is contingent, and will be wholly defeated by the legatee's death before the age or event in question. See *Re Fletcher*, 53 L. T. 813. Yet, if the interest accruing in the interval between the death of the testator and the future period in question, is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's Case* (see *ante*, p. 574), that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, modified and parcelled out into two

Vesting of Personal Legacies.

distinct portions or interests, not for the purpose of protracting the vesting, but *diverso intuitu*. On this principle, in the case of *Hanson* v. *Graham*, 6 Ves. 239, where a testator gave to his grandchildren, A., B., and C., 500*l*. Four per Cent. Annuities a-piece, when they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen, with such consent as therein mentioned; and directed that the interest of the said legacies should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir *W. Grant*, M. R., held the legacies to be vested at the death of the testator. See also *Branstrom* v. *Wilkinson*, 7 Ves. 421; *Re Duke*, 16 Ch. D. 112.

So, in the case of *Lane* v. *Goudge*, 9 Ves. 225, where a testator bequeathed the residue of certain stock to A., for A.'s second daughter that he should have born, for her education, till she should attain the age of twenty-one years: and after she should attain to the age of twenty-one years, the testator gave the said interest to her and her heirs, for ever, she being christened Z. The second daughter was christened Z., and was held to be absolutely entitled, though she died at seventeen. See also *Love* v. *L'Estrange*, 5 Br. P. C. Toml. ed. 59; *Re Wrey, Stewart* v. *Wrey*, 30 Ch. D. 507; but see *Batsford* v. *Kebbel*, 3 Ves. 363, a case which appears to be of somewhat questionable authority.

Gift of interest favours vesting.

A gift of interest, or income, obviously is difficult to be reconciled with the suspension of the vesting, because interest or income is a compensation for the forbearance of principal, to which it supposes a title: see *Scotney* v. *Lomer*, 31 Ch. D. 380; but this consideration applies with little, if any, force to a provision for maintenance *out of* the interest: *Pulsford* v. *Hunter*, 3 Br. C. C. 416. See *Leake* v. *Robinson*, 2 Mer. 387, *ante*, p. 583; see also *Re Parker*, 16 Ch. D. 44, where there was a power to raise part of the presumptive shares of children for their advancement. If, however, the *entire* income is applicable to maintenance, the argument in favour of the vesting exists in its full weight: *Fonnereau* v. *Fon-*

Vesting of Personal Legacies.

*nereau*, 3 Atk. 645; *Heath* v. *Heath*, 2 Br. C. C. 4; *Re Bunn*, 16 Ch. D. 47.

Maintenance as *a distinct gift* does not favour vesting.

Where maintenance is a distinct gift without reference to the application of the interest, it has no effect upon the vesting of the legacy: *Watson* v. *Hayes*, 5 My. & Cr. 125.

Effect where principal and interest are blended.

Where the principal and interest are so undistinguishably blended in the bequest that both must vest or both be contingent, of course no argument in favour of the vesting of the principal can be drawn from the gift of the interest. Thus, where a testator gave to each of the daughters of K., "as soon as they attain the age of twenty-one years, the sum of 200*l.*, with interest at the rate of 5*l.* per cent. per annum," Sir *J. Leach*, V.-C., held, that there was no gift either of principal or interest until the daughter attained twenty-one: *Knight* v. *Knight*, 2 Sim. & Stu. 490. But a direction subjoined to a simple bequest of stock, that the "interest" shall be added to the "principal," till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities might fall in: *Stretch* v. *Watkins*, 1 Mad. 253.

In the case of *Saunders* v. *Vautier*, Cr. & Ph. 240, a testator, by his will, bequeathed to his trustees his East India Stock upon trust to accumulate the dividends until D. W. V. should attain twenty-five, and then to transfer the principal, with such accumulated dividends, to D. W. V., his executors, administrators, or assigns absolutely. The will also contained a residuary bequest. At the time of the testator's death, a sum of 2000*l.* East India Stock was standing in his name. Lord *Cottenham*, C., held, that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one.

Vesting of Residuary Bequests.

## 4. Vesting of Residuary Bequests.

It has been generally thought that a very clear intention must be indicated in order to postpone the vesting of a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or rather *may be* its consequence; for, in solving questions of construction, actual and *possible* events must be looked at indifferently. Thus, where a testator gave to trustees all his real and personal estate upon trust for sale; and, as to one moiety of the produce, for the benefit of his daughter A., during her life; and after her decease, upon trust to pay to her husband B. an annuity of 100*l.* during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A. until they should severally attain the age of twenty-one years; and as to all the produce of the testator's said real and personal estate, *as and when they, and each and every of them, should attain his, her, and their respective age and ages of twenty-one years*, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A. had two sons, both of whom died under twenty-one; and Lord *Gifford*, M. R., held, that they respectively acquired vested interests, adverting to the circumstances that it was a gift of a residue, and that the yearly income was given to the children until the age mentioned: *Jones* v. *Mackilwain*, 1 Russ. 220. The last case was decided principally on the authority of *Booth* v. *Booth*, 4 Ves. 399, which has been justly considered as a strong decision in favour of the vesting of residuary bequests, as will appear by the following brief statement of it:—A testator bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces A. and B., until their respective marriages; and from and after their respective marriages to transfer their respective moieties; and Sir *R. P. Arden*, M. R., held that A. acquired a vested interest, although she died without ever having been married;

Residue to be transferred at marriage, held a vested interest.

**Vesting of Residuary Bequests.**

his honor relying much on the circumstance that it was a bequest of residue (*d*).

After clear immediate gift, vesting not postponed by equivocal words.

It seems, that where the testator has first given the residue in terms which would, beyond all question, confer a vested interest, the addition of subsequent equivocal expressions of a contrary tendency will not suspend the vesting. Thus, where A. by his will gave unto the children of his sister the whole of his real and personal estate (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share; *and such portion not to be otherwise claimed and inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single; Sir *R. P. Arden*, M. R., held, that the subsequent vague words were not sufficient to control the prior clear words; but the meaning was, that the legacy should be absolute, and that the legatee should not have the command of the principal till the age of twenty-two: *Dodson* v. *Hay*, 3 Br. C. C. 404; see also *Stretch* v. *Watkins*, 1 Mad. 253; *Brocklebank* v. *Johnson*, 20 Beav. 205; but see *Shun* v. *Hobbs*, 3 Drew. 93. So, where a testator, after disposing of his real and personal estate in strict settlement, added a direction that none of the devisees should take or come into possession before the age of twenty-five, this was held to be confined to the actual possession, and not to postpone the vesting: *Montgomerie* v. *Woodley*, 5 Ves. 522 (*e*). Where a testator gave a legacy to J., which he directed to be paid at the end of seven years after his death, and he directed that if J. should die before he "should become entitled" to the legacy leaving issue, the legacy shall go to such issue; J. died within the

(*d*) By comparing this case with *Atkins* v. *Hiccocks*, 1 Atk. 500, *ante*, p. 583, the reader will perceive how much stronger is the inclination to favour the vesting of residuary gifts than that of pecuniary legacies.

(*e*) As to postponing, beyond the attainment of twenty-one years of age, the payment of legacies absolutely vested, see *Re Jacob's Will*, 29 Beav. 402; *Gosling* v. *Gosling*, Johns. 265; *Gillman* v. *Daunt*, 3 K. & J. 48.

Vesting of Residuary Bequests.

seven years leaving issue: it was held that J. took an indefeasible vested interest at the testator's death: *Re Crossland*, 55 L. T. 238; W. N. 1886, p. 36.

But subsequent words may be explanatory.

But where terms of the original gift, embracing a class, are ambiguous in regard to the vesting, a clear intention to suspend the vesting, in the event of the class consisting of a single object, manifested in the gift to such object, will be decisive of the construction; since it is highly improbable that the testator should have had a different intention concerning a plurality of objects and an individual object. Thus, where a testator gave the residue of his estate, real and personal, to trustees: as to one-third, in trust for his daughter S. for life, and, after her decease, for the child or children of his said daughter, if more than one, share and share alike; to be paid, assigned, and transferred to them by his trustees, upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part should become the property of such only child, upon his or her attaining the age of twenty-five years, and be transmissible to his or her heirs, executors, or administrators; and in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over.—Sir *L. Shadwell*, V.-C., held, that the gift, in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift in case she should have more than one: *Judd* v. *Judd*, 3 Sim. 525. See also *Tracey* v. *Butcher*, 24 Beav. 438; *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Madden* v. *Ikin*, 2 Dr. & Sm. 207; *Cooper* v. *Macdonald*, L. R. 16 Eq. 271. On the other hand, if the gift to the single object (in the event that the class should consist of one object only) clearly confers a vested interest, this may indicate that the testator intended the gift to the class (in the event of its consisting of a plurality of objects) to be vested also: *King* v. *Isaacson*, 1 Sm. & G. 371.

Vesting of Residuary Bequests.

But this construction will be adopted only if the gift to the class is ambiguous in its terms, otherwise the precise words of the will must be followed, and a construction must not be put upon them which, though it is possible the testator intended it, is not the exact meaning of the words he has used: per Lord *Romilly*, M. R., in *Johnson* v. *Foulds*, L. R. 5 Eq. at p. 274; see also *Walker* v. *Mower*, 16 Beav. 365.

Attainment of particular age made a qualification of the donees.

The vesting is necessarily postponed where the attainment to a particular age is interwoven into, and made an essential ingredient in the qualification of the objects of the gift, as where it is to such children as shall attain, or to the children who shall attain, &c. Thus, where a testator devised his real estates to trustees, in trust for M. for life, and after her decease to convey the same unto and among all and every the child and children of M., *who should live to attain the age of twenty-three years*, and to his, her, and their heirs and assigns for ever, as tenants in common; and if there should be but one such child, then to such only child, his or her heirs and assigns for ever. And in case there should be no such child, or, being such, all should die under the age of twenty-three, then over—it was held, that those children alone who attained the age of twenty-three were to take; and therefore the gift was void for remoteness: *Bull* v. *Pritchard*, 1 Russ. 213. See Mr. Jarman's remarks on this case, Jarm. Wills, Vol. I., p. 855.

Gift on attaining certain age held contingent.

And, in several instances, gifts to children *on their attaining* a certain age have received a similar construction, even in spite of some circumstances apparently favourable to the immediate vesting. As, where a testatrix gave the residue of her estate and effects equally between her four sisters; and directed that, on the death of her sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance and education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years; *and upon any of their attainment to that age, they*

Vesting of Residuary Bequests.

*should be entitled to their proportion of their mother's share of the principal;* and in case of any of their decease under that age, leaving lawful issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto. There was also a bequest in favour of the other children, in case of death under twenty-two without issue; and a bequest over of the entirety in case all the children should die without issue, or, being such, they should die before the principal of their respective *shares* should become *payable.*—Sir *J. Leach,* M. R., held, that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. His Honor thought that the case was governed by *Leake* v. *Robinson,* and intimated an opinion, that even if the income had been expressly given to the children until they attain twenty-two, the shares would not have vested; for, the presumption that the testator means an immediate gift, because the entire subject, including such interest, is separated from the bulk of the estate, failed entirely, when the testator had expressly given the legacy over, in the event of the death of the legatee before a particular period: *Vawdry* v. *Geddes,* 1 Russ. & M. 203.

Remarks on the case of *Vawdry* v. *Geddes.*

But did not the gift over, to which his Honor here alludes, suggest a strong argument for the immediate vesting? Where a testator directs, that, on a given event, the "shares" of the legatees shall go in a certain manner, an inference seems to be afforded, that, in the alternative event, the property is to belong to the legatees. The adjudged construction rendered the terms of the clause of *substitution* (for such it clearly was) inaccurate throughout. And a similar observation applies to the earlier cases of *Mackell* v. *Winter,* 3 Ves. 236; and *Barker* v. *Lea,* T. & R. 413; in both which residuary bequests to children on their attaining a particular age were held to be contingent in the interim, though in each case there was a bequest over, in the event of the legatee's dying before the prescribed age; and, in the former, the postponement seemed to refer to the

**Vesting of Residuary Bequests.**

payment rather than to the gift. In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible, and one cannot help suspecting that the judgment of the Court was somewhat biassed by the events which had happened, and which rendered the adopted construction convenient. Had intestacy been produced (as it might have been) by the postponement of the vesting, there is little doubt that the adjudication would have been different. See further, Mr. Jarman's observations on the case of *Bland* v. *Williams*, 3 My. & K. 411, in Jarm. Wills, Vol. I., pp. 857, 858. And see as to the effect of a gift over as indicating an intention in favour of vesting, *Davies* v. *Fisher*, 5 Beav. 201; *Ridgway* v. *Ridgway*, 4 De G. & S. 271; *Taylor* v. *Frobisher*, 5 De G. & S. 191; *Harrison* v. *Grimwood*, 12 Beav. 192; *Carver* v. *Burgess*, 7 De G. M. & G. 96; *Thomas* v. *Wilberforce*, 31 Beav. 299; *Pearman* v. *Pearman*, 33 Beav. 394; *Knox* v. *Wells*, 2 H. & M. 674; *Wetherell* v. *Wetherell*, 1 De G. J. & S. 134; *Whilter* v. *Bremridge*, L. R. 2 Eq. 736; *Fox* v. *Fox*, L. R. 19 Eq. 286.

**As to contingent transmissible interests.**

It is to be observed, that, whenever vesting is postponed to a certain age, the attainment of that age is made, in *fact*, (though possibly not in *expression*,) part of the qualification of the objects of the gift; and death, before its arrival, has the effect of striking the name of the deceased person out of the list of presumptive objects. Hence, the *contingent* interest of those persons can never be transmitted to representatives: *Read* v. *Gooding*, 21 Beav. 478; *Sheffield* v. *Kennett*, 4 De G. & J. 593; *Re Watson's Trusts*, L. R. 10 Eq. 36. Where, however, the contingency on which the vesting depends is a *collateral event*, the death of such legatee, pending the contingency, has no other effect than that of substituting the legatee's representative for himself. Thus, where a testator bequeaths his personal estate to A., and if he shall die without leaving issue at the time of his decease, then to B.; in the event of B. dying in the lifetime of A., testate or intestate, his contingent or executory in-

terest will belong to his executor or administrator: *Pinbury* v. *Elkin*, 2 Vern. 758; *King* v. *Withers*, Cas. temp. Talb. 117, 3 Br. P. C. Toml. ed. 135; *Wilson* v. *Bayly*, 3 Br. P. C. Toml. ed. 195; *Barnes* v. *Allen*, 1 Br. C. C. 181.

**Vesting of Residuary Bequests.**

As to the transmissibility of a residue, see the judgment of *Wigram*, V.-C., in *Leeming* v. *Sherratt*, 2 Hare, 14, in which case the testator gave the residue of his real and personal property to trustees to sell the freeholds, and to get in all the personal property, and to pay and divide the money arising therefrom unto and equally among the testator's children as soon as the youngest should attain twenty-one; and, in case of the death of any of his children, leaving issue, the testator gave to such issue the share the parent so dying would have been entitled to have;—it was held, that the residuary share of a child who attained twenty-one, and died before the time of division, passed to his representatives. See also *Pye* v. *Linwood*, 6 Jur. 618; *Boulton* v. *Beard*, 3 De G. M. & G. 608; *McLachlan* v. *Taitt*, 2 De G. F. & J. 449. If, however, the gift is to individuals *nominatim*, and not to a class, the shares will vest at the testator's death; though the division is postponed until the happening of a specified event: *Re Smith's Will*, 20 Beav. 197; *Cooper* v. *Cooper*, 29 Beav. 229.

Transmissibility of residue.

# CHAPTER XV.

## EXECUTORY INTERESTS.


| | PAGE |
|---|---|
| 1. Executory Devises. | |
| *Nature and Operation of Executory Devises, generally* | 594 |
| *Stat.* 40 & 41 *Vict. c.* 33 | 595 |
| *Executory Devises in Defeazance of Estates of Freehold* | 596 |
| *Executory Devises Unsupported by Antecedent Estates of Freehold* | 600 |
| *Curtesy and Dower* | 601 |
| *Statutory Restriction on Executory Limitations* | 601 |
| 2. Executory Bequests | 603 |


## 1. Executory Devises.

**Executory Interests.**

Definition of executory devise.

*Nature and Operation of Executory Devises Generally.*]—An executory devise is a limitation by will of a future estate or interest in land which is either to take effect contingently in defeazance of a prior estate of freehold created by the will itself, or which is not, at the time of taking effect, immediately preceded by such an estate of freehold (*a*). At common law, no remainder could be limited over after a limitation in fee simple, nor could an estate of freehold be created to commence in future unsupported by a prior particular estate of freehold: see *Seymor's Case*, 10 Rep. 95 b; Fea. C. R. 225. But the judges, in their desire to carry out the intentions, have from early times relaxed the rules of the common law in the case of wills and have frequently upheld, as executory devises, limitations of this

(*a*) The operation of an executory devise is very similar to that of a springing or shifting use (as to which see Saund. on Uses, pp. 145, *et seq.*), except that the devise may be direct to the devisee and does not require the interposition of a releasee to uses as required by the Statute of Uses. The period within which an executory devise must take effect is the same as in the case of a springing or shifting use, computed from the day of the testator's death: see Butler's note, Co. Lit. 271 b., note (1) vii., 2. As to perpetuities, see *ante*, pp. 420, *et seq.*

Executory Interests.

nature, which are incapable of taking effect as remainders. "It is only an indulgence allowed to a man's last will and testament, where otherwise the will would be void": Fea. C. R. 386.

Devise capable of taking effect as remainder not an executory devise.

It is perfectly clear and settled that where an estate can take effect as a remainder, it shall never be construed to be an executory devise or a springing use: per Lord *Mansfield* in *Goodtitle* v. *Billington*, Doug. 753; see *Carwardine* v. *Carwardine*, 1 Ed. 27. Thus, if land be devised to A. and his heirs, but if A. shall die without issue then over, A. takes only an estate tail, and the limitation over is a remainder which takes effect on the determination of such estate tail: *Brice* v. *Smith*, Willes, 1; *Romilly* v. *James*, 6 Taunt. 274. But if the limitation over is to take effect on an event which may happen before the determination of the estate tail, this is an executory devise: Cru. Dig. tit. xxxviii., ch. xvii., sect. 12.

Distinction between contingent remainder and executory devise.

The distinction between a contingent remainder and an executory devise is, that the former may be barred, and was formerly liable to destruction by the determination of the particular estate upon which it depends, and though this liability was taken away by the stat. 8 & 9 Vict. c. 106, so far as regards determination of the particular estate by forfeiture, surrender, or merger, contingent remainders are still sometimes liable, as such, to failure by the natural expiration of the particular estate, if not then ready to vest in immediate possession: *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, L. R. 5 Eq. 399; *Percival* v. *Percival*, L. R. 9 Eq. 386; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417. An executory devise, on the contrary, operates to create a future interest, which cannot be barred, but is independent of any particular and indestructible: see *Pells* v. *Brown*, Cro. Jac. 590.

Stat. 40 & 41 Vict. c. 33.

By the stat. 40 & 41 Vict. c. 33, the failure to which contingent remainders are liable is obviated to a great extent (*b*), for by that Act it is enacted:

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(*b*) This enactment does not apply to instruments executed before the passing of the Act, viz., the 2nd of August, 1877.

Cases not within this Act.

**Executory Interests.**

Cases in which contingent remainders capable of taking effect.

"Every contingent remainder created by any instrument created after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

Land was devised to S. for life, with remainder to the use of her children who should attain twenty-one years of age; at the death of S. some of her children had not attained that age; it was held that the interests of such children were saved by this statute: *Re Bourne*, W. N. 1887, p. 42.

Devise of freehold defeated by executory gift over.

*Executory Devises in Defeazance of Estates of Freehold.*]—Executory devises are of two kinds. The first is, where there is a devise of an estate of freehold, either of the whole fee, or of a less estate, but such disposition is defeated wholly or in part in a certain event. So in *Pells* v. *Brown*, Cro. Jac. 590, a testator devised land to T. B. and his heirs for ever, and if T. B. died without issue, living W. B., then W. B. should have the lands to him his heirs and assigns: this was held to be a limitation in fee to T. B., and also a good limitation to W. B., which though incapable of taking effect as a remainder, was effectual in its operation as an executory devise: see also *Heath* v. *Heath*, 1 Br. C. C. 147; *Doe* v. *Welton*, 2 B. & P. 324; *Doe* v. *Rawding*, 2 B. & Al. 441; *Right* v. *Day*, 16 East, 67; *Doe* v. *Frost*, 3 B. & Al. 546. Again, a devise to A. for life or in tail with a limitation over to B. in case A. shall become possessed of the family estate (*Stanley* v. *Stanley*, 16 Ves. 491), or shall succeed to a peerage (*Carr* v.

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Moreover, there seem to be still certain cases to which the Act does not apply, viz., where the particular estate does not determine before the contingent remainder vests: see Jarm. Wills, Vol. I., p. 874.

Executory Interests.

*Earl of Erroll*, 6 East, 58), or shall refuse or neglect to assume a certain surname (*Doe* v. *Beauclerk*, 11 East, 657), would be a good executory devise to B. And the same principle will prevail where the prior devise in fee is not vested but contingent. Thus, where a testator devised lands to his wife and after her death to the child of which she was then supposed to be pregnant, and his heirs, provided that if such child should die under age leaving no issue of his body, then the lands should go to another person; it was held that the true construction of the will was that there was a good devise to the wife for life with a contingent remainder to the child in fee, and a good executory devise over capable of taking effect if the child should not attain twenty-one years, in defeazance of his estate: *Gulliver* v. *Wickett*, 1 Wils. 105.

Partial defeazance of estate of freehold by executory devise.

Sometimes an executory devise operates so as only partially to defeat the antecedent estate of freehold, as where an estate in fee simple or an estate tail is in a certain event cut down to an estate for life. So, where a testator devised land to his two daughters and their heirs and assigns; but, if either of them should marry without consent of his executors, the daughter so marrying should have only an estate for life therein, and then, or if either of them should die, &c. (*c*); if either of them should die unmarried testator's son R. or his heirs should take it to him and his heirs, paying 500*l.* to the other daughter; R. subsequently before the contingency happened conveyed all his "right, title," &c., to G.; the question was as to the validity of the conveyance. Lord *Hardwicke* said: "As to the nature of the interest here given, the will is very oddly worded; what might mislead them into the recital in the deed was that if the estates were turned into estates for life he [R.] would have a vested remainder. But it was still an executory devise, not a remainder or a fee given before; and in a reasonable compass of time, of the life of the

(*c*) The report does not state what the gift over was, but it would appear that it was a gift over of the share of a daughter marrying without consent, to R. in fee, subject to her life estate.

Executory Interests.

daughters, will thereby go to R. and his heirs." So also, where a devise in fee simple is defeated only to the extent necessary to let in an executory devise for life. Thus, where a testator devised lands to C. and her heirs, but if C. died without leaving issue living at her death, he devised the lands to the nine children of A. to be equally divided among them; C. having died leaving no issue it was held that there was an executory devise (being before the Wills Act) to the children of A. as tenants in common for life only, and that this executory devise affected the estate in fee of C. only to the extent of the life interests of the children, subject to which, the property remained in C. and her heirs: *Gatenby* v. *Morgan*, 1 Q. B. D. 685; see also *Hanbury* v. *Cockrell*, 1 Roll. Ab. 835.

Effect of failure of executory devise.

The effect of failure wholly or in part of an executory limitation, which is to take effect in defeazance of a prior estate of freehold, remains to be considered. In *Jackson* v. *Noble*, 2 Kee. 590, a testator gave real and personal property to trustees upon trust for A. for life, and, after her decease, to convey to her heirs, executors, &c.; but in case A. should marry and have no children, then the property to belong to D., or, in case of his decease before A., then to his children; A. married but had no children; D. died in A.'s lifetime leaving no children: it was held that A. was absolutely entitled to the property.

Where cause of failure is contemplated by testator.

It is to be observed that the contingency, the non-occurrence of which caused the executory devise to fail, was expressly contemplated by the terms of the will. And to this extent the decision seems to be confirmed by the decision of *James*, L.J. (for *Wickens*, V.-C.) in *Crozier* v. *Crozier*, L. R. 15 Eq. 282. In that case a testator gave real and personal estate to his wife, and after her death to his children equally, should there be any; there were no children: it was held that the wife was absolutely entitled.

Where cause of failure is not contemplated.

But if an executory devise fails from some other cause not contemplated by the testator, the prior gift will generally fail also. Thus, in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, a testatrix gave 1000*l.* Consols to A. for life, and after her death to B., and

Executory Interests.

if B. "should die unmarried or without children the 1000*l.* I here will to revert to" C.; the testatrix then appointed D. her residuary legatee: both A. and C. died in the lifetime of the testatrix, and on the death of the testatrix B. took possession of the stock, which was settled on her marriage, but she died without having had a child: it was held that the executory gift to C. having failed by lapse, D. became entitled to the stock as executory legatee. And the same rule would doubtless apply to realty.

Where the executory devise is void.

So also the prior defeasible gift will apparently fail, if the executory devise fails as being for an illegal purpose, or otherwise void *ab initio:* see *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713. In that case there was an appointment to an object of the power absolutely, with an appointment over, on a contingency which happened, to a person not an object of the power, and it was held that the prior appointment failed; *Parke*, B., said that the question was the same whether arising under an appointment or a devise. See also *Robinson* v. *Wood*, 6 W. R. 728; 4 Jur. (N. S.) 625, where the executory gift over was to a charity. But see *Ridgway* v. *Woodhouse*, 7 Beav. 437.

It is stated in Jarm. Wills, Vol. I., p. 869, that "to the rule in *Doe* v. *Eyre* the case of a gift over which is to defeat a prior devise in a too remote event forms an exception since the law refuses permission to await that event for any purpose; so that the prior gift must, of necessity, remain absolute." See *Courtier* v. *Oram*, 21 Beav. 91; *Webster* v. *Parr*, 26 Beav. 236; see also *Hodgson* v. *Holford*, 11 Ch. D. 959. But see the remarks of Lord *St. Leonards* on the case of *Doe* d. *Blomfield* v. *Eyre*, Sugd. Pow. 514.

Effect of substituted gift to children of donees, where there are no children.

Where there is an absolute gift to individuals or to a class to take effect either at the death of the testator, or on the determination of a prior life estate, or after some other future contingency or period, with a gift over of the shares of persons dying before the period of distribution, to their children, the gift will remain absolute in the case of any donees who have no children: *Smither* v. *Willock*,

Executory Interests.

9 Ves. 233; *Hodgson* v. *Smithson*, 8 De G. M. & G. 604.

So also where absolute interests are in the first instance given by a testator to his children, and then trusts are declared of his daughters' shares for benefit of them and their children, the qualifying trusts will operate *pro tanto* only, so that daughters having no issue will take absolutely: *Whittell* v. *Dudin*, 2 J. & W. 279; see *Hulme* v. *Hulme*, 9 Sim. 644; *Winkworth* v. *Winkworth*, 8 Beav. 576; *Kellett* v. *Kellett*, L. R. 3 H. L. 160.

Devise executory for want of antecedent estate of freehold.

*Executory Devises unsupported by antecedent Estate of Freehold.*]—The other kind of executory devises is, where there is a limitation of a future estate or interest in land, which at the time of its taking effect is not supported by any antecedent estate of freehold. Thus, a will may contain no devise of an immediate estate of freehold, but may simply limit a future estate of freehold to commence *in futuro* either at a fixed period, or upon the happening of a specified contingency; such a limitation not being preceded by any immediate freehold cannot take effect as a remainder, but it may operate as an executory devise. So where a testator devised lands to A. in fee to take effect six months after the testator's death, this was held to be a good executory devise: *Clarke* v. *Smith*, 1 Lutw. 798. So, also, where the devise was to A. for five years, remainder to B. in fee; it was held that the gift over was an executory devise, not a remainder, for a term of years cannot support a remainder: *Pay's Case*, Cro. Eliz. 878; see also *Gore* v. *Gore*, 2 P. Wms. 28. Similarly, where the future estate is limited upon a contingency; as where there is a devise to the son of A., who has no son living at the testator's death: *Bullock* v. *Stones*, 2 Ves. sen. 521.

Again, an antecedent estate of freehold may be so limited as necessarily (*d*) to determine before a sub-

(*d*) If the antecedent estate is so limited as only to be liable to determine before the subsequent limitation is ready to take effect, this would make the subsequent limitation a contingent remainder;

Executory Interests.

sequent limitation can take effect; thus leaving a gap between the termination of the prior estate and the commencement of the subsequent limitation; as, for instance, if the devise in *Clarke* v. *Smith*, *supra*, had been to A. for life with a limitation over to B. in fee to take effect six months after the death of A.; such a limitation would take effect, not as a remainder, but as an executory devise; and for the intervening six months the residuary devisee or the heir-at-law (as the case may be) would be entitled to the rents and profits.

Curtesy and dower attach to defeasible estates in fee.

*Curtesy and Dower.*]—Where there is an immediate devise in fee simple with an executory devise over, the right to curtesy generally attaches to the prior estate and is not defeated by its determination: *Buckworth* v. *Thurtle*, 3 B. & P. 658; see 1 Inst. 241 a, note. But the rule is otherwise where children, who would have taken under the prior devise had there been no limitation over, take as purchasers by virtue of such limitation. Thus, where a testator devised land to A. and his heirs, but if she died leaving issue, then to such issue and their heirs; A. having died leaving issue, it was held that A.'s husband was not entitled to curtesy: *Barker* v. *Barker*, 2 Sim. 249; see *Sumner* v. *Partridge*, 2 Atk. 47. The same principles apply also to the right to dower. In *Moody* v. *King*, 2 Bing. 447, there was a devise to W. Frost and his heirs, but if he should have no issue, the property devised was to go on his decease to the heir-at-law; Frost having died without issue his estate in fee determined, but his wife was held to be entitled to dower. See also *Smith* v. *Spencer*, 2 Jur. (N. S.) 778.

Alienation of land subject to executory limitations.

*Statutory Restriction on Executory Limitations.*]—A consequence of the doctrine that an executory devise cannot be barred is, that until recently the alienation of land was often prevented by such devises for a longer period than by the ordinary limitations in strict settlement. Thus, in the case of a

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but if incapable of taking effect as such, it would now generally take effect as an executory devise: see *ante*, p. 595.

Executory Interests.

devise to A. and his heirs, but if A. should die without leaving issue living at his death, to B. and his heirs, the land could not be sold at all during the life of A. without the concurrence of B., and of all other persons (if any) interested similarly under any executory limitations in defeazance of B.'s estate; but, in the case of a devise to the use of A. for life with remainder to the use of his first and other sons in tail, A. and his son as soon as the latter attained twenty-one years of age could bar the estate tail and sell the land.

Restriction on executory limitations.

In order to render lands subject to executory limitations more readily saleable, it is enacted by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 10, that—

"(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and so soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

"(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act."

The effect of this section is that immediately on any issue attaining twenty-one, the devisee becomes indefeasibly entitled to the estate or interest given to him by the will as if there had been no executory limitation over, and acquires a power of disposing of the land in accordance with such estate or interest. If the prior limitation is of an estate in fee simple, he can dispose of the land as owner of such estate, and is absolutely entitled to the proceeds of sale; if the limitation is of a life estate or of a term for years determinable on life, he can sell the fee under his statutory powers as tenant for life: see *Re Morgan*, 24 Ch. D. 114; and if the limitation is for a term of years absolute, he can sell the chattel interest in the land.

Executory Interests.

## 2. Executory Bequests.

Legal remainders cannot be created in personalty.

It is, even at the present time, a settled rule of law that successive estates cannot directly be created in either chattels real, or pure personalty. Such dispositions must either be effected by the interposition of trustees, to whom the legal ownership of the personalty is given absolutely, but upon trusts for the benefit of the successive beneficiaries enforceable in equity, or must operate by way of executory bequest. And the same rule applies to bequests intended to take effect *in futuro* simply, not preceded by a gift for life or other partial interest.

Successive bequests good as executory gifts.

Where, therefore, a term or personal estate was bequeathed to a person for life, or otherwise, and after his death or some other contingency or period, to another, the ulterior limitation was void at common law, and the whole property vested in the person to whom it was given for life. But a distinction was made between a bequest of personal property itself, and a bequest of the use of such property. See Dyer, 74, pl. 18; Fea. C. R. 402; and see *Manning's Case*, 8 Rep. 95; *Lampet's Case*, 10 Rep. 46; *Cotton* v. *Heath*, 1 Roll. Abr. 612. These cases, starting from the principle here stated, establish the doctrine that limitations over of terms of years, after a gift to one for life, are good as executory bequests. And it is equally settled that the doctrine extends also to gifts over of chattels personal: *Vachel* v. *Vachel*, 1 Ch. Ca. 129; *Hyde* v. *Parratt*, 1 P. Wms. 1; and see *Catchmay* v. *Nicholls*, and *Shirley* v. *Ferrers*, *ib.* in note; *Richards* v. *Baker*, 2 Atk. at p. 323. So, if the gift over is on a contingency, or after a certain period: *Martin* v. *Long*, 2 Vern. 151.

Inventory.

In the case of contingent and executory bequests, the Court will order an inventory to be signed by the donee for life, and to be deposited for the benefit of all parties: *Bill* v. *Kinaston*, 2 Atk. 82.

Trover, &c.

Where the personalty is legally vested in trustees for the benefit of successive beneficiaries, the trustees may maintain trover if the property is taken in

Executory Interests.

execution: *Cadogan* v. *Kennett*, Cowp. 432; and see *Hoare* v. *Parker*, 2 T. R. 376; and if the person beneficially entitled for life becomes bankrupt, the trustee in bankruptcy is not entitled to take possession of the property for the benefit of the creditors: *Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666. But if the legal interest is in the donee for life, with an executory gift over, it would seem that his creditors are entitled to take the property in execution: see *Foley* v. *Burnell*, 1 Br. C. C. 274.

Equitable remedies.

As to equitable remedies for the protection and recovery of personalty wherein successive interests are limited by way of executory bequest, see *Pusey* v. *Pusey*, 1 Vern. 273; *Fells* v. *Read*, 3 Ves. 70; *Lloyd* v. *Loaring*, 6 Ves. 773; *Lowther* v. *Lowther*, 13 Ves. 94; *Earl of Macclesfield* v. *Davis*, 3 Ves. & B. 16.

Whether substituted partial gift defeats prior gift *in toto*.

It seems to be a corollary from the doctrine which governs devises of realty (see *ante*, p. 597), that, where the substituted executory bequest is not co-extensive in point of interest with the prior bequest, it defeats the latter *pro tanto* only. Such was evidently the opinion of Lord *Alvanley*, in the case of *Taylor* v. *Langford*, 3 Ves. 119, where A. by his will bequeathed the produce of his residuary estate to his two sisters, C. and D., share and share alike, during their natural lives, and after their decease the principal to be paid to their children; but whichever sister died before the other, then the share which was so paid to her should be paid to her children; but if such sister so dying *should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid.* A. having died without leaving children, it was contended that the first words completely disposed of the property, and the subsequent expressions were only applicable to the life interest of the sisters; and the decree, in this instance, and former orders in the cause, proceeded on this principle.

As to implication of cross-executory limitations, see *Re Hudson*, 20 Ch. D. 406.

# CHAPTER XVI.

## GIFTS TO CHILDREN, ETC.


PAGE

1. Description of Persons Included ..... 605

2. Mode of Distribution among Issue of Various Degrees ..... 610

3. Class Entitled in Reference to the Period of Birth.
*Where the Gift is Immediate* 615
*Where the Gift is Preceded by a Life Interest* ..... 616
*Where Distribution is Postponed to a Certain Age* ... 621
*Words Operating to Restrict or Enlarge the Class* ..... 623
*Claims of Child* en ventre sa mère ..... 625

PAGE

*Rule Applicable to Grandchildren, Brothers, &c.* ... 626
*Gifts over upon Death without Children, or without Having or Leaving Children* ..... 627

4. Gifts to Younger Children, etc. ..... 628

5. Rule in Wild's Case ..... 632

6. Rule in Shelley's Case.
*Statement of the Rule* ..... 635
*Extent and Operation of the Rule* ..... 636
*Cases where the Rule does not Apply* ..... 641
*Doctrine of General and Particular Intention* ..... 643


### 1. Description of Persons included.

Gifts to Children, &c.

A gift to children generally (*a*) includes *primâ facie* children by any marriage, past, present, or future: see *Salkeld* v. *Vernon*, 1 Eden, 64; *Malim* v. *Keighley*, 2 Ves. jun. 333; and it will not be confined to children of an existing marriage, merely on conjectural grounds, such as that of the testator being a relation of the husband or wife of the parent in question: *Barrington* v. *Tristram*, 6 Ves. 345; *Critchett* v. *Taynton*, 1 Russ. & M. 541; *Re Pickup's Trusts*, 1 J. & H. 389; *Pasmore* v. *Huggins*, 21 Beav. 103; *Isaac* v. *Hughes*, L. R. 9 Eq. 191. But if the terms of the will are such as necessarily to show an intention that the gift should be confined to the children of a particular marriage, effect will

(*a*) See as to gifts to *younger* children, *post*, p. 628.

Gifts to Children, &c.

of course be given to such intention: see *Stavers* v. *Barnard*, 2 Y. & C. C. C. 539; *Lovejoy* v. *Carter*, 35 Beav. 149.

Gifts to children not extended to grandchildren.

A gift to issue of one degree is, generally speaking, incapable of being extended to issue of another degree. Thus, a gift to children will not apply to grandchildren: *Moor* v. *Raisbeck*, 12 Sim. 123. It was, however, formerly considered, that, if there was no child, grandchildren might take: see the *dicta* of Lord *Alvanley* and Sir *W. Grant* in *Crooke* v. *Brooking*, 2 Vern. 106; and in the case of *Earl of Orford* v. *Churchill*, 3 Ves. & B. 69, Sir *W. Grant* observed, that, "where there is a total want of children, grandchildren have been let in under a liberal construction of the word 'children.'" Such a construction was not, however, required by that case, and does not seem to be established by any reported decision; it is, moreover, incompatible with that primary rule, which forbids the expounding a testator's intention by the light of subsequent events, and which principle requires that the word "children," like every other descriptive appellation, should not be diverted from its proper and established signification, unless circumstances, existing at the making of the will, shew that it could not possibly have been used in that sense. As, where a testator gives to the children of A., who was dead when the will was made, leaving grandchildren but no child; probably in this case, and presuming the facts to be known to the testator, the bequest might be held to comprise the grandchildren. See *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419; *Berry* v. *Berry*, 3 Giff. 134; *Fenn* v. *Death*, 23 Beav. 73; *Re Smith, Lord* v. *Hayward*, 35 Ch. D. 558. But it was held, that, under a bequest to the children of five persons, described as the testator's *late* brothers and sisters, the grandchildren of one of the five, *who was* then *dead, leaving grandchildren but no child*, could not take concurrently with the children of the other four; since, to have included them, would have involved the incongruity of reading the word "children" in two different senses: *Radcliffe* v. *Bulkeley*, 10 Ves. 195. And grandchildren will not

Gifts to Children, &c.

take, though no children are living at the date of the will, if the testator expressly distinguishes between children and grandchildren: *Loring* v. *Thomas*, 3 Dr. & Sm. 497. The reasoning which excludes grandchildren from taking under a bequest to children, of course, would apply to the claim of great-grandchildren to be objects of a gift to grandchildren: *Earl of Orford* v. *Churchill*, 3 Ves. & B. 69.

Cousin does not include descendants of cousins.

It has been held, that "first cousins, or cousins german," does not include the descendants of first cousins: *Sanderson* v. *Bayley*, 4 My. & C. 56; and the expression "cousins" *primâ facie* means first cousins: *Stoddart* v. *Nelson*, 6 De G. M. & G. 68; *Stephenson* v. *Abingdon*, 31 Beav. 305.

Gift to cousins, how construed.

A legacy to first and second cousins is construed strictly, and will not include first cousins once or twice removed: *Re Parker*, 17 Ch. D. 262. The decisions in *Silcox* v. *Bell*, 1 Si. & St. 301, and *Charge* v. *Goodyear*, 3 Russ. 140, are overruled; and the decision in *Mayott* v. *Mayott*, 2 Br. C. C. 125, in favour of first cousins once removed, under a gift in these terms, applies only to cases where the testator has no first or second cousins living at the date of the will: see also *Slade* v. *Fooks*, 9 Sim. 386; *Re Bonner*, 19 Ch. D. 201.

Gift to nieces not extended to great-nieces.

It has been decided, that a great-niece cannot take under a gift to nephews and nieces, though subsequently, in a codicil, described by the testator as his niece; and the circumstance that no niece was living at the testator's death was held not to vary the construction, for the conclusive reason assigned by the Master of the Rolls (Sir *T. Plumer*), that nieces *might* have been born: *Shelley* v. *Bryer*, Jac. 207; see also *Faulkner* v. *Butler*, Amb. 514; *Crook* v. *Whitley*, 7 De G. M. & G. 490; *Williamson* v. *Moore*, 10 W. R. 536; *Smith* v. *Liddiard*, 3 K. & J. 252; *Thompson* v. *Robinson*, 27 Beav. 486; *Re Blower's Trusts*, L. R. 6 Ch. 351; *Wells* v. *Wells*, L. R. 18 Eq. 504.

In all these cases unsuccessful attempts were made to show that the meaning of the words nephews and nieces was capable of enlargement, having regard to the terms of the will in each particular case. But where

Gifts to Children, &c.

a testator gave the residue of his estate in trust for "his nephews and nieces living" and their issue; and the testator had not any nephews or nieces of his own nor any brother or sister living at the date of his will: it was held that nephews and nieces of the testator's wife took under the gift: *Sherratt* v. *Mountfort*, L. R. 8 Ch. 928; see also *Hogg* v. *Cook*, 32 Beav. 641; *Grant* v. *Grant*, L. R. 5 C. P. 380, 727. For cases in which the context of the will has been held to enlarge the meaning of the terms "nephew" and "niece," see *James* v. *Smith*, 14 Sim. 214; *Weeds* v. *Bristow*, L. R. 2 Eq. 333.

Nephews and nieces on both sides.

In *Frogley* v. *Phillips*, 3 De G. F. & J. 466, a bequest in trust for the testator's nephews and nieces "on both sides" was held to extend to children of his wife's brothers and sisters, the testator having also nephews and nieces of his own living at his death.

"Male nephews."

In an Irish case a gift to "male nephews" was restricted to sons of brothers: *Lucas* v. *Cuddy*, I. R. 10 Eq. 514 (*b*).

In *Waring* v. *Lee*, 8 Beav. 247, a bequest to nephews and nieces, grand-nephews and grand-nieces, in such shares, and subject to such trusts, intents, and purposes, as the testator's widow should appoint, was held not to authorise an appointment to a grand-niece for life, with remainder to her children.

Half brothers and sisters and their issue.

It has never been decided whether a gift to brothers and sisters extends to brothers and sisters of the half-blood (see arg. in *Leake* v. *Robinson*, 2 Mer. 363); but the affirmative is not to be doubted; and in *Grieves* v. *Rowley*, 10 Hare, 63, it was held that a gift to nephews and nieces extended to the children of half-brothers and half-sisters. See also *Kitchen* v. *Myers*, W. N. 1886, p. 64. It is well known that relations of the half-blood are within the Statute of Distributions; and, consequently, are

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"Issue male."

(*b*) In *Lywood* v. *Kimber*, 29 Beav. 38, it was held that under a gift to the "issue male" of A., only persons claiming through males were entitled.

included in a gift to relations: *Cotton* v. *Scarancke*, 1 Mad. 45. Gifts to Children, &c.

Gifts to relations do not, unless explained, include relations by affinity, so that a grandson's widow cannot take under a gift to grandchildren: *Hussey* v. *Berkeley*, 2 Ed. 194. See *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372; *Wells* v. *Wells*, L. R. 18 Eq. 504.

Descendants or issue (*c*).

A gift to descendants, or issue (which seem to be co-extensive terms), will, unless narrowed by the context, comprise descendants of every degree: *Cook* v. *Cook*, 2 Vern. 545; *Crosley* v. *Clare*, 3 Swanst. 320, n., Amb. 397; *Wyth* v. *Blackman*, 1 Ves. sen. 196, 3 Ves. 258; *Wythe* v. *Thurlston*, Amb. 555, *S. C.*; *Pierson* v. *Garnet*, 2 Br. C. C. 38, 230; *Butler* v. *Stratton*, 3 Br. C. C. 369; *Bernard* v. *Mountague*, 1 Mer. 422; *Re Jones' Trusts*, 23 Beav. 242; *Maddock* v. *Legg*, 25 Beav. 531; *Hobgen* v. *Neale*, L. R. 11 Eq. 48; *Re Corlass*, 1 Ch. D. 460. The word "issue" has been held to be restrained to children by a clause referring to their taking their *parents'* shares: *Sibley* v. *Perry*, 7 Ves. 522. See *Slater* v. *Dangerfield*, 15 M. & W. 263; *Pruen* v. *Osborne*, 11 Sim. 132; *Buckle* v. *Fawcett*, 4 Hare, 536; *Bradshaw* v. *Melling*, 19 Beav. 417; *Smith* v. *Horsfall*, 25 Beav. 628; *Stephenson* v. *Abingdon*, 31 Beav. 305; *Macgregor* v. *Macgregor*, 1 De G. F. & J. 63; *Martin* v. *Holgate*, L. R. 1 H. L. 175; *Bryden* v. *Willett*, L. R. 7 Eq. 472; *Heasman* v. *Pearse*, L. R. 7 Ch. 275. A distinction is, however, made where there is a gift over in default of "children or issue," in which case the term "issue" will not be restricted to mean "children" only, though the issue are to take their parents' shares: *Ross* v. *Ross*, 20 Beav. 645; *Ralph* v. *Carrick*, 11 Ch. D. 873. Difficulty, however, often arises from the testator having used the words issue and children synonymously, rendering it necessary, therefore, in order to avoid the failure of the gift from uncertainty, that the pre-

(*c*) The term "offspring" is synonymous with "issue:" *Thompson* v. *Beasley*, 3 Drew. 7; and is subject to similar rules extending or restricting its meaning: see *Young* v. *Davies*, 2 Dr. & Sm. 167; *Lister* v. *Tidd*, 29 Beav. 618. "Offspring."

Gifts to Children, &c.

valency of one should be established. Lord *Hardwicke* thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution, viz., to each, or their respective *children*, one-fourth, the word children was not restrictive and explanatory of "issue" previously mentioned: *Wyth* v. *Blackman*, 1 Ves. sen. 196; 3 Ves. 258. See also *Royle* v. *Hamilton*, 4 Ves. 437; *Dalzell* v. *Welsh*, 2 Sim. 319; *Cursham* v. *Newland*, 2 Scott, 105; 2 Beav. 145; 4 M. & W. 104; *Clay* v. *Pennington*, 7 Sim. 370; *Harley* v. *Mitford*, 21 Beav. 280; *Re Heath's Settlement*, 23 Beav. 193; *Re Hopkins' Trusts*, 9 Ch. D. 131. See further, as to gifts to issue, Jarm. Wills, Vol. II., pp. 101 *et seq.*

## 2. Mode of Distribution Among Issue of Various Degrees.

Distribution *per stirpes* and *per capita*.

Wherever the devise or bequest comprises issue of several degrees, it should be distinctly shewn whether the objects are to take *per capita* or *per stirpes*. The different effects of these respective modes of distribution may be exhibited by the following supposed case—Gift to the issue or descendants of A. A. dies, leaving an only surviving child, who has no child, but A. has left three grandchildren, the children of a deceased child; a distribution *per stirpes* would occasion a division of the property into moieties, of which one would go to the surviving child, and the other to the three grandchildren. A distribution *per capita* would cause a division into four shares, of which the surviving child would take one, and the three grandchildren respectively the remaining three. Where the gift is to issue, or descendants *simpliciter*, it seems, that the latter construction prevails, and that all the objects take as joint tenants; *Davenport* v. *Hanbury*, 3 Ves. 257; unless the bequest contains words of severance, or other expressions, importing division or equality, which would make the legatees tenants in common, but would not further alter the construction: *Butler* v. *Stratton*, 3 Br. C. C. 367;

*Crosley* v. *Clare*, 3 Swanst. 320, n. ; incorrectly reported in Amb. 397.

Under a gift to A. and the children of B., in the absence of any expressions indicating a different intention, the donees take *per capita* and not *per stirpes : Butler* v. *Stratton*, Br. C. C. 367 ; *Dowding* v. *Smith*, 3 Beav. 541 ; *Rickabe* v. *Garwood*, 8 Beav. 541 ; *Paine* v. *Wagner*, 12 Sim. 184 ; *Amson* v. *Harris*, 19 Beav. 210. So also, if the gift is to the children of A. and B. or to A. and any other class or classes of persons : *Baker* v. *Baker*, 4 Hare, 269 ; *Dugdale* v. *Dugdale*, 11 Beav. 402 ; *Pattison* v. *Pattison*, 19 Beav. 638 ; *Armitage* v. *Williams*, 27 Beav. 346 ; *Rook* v. *Att.-Gen.*, 31 Beav. 313.

Even if a testator makes a gift in favour of his living children A. & B., and the children of a deceased son C., the distribution will be *per capita ;* though there may be plausible ground to conjecture that the testator intended the children of the deceased son to represent their deceased parent only : *Blackler* v. *Webb*, 2 P. Wms. 383 ; see also *Tomlin* v. *Hatfield*, 12 Sim. 167 ; *Tyndall* v. *Wilkinson*, 23 Beav. 74 ; *Payne* v. *Webb*, L. R. 19 Eq. 26.

Where the distribution among descendants or issue is *per capita*, children take concurrently with their parents. Thus, under a gift to the issue or descendants of A., a person who has died leaving three children, B., C., and D., of whom B. has no child, C. has one child but no grandchild, and D. has no child but three grandchildren, the distribution would be into seven shares, of which B. would take one, C. and her child respectively two more, and D. and her three grandchildren the remaining four : *Freeman* v. *Parsley*, 3 Ves. 421. And a bequest to such of the children of A., B., and C., as should be living at the testatrix's decease, or (which was turned into *and*) the issue of such of them as should be married, in equal shares, has also been held to cause a distribution *per capita : Horridge* v. *Ferguson*, Jac. 583. And see *De Witte* v. *De Witte*, 11 Sim. 41, where a testator bequeathed the residue of his personal estate in trust for his daughter S. and her children, and it was held that the daughter and her children,

Gifts to Children, &c.

living at the testator's death, were entitled to the residuary estate as joint tenants. See also *Stokes* v. *Heron*, 12 Cl. & F. 161 ; and *Cunningham* v. *Murray*, 1 De G. & Sm. 368.

In *Abbay* v. *Howe*, 11 Jur. 765, where a testator bequeathed certain monies, after the death of a tenant for life of the interest thereof, unto and equally amongst all and every the children of S. W. and S. K. which should be living at the death of the said S. K., and the lawful issue of such of them as should be then dead, share and share alike, V.-C. *Knight Bruce* held, that this was a gift *per capita* and not *per stirpes*.

Whether children take *per stirpes* or *per capita*.

In regard to the question of distribution *per stirpes* or *per capita* among children or other descendants of the *same degree*, the rule is thus stated in Jarm. Wills, Vol. II., p. 194 : "Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take *per capita*, not *per stirpes*. The same rule applies where a devise or bequest is made to a person and the children of another person, or to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as 'to my son A. and the children of my son B. ;' in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his view. So, if the gift be to A. and B. and their children, or to a class, and their children, every individual coming within the terms of the description, as well children as parents, will take an equal proportion of the fund ; that is, the distribution will be made *per capita*. But this mode of construction will yield to a very faint glimpse of a different intention in the context."

Thus, where the testatrix directed her trustees to divide the rents of her real estate equally between A., B., C., and D. (the widow of E.), until E.'s children attained twenty-one, and then to sell and divide the proceeds among A., B., C., and E.'s children in equal shares, but if D. married, her

Gifts to Children, &c.

share was to be applied to the maintenance of E.'s children, it was held, that, as the testatrix had devoted one-fourth of the income only to the maintenance of E.'s children, it must be presumed that she intended them to take that share only among them, and not each an equal share with A., B., and C.; and a gift of the residue equally between A., B., C., and E.'s children was held to have the same meaning: *Brett* v. *Horton*, 4 Beav. 238. See *Blakelock* v. *Sharp*, 12 Jur. 819; *Crone* v. *Odell*, 1 Ba. & B. 449; 3 Dow, 61.

A gift to several individuals, or to a class, "or their children," is generally regarded as substitutional, so that the children take *per stirpes*: *Price* v. *Lockley*, 6 Beav. 180; *Burrell* v. *Baskerfield*, 11 Beav. 525; *Congreve* v. *Palmer*, 16 Beav. 435; *Timins* v. *Stockhouse*, 27 Beav. 434; see also *Gowling* v. *Thompson*, 19 L. T. (N. S.) 242; *Re Sibley's Trusts*, 5 Ch. D. 494. So also where the gift was to A. and B., share and share alike, and after the decease of A. and B., to their children share and share alike, both A. and B. having died before the period of distribution, it was held that the property was divisible in moieties between the representatives of A. and the children of B.: *Re Hutchinson's Trusts*, 21 Ch. D. 811. Similarly, where there is a direction that children or issue are to take their parents' share: *Minchell* v. *Lee*, 17 Beav. 727; *Johnson* v. *Cope*, 17 Beav. 561. And where there was a gift to A. and B. and the issue of C. and D., "in equal shares if more than one of such respective issue," Lord *Westbury* held that the use of the word "respective" indicated such intention that the distribution should be *per stirpes*: *Davis* v. *Bennett*, 4 De G. F. & J. 327. See *Hunt* v. *Dorsett*, 5 De G. M. & G. 570; *Shand* v. *Kidd*, 19 Beav. 310; *Ayscough* v. *Savage*, 13 W. R. 373. So if there are words equivalent to "respectively": *Re Campbell's Trusts*, 33 Ch. D. 98; see *Smith* v. *Streatfield*, 1 Mer. 358; *Brett* v. *Horton*, 4 Beav. 239.

When distribution *per stirpes* extends throughout.

In the following cases it was held that expressions used by testators indicated that a distribution *per stirpes* should extend to all successive takers: *Dock*

Gifts to Children, &c.

v. *Lacy*, 8 Beav. 214; *Palmer* v. *Crutwell*, 8 Jur. (N. S.) 479; *Ross* v. *Ross*, 20 Beav. 645; *Powell* v. *Powell*, 28 L. T. (N. S.) 730; *Re Orton's Trust*, L. R. 3 Eq. 375; *Gibson* v. *Fisher*, L. R. 5 Eq. 51. But a direction that if an original donee dies before the period of distribution, his issue shall take his share equally to be divided between them is not a sufficient indication of intention that issue remoter than children of such donee shall take *per stirpes*: *Weldon* v. *Hoyland*, 4 De G. F. & J. 564.

Gift to several with remainder to their children.

Where there is a gift to several persons with remainder to their children, the mode of distribution will depend on whether the donees for life take as tenants in common, or as joint tenants. In the former case the general rule is that the children will take *per stirpes*: see *Perry* v. *White*, Cowp. 777; *Tanière* v. *Pearkes*, 2 S. & St. 383; *Flinn* v. *Jenkins*, 1 Coll. 365; *Willes* v. *Douglas*, 10 Beav. 47; *Arrow* v. *Mellish*, 1 De G. & S. 355; *Doe* d. *Patrick* v. *Royle*, 13 Q. B. 100; *Bradshaw* v. *Melling*, 19 Beav. 417; *Turner* v. *Whittaker*, 23 Beav. 196; *Archer* v. *Legg*, 31 Beav. 187; *Milnes* v. *Aked*, 6 W. R. 430; *Wills* v. *Wills*, L. R. 20 Eq. 342. But effect will of course be given to any expressions clearly indicating a contrary intention: see *Stephens* v. *Hyde*, Ca. temp. Talb. 27; *Abrey* v. *Newman*, 16 Beav. 431; *Peacock* v. *Stockford*, 3 De G. M. & G. 73; *Swabie* v. *Goldie*, 1 Ch. D. 380. A gift to several as tenants in common for life, with remainder to the children of some only of the donees for life, has been regarded as showing a contrary intention: *Swan* v. *Holmes*, 19 Beav. 471; see *Sarel* v. *Sarel*, 23 Beav. 87. Under a gift in equal shares to persons for life and then to their children and grandchildren, the families take *per stirpes*, and the children and grandchildren take *per capita*: *Barnaby* v. *Tassell*, L. R. 11 Eq. 363.

Where, however, the donees for life take jointly or as tenants in common with benefit of survivorship, the distribution is necessarily postponed till the death of the survivor, and the general rule is that all the objects take *per capita*: *Pearce* v.

*Edmeades*, 3 Y. & C. 246; *Stephenson* v. *Gallan*, 18 Beav. 590; *Taafe* v. *Conmee*, 10 H. L. C. 64; *Parfitt* v. *Humber*, L. R. 4 Eq. 443. Gifts to Children, &c.

### 3. Class entitled in Reference to the Period of Birth.

Where gift is immediate.

1st. An immediate devise or bequest to children (*i.e.* a gift to take effect *in possession* at the testator's decease), whether of a person living (*Northey* v. *Burbage*, Pre. Ch. 470; *Hill* v. *Chapman*, 3 Br. C. C. 391); or dead (*Viner* v. *Francis*, 2 Cox, 190, 2 Br. C. C. 658; *Doe* d. *Stewart* v. *Sheffield*, 13 East, 576; *Shuttleworth* v. *Greaves*, 4 My. & C. 35); whether the term be children simply, or *all* the children (*Heath* v. *Heath*, 2 Atk. 121; *Singleton* v. *Singleton*, 1 Br. C. C. 542, n.; *Scott* v. *Harwood*, 5 Mad. 332; *Davidson* v. *Dallas*, 14 Ves. 576);—comprehends the children living at the testator's decease, and those only; see also *Peyton* v. *Hughes*, 7 Jur. 311; *Leach* v. *Leach*, 2 Y. & C. C. C. 495; *Cort* v. *Winder*, 1 Coll. 320. But if no child is then living, it extends, by way of executory gift, to all who at any time afterwards come into existence: *Weld* v. *Bradbury*, 2 Vern. 705; *Shepherd* v. *Ingram*, Amb. 448; *Haughton* v. *Harrison*, 2 Atk. 329; *Harris* v. *Lloyd*, T. & R. 310; unless a designated person is associated in the gift with the class, so that he might take in common with them, in which case it has been held that, if, at the time when the gift should take effect, there is no member of the class in existence, the person designated will take all: *Read* v. *Willis*, 1 Coll. 86.

This rule includes gifts to "A. and his issue," or to "A. and his children," where the context does not require a different construction, see the section *post*, "Rule in *Wild's Case*."

When the gift is to such children as shall be living at A.'s death, whether A. dies before or after the testator, the children must be ascertained at A.'s death: *Allen* v. *Callow*, 3 Ves. 293; *Turner* v. *Hudson*, 10 Beav. 222; see *Harvey* v. *Harvey*, 3 Jur. 949. But, as a general rule, the donees take as a

Class of Children Entitled.

class, so that the share of any one of them dying before the testator will not lapse: *Lee* v. *Pain*, 4 Hare, 250; *Leigh* v. *Leigh*, 17 Beav. 605; see *Viner* v. *Francis*, 2 Cox, 190; *Dimond* v. *Bostock*, L. R. 10 Ch. 358. If, however, the testator renders the donees *personæ designatæ* by naming them or specifying their number, the shares of any who die in the testator's lifetime will lapse: *Bain* v. *Lescher*, 11 Sim. 397; *Re Hall's Estate*, 21 Beav. 314; *Spencer* v. *Wilson*, L. R. 16 Eq. 501; *Re Smith's Trusts*, 9 Ch. D. 117. But if the testator names persons who are members of a class and extends his gift to other members of the same class who may subsequently be born, the named persons will take as a class and not as *personæ designatæ*: *Re Stanhope's Trusts*, 27 Beav. 201; *Re Jackson*, 25 Ch. D. 162. See also *Re Featherstone's Trusts*, 22 Ch. D. 11, where, however, the decision turned on the special terms of the will.

Construction, whether varied by gift over.

Where an immediate gift to children is followed by a gift over to the survivors, in the event of any of them dying under twenty-one, though this would necessarily postpone the distribution of the original share of each legatee until his or her majority (which, indeed, the incapacity of minority would do), yet the gift is confined to children living at the testator's decease: *Davidson* v. *Dallas*, 14 Ves. 576. See *Scott* v. *Harwood*, 5 Mad. 332.

Where the gift is future.

2nd. Where the devise or bequest is to a person for life, or for any other particular estate or interest, with an ulterior gift to children, the latter includes the objects living at the testator's death, and all who afterwards come *in esse* during the continuance of the estate for life, or other particular estate or interest: *Baldwin* v. *Karver*, Cowp. 309; *Devisme* v. *Mello*, 1 B. C. C. 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Paul* v. *Compton*, 8 Ves. 375; *Meredith* v. *Meredith*, 10 East, 503; *Mogg* v. *Mogg*, 1 Mer. 654; *Leake* v. *Robinson*, 2 Mer. 363; *Odell* v. *Crone*, 3 Dow, 61; *Lenden* v. *Blackmore*, 10 Sim. 626; *Cooke* v. *Bowen*, 4 Y. & C. 244; *Locker* v. *Bradley*, 5 Beav. 593. See also *Re Smith*, 2 J. & H. 594,

and *Re Aylwin's Trusts*, L. R. 16 Eq. 590, where the particular estate was determined by bankruptcy. Class of Children Entitled.

And this construction will not be varied if there is a gift over in case of the death of any of the children under age: *Berkeley* v. *Swinburne*, 16 Sim. 275: see that case explained per cur. in *Re Emmet's Estate*, 13 Ch. D. at pp. 490 *et seq* (*d*). See also *Re Bragger*, W. N., 1887, p. 43; 56 L. T. 521.

This is a very convenient rule where the preceding interest is for the life of the parent, since it necessarily lets in every child who can come into existence. The entire property vests in the child or children, if any living at the testator's decease, with a liability to be divested *pro tanto* as the subsequent children are respectively born: see *Watson* v. *Watson*, 11 Sim. 73; *Woodcock* v. *Renneck*, 4 Beav. 130; *Pye* v. *Linwood*, 6 Jur. 618; *Packham* v. *Gregory*, 9 Jur. 175; *Locker* v. *Bradby*, 5 Beav. 593; *Evans* v. *Jones*, 2 Coll. 516; *Pattison* v. *Pattison*, 19 Beav. 638. Vested interests liable to be divested *pro tanto*.

The rule applies to executory gifts made to take effect in defeazance of a prior gift: *Ellison* v. *Airey*, 1 Ves. sen. 111; *Stanley* v. *Wise*, 1 Cox, 432; *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; and apparently to all gifts to take effect *in futuro*: see *Oppenheim* v. *Henry*, 10 Hare, 44. Executory gifts.

Where the postponement of distribution is occasioned by the reversionary nature of the property, there being a prior life-interest not belonging to the testator, children born before the reversion falls into possession are admitted precisely in the same manner as if the life-interest were created by the will: *Walker* v. *Shore*, 15 Ves. 122. But the mere Gifts of reversions.

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(*d*) The rule which lets in children born down to the period of distribution, is often stated as if it required that they should be *living* at that period. See *Baldwin* v. *Karver*, Cowp. 309; *Ayton* v. *Ayton*, 1 Cox, 327, marg. note; *Bartleman* v. *Murchison*, 2 Russ. & M. 140. It is sufficient, however, to establish the claim of any child, or of his representatives, that he was living at the death of the testator, or, subsequently, at *or before* the period of distribution or possession; and, to authorise a narrower construction, some restrictive terms must be elicited from the will: see the cases cited in the text. Children need not be living at the time of distribution.

Class of Children Entitled.

charging with annuities the property bequeathed to the children, even by the same will, does not let in children born during the continuance of those annuities: *Singleton* v. *Gilbert*, 1 Cox, 68. The rule applies also to cases of testamentary appointment under powers: see *Harvey* v. *Straney*, 1 Drew. 73, 122.

Effect where there is no object at the period of distribution.

Where the prior interest is not for the life of the parent of the children to whom the ulterior property is given, it is obvious that there may happen to be no child born until after the expiration of such interest; and then a question would arise as to the admission of such subsequently born child or children. On this point it is conceived, that the following distinctions may be gathered from the cases:—1st. That, if the subject of devise be the legal inheritance of freehold lands, as the ulterior devise to the children must take effect, if at all, as a remainder, it follows, from the rules applicable to this species of estates, that, unless some child is in esse before the preceding particular estate determines, the remainder will fail, as such, by reason of the impossibility of its taking effect at the instant of the determination of the particular estate. Thus, if freehold lands of a testator are devised to A. for life, and after his decease to the children of B. in fee, and A. dies before B. has any child born, the remainder to the children would fail, unless saved by the operation of the stat. 40 & 41 Vict. c. 33, *ante*, p. 595; and the same consequence would (before the stat. 8 & 9 Vict. c. 106, s. 8) have ensued if A.'s estate had ceased by forfeiture before B. had any child, unless the remainder had been preserved from destruction in this event by the usual limitation to trustees. But that, 2ndly, if the gift to the children be not subject to the rules governing contingent remainders, as if it be an executory devise, or a devise of copyhold lands, or of freeholds, in which the testator had the equitable inheritance only, or if it be personal estate; in any of these cases, it should seem, that, in the event of no child being in existence when the gift takes effect in possession, or rather having been in existence at some time since the

decease of the testator, the effect of this event would be to let in the whole range of children at any time thereafter born. Thus, if lands are devised to A. in fee, and if A. dies under age and without issue, then to the children of B. in fee, and, in default of such children, to C. in fee; if A. should die under age, without leaving issue when B. has not a child born, the executory devise to such children would not be defeated by that event, but would take effect in favour of any child or children afterwards coming into existence: *Hutcheson* v. *Jones*, 2 Mad. 124; see *Haughton* v. *Harrison*, 2 Atk. 329; *Horseman* v. *Abbey*, 1 J. & W. 381.

**Class of Children Entitled.**

In the case of *Chapman* v. *Blissett*, Cas. temp. Talbot, 145, lands were devised to trustees upon certain trusts during the life of A., and after his decease as to one moiety in trust for the children of A., and as to the other moiety in trust for the children of B.; B. had no child born until after the decease of A.; and it was held, that such after-born child was entitled to the other moiety. Lord *Talbot* observed: "In regard to trusts, the rules are not so strict as at law; for, the whole legal estate being in the trustees, the inconveniency of the freehold's being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented." "The same doctrine," observes Mr. Jarman (Jarm. Wills, Vol. II., p. 171), "would seem to hold in regard to bequests of personal estate; to which it is obvious none of the rules governing contingent remainders are applicable." Mr. Jarman then enters into an examination of the case of *Godfrey* v. *Davis*, 6 Ves. 43, and concludes that the judgment of *Sir W. Grant*, M. R., was partly founded upon the particular circumstances of the case. See Jarm. Wills, Vol. II., p. 175.

*Chapman* v. *Blissett.*

Such a construction is tacitly recognised in the case of *Wyndham* v. *Wyndham*, 3 Br. C. C. 58, where a testator bequeathed the residue of his estate to A. for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A. should die without any child or

Gift held to await the event of the birth of children.

**Class of Children Entitled.**

children, then he left the residue to the younger children of B., if he should have any, and if not, he left it to C. A. died without children before B. had any, and B. afterwards died without having had a child, and the question in this cause was, as to what became of the income in the interval between the deaths of A. and B.; which question of course assumes that the property did not go over to C. immediately on the death of A. without a child, but remained in expectancy during the whole life of B., to await the event of his having children. See also *Lord Beaulieu* v. *Lord Cardigan*, Amb. 533; *Hutchinson* v. *Jones*, 2 Mad. 124; *Horseman* v. *Abbey*, 1 J. & W. 381; and see these cases stated, and observed upon, Jarm. Wills, Vol. II., p. 174 *et seq.*

General conclusion from the cases.

Mr. Jarman, at p. 176, thus sums up the general conclusion to be drawn from the cases:—"The weight of authority, therefore, is decidedly in favour of the position, that all gifts to children, preceded by an anterior interest, will embrace the objects existing at the death of the testator, and all who may come *in esse* before the determination of such interest; and that in all such cases, except in the case of a legal remainder of real estate, if there be no object at the time of the vesting in possession, all the children subsequently born will be let in, unless the terms of the gift restrict it to a narrower class of objects."

*Bartleman* v. *Murchison.*

The doctrine, however, of the cases in question may seem to be encountered by the case of *Bartleman* v. *Murchison*, 2 Russ. & M. 136, or rather by the principle of the reasoning of the Lord Chancellor in that case; for the case itself was distinguishable in this respect, that the gift was to an individual and not to a class. The bequest was of an annuity to A. for life, and after her decease to B. "*if a widow*, but not otherwise, but to revert back to any child or children after her death;" and it was held that B., who was married at the death of A., and *afterwards* became a widow, was not entitled; Lord *Brougham* observing: "Although, in construing bequests of personal, the same technical strictness

Class of Children Entitled.

does not prevail as in devises of real estate, the same rules are, to a great extent, applicable;" and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, his Lordship remarked: "It is only following out the same principle, to hold, *that a person to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession.*"

Class entitled where distribution is postponed to a certain age.

3rd. Another rule of construction respecting gifts to children is, that, where the possession or distribution is postponed until the attainment of a particular age, the gift will include the children living at the death of the testator, and those who come into existence before the *eldest* reaches the prescribed age.

As, where a testator bequeaths a sum of money to be divided among such of the children of A. as shall attain the age of twenty-one years, the gift will embrace as well children living at the testator's decease, as those who come *in esse* before the majority of the eldest: *Congreve* v. *Congreve*, 1 Br. C. C. 530; *Gilmore* v. *Severn*, Id. 582; *Barrington* v. *Tristram*, 6 Ves. 348; *Paul* v. *Compton*, 8 Ves. 380; *Gilbert* v. *Boorman*, 11 Ves. 23; *Curtis* v. *Curtis*, 6 Mad. 14; *Titcomb* v. *Butler*, 3 Sim. 417; *Balm* v. *Balm*, Id. 492. And the rule is the same where the gift is to *all* the children: *Whitbread* v. *Lord St. John*, 10 Ves. 152. See also *Matthews* v. *Paul*, 3 Swanst. 339; *Curtis* v. *Curtis*, 6 Mad. 14; *Blease* v. *Burgh*, 2 Beav. 221; *Gardner* v. *James*, 6 Beav. 170; *Boughton* v. *James*, 8 Jur. 329, 1 Coll. 26; *Gillman* v. *Daunt*, 3 K. & G. 48; *Re Emmet's Estate*, 13 Ch. D. 484. *Pari ratione*, if the distribution is to take place at the majority of the *youngest* child, then children born up to that period will be let in: *Hughes* v. *Hughes* (*e*), 3 Br. C. C. 352. In

(*e*) In this case the gift was to all the children of the testator's daughters A., B., and C., to be divided when the youngest of his said grandchildren should attain twenty-one; and it was declared

Class of Children Entitled.

these respective cases, if the eldest or youngest child (as the case may be) in the testator's lifetime reached the age which was made the period of distribution, the gift, being in event immediate at his decease, would receive the same construction as if it had been so framed, *i.e.*, would be confined to children existing at the death of the testator. But if, at the death, no child had attained the prescribed age, then all the children who might come *in esse* before the eldest or youngest (as the case may be) attained the age would be let in. Where there is a gift to children to vest in possession or marriage, the class will apparently be ascertained on the marriage of the child who first marries: see *Dawson* v. *Oliver Massey*, 2 Ch. D. 753.

The rule which lets in children born down to the period when some one object is entitled to call for distribution, shews the anxiety of the Courts, in construing gifts to children, to widen the range of objects as much as can be done, without postponing the enjoyment of *any* of the legatees beyond the prescribed age, which would be the necessary consequence of waiting, after the attainment of such age by any child, to see if any others come into existence. And a construction narrowing the class will not be adopted on light, though plausible grounds, such as that of the trustees having a power of advancing the shares before the period of distribution: *Titcomb* v. *Butler*, 3 Sim. 417; or by a survivorship clause, in case of the death of any of the children: *Balm* v. *Balm*, 3 Sim. 492.

Nor will the rule be departed from though the consequence of adhering to it may be, that the gift will fail for remoteness: *Leake* v. *Robinson*, 2 Mer.

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by the decree, as stated by Mr. Eden, which corrects the seeming inaccuracy of the case, that the residue should be divisible among the grandchildren of the testator living at his death, and who had been since born, and who should be born, *until the youngest of such grandchildren should attain the age of twenty-one.* (See Jarm. Wills, Vol. II., p. 82.) If the youngest of such grandchildren had died under age, the period of distribution would have been accelerated. See *Smith* v. *Jackson*, 1 L. J. Ch. 231.

363 ; *Arnold* v. *Congreve*, 1 Russ. & M. 209 ; *Boughton* v. *James*, 1 H. L. C. 406. See *Picken* v. *Matthews*, 10 Ch. D. 264 ; and see *Kevern* v. *Williams*, 5 Sim. 171, where a direction postponing the distribution beyond legal limits of clearly vested gifts was rejected. Class of Children Entitled.

The rule of convenience, by which children born before the eldest of them has attained twenty-one are alone admissible, to the exclusion of those born after the period of distribution, does not apply to similar bequests of income ; in such cases members of the class, whenever born, as soon as they become entitled take their share of the income : *Re Wenmouth's Estate*, 37 Ch. D. 266 ; see *Mogg* v. *Mogg*, 1 Mer. 654. As to gifts of income.

4th. The preceding rules fixing the class of objects in reference to the period of their birth, only apply when the gift is indefinite ; for the construction involved in them of course yields to, and is liable to be controlled by, words pointing out a wider or narrower range of objects. Words restricting or enlarging the sense.

Thus, the words "now living," added to a gift to children, take it completely out of the rules in question ; the time referred to is held to be the period of making the will ; precluding the claim, therefore, of children born in the interval between that period and the death of the testator (*f*) : *James* v. *Richardson*, 1 Vent. 334 ; 2 Vent. 311 ; *S. C.*, nom. *Burchet* v. *Durdant*, T. Raym. 330. See *Att.-Gen.* v. *Bury*, 1 Eq. Ca. Ab. 201 ; *Crosley* v. *Clare*, 3 Swanst. 320, n. ; *Abney* v. *Miller*, 2 Atk. 593 ; *Blundell* v. *Dunn*, cit. 1 Mad. 433 ; and not only so, but the objects are regarded not as a fluctuating class, embracing such of the children existing at the date of the will as happen to be living at the testator's decease (as one should have inferred, judging from the construction applied to indefinite gifts to children) ; "Now living."

(*f*) The same reasoning might seem to apply to verbs in the present tense. But a bequest to A.'s children to every child he *hath*, was extended to future children : *Ringrose* v. *Bramham*, 2 Cox, 384.

Class of Children Entitled.

but the gift is construed as applying to the children living at the making of the will, *as individuals*, in the same manner as if they were described by name; from whence ensues this consequence, that, if any of them die in the lifetime of the testator, being tenants in common, their shares lapse. See *Ackerman* v. *Burrows*, 3 Ves. & B. 54; see also *ante*, p. 616. But if the class is to be ascertained by an event contingent at the date of the will (as where the gift is to all the children of B. who shall be living at A.'s death), the happening of that event before the testator's death does not so ascertain the individual members of the class as to make their shares subject to lapse by death before the testator: *Lee* v. *Pain*, 4 Hare, 250, *ante*, p. 616.

Words "born" or "begotten."

The word, *born* or *begotten*, however, added to a gift to children, does not restrict it to objects born before the making of the will, (Co. Litt. 20, b.), or before the death of the testator: *Brown* v. *Groombridge*, 4 Mad. 495; nor does a gift to children *hereafter to be born* apply exclusively to after-born children, but includes such as are born before the making of the will; *Doe* v. *Hallett*, 1 M. & S. 124. See *Hewet* v. *Ireland*, 1 P. Wms. 426. See also Mr. Jarman's observations on the cases of *Hebblethwaite* v. *Cartwright*, Cas. temp. Talb. 31, and *Shuldham* v. *Smith*, 6 Dow, 22, in his Treatise on Wills, Vol. II., p. 182, notes (*s*), (*u*).

"*To be* born," or "*to be* begotten."

The effect of the words "*to be* born or begotten," in letting in after-born children, admits of the following distinction:—If the gift is *immediate*, so that, without these additional words, it would be confined to children living at the testator's death, they operate to enlarge the gift, so as to comprehend all after-born children, without any regard to the circumstance of there being, or not being, a child living at the death. But where the words in question are annexed to a gift *in remainder*, or any other future gift, which would, under the ordinary rule, embrace children born after the testator's decease, they do not in general enlarge or vary the range of objects.

Thus, if a testator give a fund to the children of

A. *begotten and to be begotten*, the bequest will not be confined to the children, if any, living at the testator's decease (as would have been the construction without these words), but will extend to *all* after-born children: *Mogg* v. *Mogg*, 1 Mer. 654; see *Gooch* v. *Gooch*, 3 De G. M. & G. 366; while, on the other hand, if the gift be to A. for life, and, after his decease, to his grandchildren *born and to be born;* this will extend to grandchildren coming into existence before the period of distribution, but no farther, being precisely the same construction which would have obtained if the words in question had not been added: *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Gilbert* v. *Boorman*, 11 Ves. 238; *Parsons* v. *Justin*, 34 Beav. 598. And a power of selection by will, given to a legatee for life in favour of grandchildren "hereafter to be born," has been held not to authorise an appointment to grandchildren born after the death of the donee of the power: *Paul* v. *Compton*, 8 Ves. 375.

Class of Children Entitled.

The preceding rules, fixing the classes of children entitled under indefinite gifts, are not applicable to pecuniary legacies payable, not out of any divided or appropriated fund, but out of the general personal estate. In the latter case, the letting in unborn children is attended with the consequence of tying up the entire personalty, which cannot be distributed until the number of the pecuniary legatees is ascertained: *Storrs* v. *Benbow*, 3 De G. M. & G. 390; see also *Defflis* v. *Goldschmidt*, 19 Ves. 566; 1 Mer. 417; *Sprackling* v. *Rainer*, 1 Dick. 344.

Whether preceding rules apply to pecuniary legacies.

It may be here observed that in case of a variation in a will between the words of gift to a class of children and the words of gift over, the Court will lean to a construction vesting the shares at twenty-one: *Jackson* v. *Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806.

Court favours construction vesting shares at twenty-one.

5th. In applying the rules which regulate the claims of children by the period of their birth, a child *en ventre sa mère* is to be considered as a child in existence; and nothing but a clearly marked intention would induce a contrary construction. Thus,

Child *en ventre sa mère* regarded as a child *in esse*, and even born.

Class of Children Entitled.

not only will a devise or bequest to the children of A. *living* at a given period include a child of this description: *Doe* v. *Clarke*, 2 H. Bl. 379; *Clarke* v. *Blake*, 2 Ves. jun. 673; but even a gift to children *born* at a prescribed period, has been recently held to extend to a child then *in esse*, though not actually born: *Trower* v. *Butts*, 1 S. & St. 181. See also *Whitelock* v. *Heddon*, 1 B. & P. 243. This rule of construction prevails in all cases where an unborn child is benefited by its application, as in the case of an appointment under a power: *Re Farncombe's Trusts*, 9 Ch. D. 652; or where his acquisition of property by devise or devolution would otherwise be prevented: *Burdett* v. *Hopegood*, 1 P. Wms. 485; *Pearce* v. *Carrington*, L. R. 8 Ch.; but not where the application of the rule would be to his detriment: see *Blasson* v. *Blasson*, 2 De G. J. & S. 665. It has been held that the rule does not extend to brothers and sisters: *Re Gardiner's Estate*, L. R. 20 Eq. 647; and in *Bennett* v. *Honeywood*, Amb. 708, it was held that the admission of children *en ventre* was confined to gifts to children and could not be extended to gifts to relations. See, however, Mr. Jarman's observations on these decisions: Jarm. Wills, Vol. II., p. 186. The express mention of posthumous children, therefore, has been properly omitted out of the modern forms. See 2 Jarm. Wills, 103—105, and the cases there cited.

Rules fixing the class of objects apply to grandchildren, brothers, &c.

6th. Gifts to grandchildren, great-grandchildren, and remoter degrees of issue, are governed by the same rules of construction, in regard to the period of ascertaining the objects, as gifts to children: see 2 Vern. 545. And gifts to brothers and sisters, nephews and nieces, &c., are also undistinguishable, being, in fact, substantially gifts to children described by another degree of relationship; for instance, a gift to nephews and nieces is, in effect, a gift to the children of brothers and sisters. Thus, it is clear, that if land or money is given to A. for life, and after his decease to his brothers or sisters, the gift will include the brothers or sisters living at the testator's decease, and those that come *in esse*

during the life of A.: *Devisme* v. *Mello*, 1 Br. C. C. 537; *Leake* v. *Robinson*, 2 Mer. 363; *Balm* v. *Balm*, 3 Sim. 492. So, if an immediate devise or bequest is made to brothers or sisters, it will apply to brothers and sisters living at the testator's death, without regard to the antecedent history of the class: *Doe* v. *Sheffield*, 13 East, 526. Where a testator gave property upon trust for the person who should at a time subsequent to his own death by virtue of the Statutes of Distribution be his next of kin, it was held that the class must be ascertained as if the testator had died at such subsequent time: *Sturge and the Great Western Rail. Co.*, 19 Ch. D. 444.

Class of Children Entitled.

7th. Another question is whether a gift over in case of a prior devisee or legatee dying without children, means without *having had* or without *leaving* a child.

Whether dying without children means *having* or *leaving* a child.

Where the expression used is simply "without children" or "without any child," it is construed to refer to the period of the death: *Hughes* v. *Sayer*, 1 P. Wms. 534; *Thicknesse* v. *Legge*, 3 Br. P. C. Toml. 365 (*g*). See *Jeffreys* v. *Conner*, 28 Beav. 328.

But the words "without having children" mean without having had a child: *Weakley* d. *Knight* v. *Rugg*, 7 T. R. 322; *Bell* v. *Phyn*, 7 Ves. 453; *Wall* v. *Tomlinson*, 16 Ves. 413; *Findon* v. *Findon*, 1 De G. & J. 380; *Jeffreys* v. *Conner*, 28 Beav. 328.

"Without *having*" children.

A gift over upon death "without *leaving*" children or issue, *primâ facie* applies only to children or issue living at the death: *Read* v. *Snell*, 2 Atk. 647; *Cross* v. *Cross*, 7 Sim. 201; *Wingrave* v. *Palgrave*, 1 P. Wms. 401; *Farrer* v. *Barker*, 9 Hare, 737; *Bythesea* v. *Bythesea*, 17 Jur. 645; *Kimberley* v. *Tew*, 4 Dr. & W. 139; *Re Watson's Trusts*, L. R. 10 Eq. 36; *Jeyes* v. *Savage*, L. R. 10 Ch. 555.

"Without *leaving*" children.

Sometimes, however, the expression is construed as equivalent to "without having" children, so as to avoid destroying vested interests: *Maitland* v.

(*g*) In many such cases the word "children" has been construed to mean issue: see *Doe* v. *Webber*, 1 B. & Al. 713; *Doe* v. *Simpson*, 4 Bing. N. C. 33; *Bacon* v. *Cosby*, 4 De G. & S. 261; *Parker* v. *Birks*, 1 K. & J. 156.

Class of Children Entitled.

*Chalie*, 6 Mad. 243; *Ex parte Hooper*, 1 Drew. 264; *Re Thompson's Trusts*, 5 De G. & S. 667; *Sheffield* v. *Kennet*, 4 De G. & J. 593; *White* v. *Hill*, L. R. 4 Eq. 265; *Bryden* v. *Willett*, L. R. 7 Eq. 472; *White* v. *Hight*, 12 Ch. D. 751; and see *Powis* v. *Burdett*, 9 Ves. 428, where there was a prior advancement out of portions.

### 4. Gifts to Younger Children, First Son, Eldest Son, etc.

Younger, means unprovided-for children.

Gifts to *younger* children are commonly intended as a provision for all the branches of a family, for whom there would otherwise be no provision; for the *eldest* son, by the law of primogeniture and the ordinary mode of family settlements, usually takes the estate; and this consideration has so materially influenced the construction, that the term "younger children" has been held, in many instances, to mean children without distinction of age, other than those who take the estate. Thus, under a trust to raise portions for younger children, a second son who succeeds to the lands charged therewith by the death of his elder brother will not be entitled to participate in the portions: *Reid* v. *Hoare*, 26 Ch. D. 363, where the cases on the point are fully considered. So also, if a testator, having power to devise lands to any of his children, charged with portions for the younger children, appoints the lands to one or more of the younger children, the other children, *though senior to the appointees* of the land, would be entitled to share in the portion: *Duke* v. *Doidge*, 2 Ves. sen. 203. See also *Chadwick* v. *Doleman*, 2 Vern. 528; *Beale* v. *Beale*, 1 P. Wms. 244; *Butler* v. *Duncombe*, Id. 451; *Heneage* v. *Hunloke*, 2 Atk. 456; *Pierson* v. *Garnett*, 2 Br. C. C. 38; see *Peacock* v. *Pares*, 2 Kee. 699; *Sing* v. *Leslie*, 2 H. & M. 87; and the rule applies to a devise of lands to younger children: *Re Bayley's Settlement*, L. R. 6 Ch. 590; see *Hall* v. *Luckup*, 4 Sim. 5. So, if settled land is disentailed and resettled by the tenant for life and his eldest son, such son will be excluded from participating in portions for younger

children if he substantially takes under the resettlement an interest for the benefit of himself and his issue, similar to what he had before the estate tail under the original settlement was barred: *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43. But not so a younger brother succeeding by devise or descent from his elder brother, where the estate tail has been simply barred without any resettlement, as in that case the younger son takes under a new title: *Spencer* v. *Spencer*, 8 Sim. 87; *Maconbrey* v. *Jones*, 2 K. & J. 684. And, upon the same principle, a gift to younger children is confined to children of an existing marriage, since otherwise it might let in the eldest son of a future marriage, taking, by settlement or otherwise, a large estate: *Coleman* v. *Seymour*, 1 Ves. sen. 209 (*h*). Gifts to Younger Children.

But the construction in question, it seems, is confined to gifts by parents, or a grandfather (1 Ves. sen. 209), or other person standing *in loco parentis*, and does not extend to gifts by strangers, who are considered to use the term "younger children" in its general or popular sense: see *Lord Teynham* v. *Webb*, 2 Ves. sen. 197; *Hall* v. *Hewer*, Amb. 203; *Lady Lincoln* v. *Pelham*, 10 Ves. 166. Nor is there any reported instance of its being applied to such dispositions of real estate, unless where aided by the context. See *Heneage* v. *Hunloke*, 2 Atk. 456; *Wilbraham* v. *Scansbrick*, 1 H. L. C. 176; *Livesey* v. *Livesey*, 2 H. L. C. 419; *Sandeman* v. *Mackenzie*, 1 J. & H. 628; *Lyddon* v. *Ellison*, 19 Beav. 565; see also *Bathurst* v. *Errington*, 2 App. Ca. 698.

An only son cannot succeed to property limited to the use of the second, third, fourth, fifth, and all and every other the sons and son of A., save and except an eldest son: *Tinte* v. *Bermingham*, L. R. 7 H. L. 634. But an only child has been held to be entitled to a bequest to the "youngest child" of A.: *Emery* v. *England*, 3 Ves. 232; see *West* v. *Primate* Only son.

(*h*) It is clear, that a gift of portions to children in general, cannot be restrained to younger children, because charged on an estate which is devised to the eldest son: *Incledon* v. *Northcote*, 3 Atk. 438.

**Gifts to Younger Children.**

Period when the class of younger children is ascertained.

*of Ireland*, 2 Cox, 258. See further as to gifts to younger children, Jarm. Wills, Vol. II., pp. 201 *et seq.*

Whether, in all other respects, gifts to *younger* children are governed by the rules which apply to gifts to children in general, is doubtful. A gift to younger children, taking effect in possession at the decease of the testator, certainly has been held, in conformity to the general rule, to include the persons *then* answering to the description, and those only: *Coleman* v. *Seymour*, 1 Ves. sen. 209. And it might seem to follow, that a gift to A. for life, and after his decease to his younger children, would apply to those who answered the description at the testator's decease, and vest in them accordingly, subject to be divested *pro tanto* in favour of any who afterwards might come into being before the period of distribution: see *Lady Lincoln* v. *Pelham*, 19 Ves. 166. But this construction, however well recommended by the principles of analogical reasoning, has not invariably been adopted; for, in many instances, gifts by parents or persons standing *in loco parentis* to younger children, preceded by the gift of a life interest to the parent, have been held to apply to persons answering the description when the portions become payable, and not to a younger child, who becomes an elder during the life of the donee for life: *Chadwick* v. *Doleman*, 2 Vern. 528; *Broadmead* v. *Wood*, 1 Br. C. C. 77; *Savage* v. *Carroll*, 1 Ba. & B. 265; *Maconbrey* v. *Jones*, 2 K. & J. 692. A distinction, however, has been made in the case of gifts which are not parental provisions, and it seems to be now settled that, in such cases, the time of vesting is the proper time for ascertaining who are entitled to realty or personalty, under a devise or bequest to younger children: *Adams* v. *Bush*, 8 Sc. 405; 6 Bing. N. C. 164; *Re Theed's Settlement*, 3 K. & J. 375; see also *Adams* v. *Adams*, 25 Beav. 652; *Sandeman* v. *Mackenzie*, 1 J. & H. 613. A different conclusion was, indeed, come to in two cases, which related to contingent transmissible interests in personalty, but the soundness of these decisions is perhaps now open to question: see *Hall* v. *Hewer*, Amb. 203; *Ellison* v. *Airey*, 1 Ves. sen.

111. See Mr. Jarman's observations on these cases, Jarm. Wills, Vol. II., p. 207 ; and see *Bryan* v. *Collins*, 16 Beav. 14. Of course, an express exception of the son who shall be the eldest at the time of the death of the tenant for life, restrains the gift to the younger children *at that period : Billingsley* v. *Wills*, 3 Atk. 219. And a gift to the elder son for the time being in one part of the will, would, it seems, form a ground for giving a similar construction to a gift to younger children indefinitely in another part. See *Bowles* v. *Bowles*, 10 Ves. 177 ; *Sansbury* v. *Read*, 12 Ves. 175. Gifts to Younger Children.

It is clear that, even in a case of parental provision, if there be an express gift over in the event of a younger child becoming an elder before a given age or period, such a child, becoming an elder *after* the prescribed age or period, is not excluded, agreeably to the rule *exclusio unius est inclusio alterius : Windham* v. *Graham*, 1 Russ. 331. Some of Lord *Gifford's* reasoning in this case favours the conclusion that the time of vesting is the period of ascertaining who are younger children ; and which seems to be the sound rule (see also *Re Bayley's Settlement*, L. R. 6 Ch. 590), though scarcely reconcilable with the case of *Matthews* v. *Paul*, 3 Swanst. 328, where Sir *T. Plumer* held, that the exception of "an eldest son" applied to the time of distribution, and not to the period of vesting. The circumstances, however, were not such as to render it necessary to decide on the alternative of these two constructions. See Mr. Jarman's observations upon *Matthews* v. *Paul*, Jarm. Wills, Vol. II., p. 210 ; and see *Domvile* v. *Winnington*, 26 Ch. D. 382.

Gifts to *first* and *second, eldest* and *youngest* children, frequently raise a question with respect not only to what is meant by these words, but also to the period when they are to be applied. In *Trafford* v. *Ashton*, 2 Vern. 660, under a devise in trust for A. for life, remainder to the *second* son of her body in tail, "second" was held to mean second in order of *birth*, and to apply to a second son who had become an elder at the testator's decease : see also *Meredith* v. *Treffry*, 12 Ch. D. 170. But the rule will be ex- Gift to *second* son.

Gifts to Younger Children.

cluded if the first or second son in order of birth is dead at the date of the will to the testator's knowledge: *King* v. *Bennett*, 4 M. & W. 36; or if the will contains expressions showing a contrary intention: see *Bowles* v. *Bowles*, 10 Ves. 177; *Livesey* v. *Livesey*, 2 H. L. C. 419; *Bathurst* v. *Errington*, 2 App. Ca. 698. And a son who comes *in esse* after the date of the will but dies before the testator, is not taken into account. In *Lomax* v. *Holmden*, 1 Ves. sen. 290, Lord *Hardwicke* considered, that, under a devise to A. for life, remainder to his *first* son in tail, *first* was to be construed as *eldest*, so as to extend to a son who was the second in order of birth, but the eldest at the testator's decease: see *King* v. *Bennett*, 4 M. & W. 36; *Driver* v. *Frank*, 3 M. & S. 25; *Alexander* v. *Alexander*, 16 C. B. 59.

"First son."

Devise to second &c., and *other* sons.

In *Langston* v. *Langston*, 8 Bli. N. S. 16; 2 Cl. & F. 194, a gift to second, &c., "and all and every *other* son" of A., was extended to the eldest son by implication, a consideration of the entire will indicating a probability that a devise to him was omitted by mistake.

### 5. Rule in Wild's Case—"Children," &c., where Words of Limitation.

Children, &c., where words of limitation.

In *Wild's Case*, 6 Rep. 16 b, and in other early cases, it is laid down, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it was said (6 Rep. 17), "the intent of the devisor is manifest and certain, that the children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum naturâ*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation." The principle has been followed in several subsequent cases. (See Jarm. Wills, Vol. II., pp. 389—91). But the object of the rule is to give effect to the testator's intention to benefit the children as far as may be, in any event. And

Rule in Wild's Case.

accordingly in *Buffar* v. *Bradford*, 2 Atk. 220, where a testator in a certain event gave real and personal estate to *A. and the children of her body;* and A. having died in the testator's lifetime, leaving a child, who was born after the making of the will, *at which time A. had no child*, it was contended, on the authority of *Wild's Case*, that the devise had lapsed; but Lord *Hardwicke* held the child to be entitled. His Lordship said, "it must be allowed that children, in their natural import, are words of purchase and not of limitation, unless it is to comply with the intention of a testator, where the devise cannot take effect in any other way." But this decision must be regarded as depending on the circumstances of the case, and not as sanctioning a general modification of the rule. See the observations on this case in Jarm. Wills, Vol. II., p. 392. See also on this point *Seale* v. *Barter*, 2 B. & P. 487; *Grieve* v. *Grieve*, L. R. 4 Eq. 180.

Where there are children at the time of the devise.

According to the resolution in *Wild's Case*, as reported in Coke (6 Rep. 17), it has been considered as settled, that children, if there were any, would take jointly with their parent by purchase; and with this seems to agree *Oates* v. *Jackson*, 2 Stra. 1172. But, in *Jeffery* v. *Honywood*, 4 Mad. 398, (and see Mr. Jarman's observations thereon, Jarm. Wills, Vol. II., p. 394), where the devise was to A. and "to all and every the child and children, whether male or female, of her body lawfully issuing; and unto his, her, and their heirs or assigns for ever, as tenants in common," Sir *J. Leach*, V.-C., held, that A. took an estate for life, with remainder to her children as tenants in common in fee. He said, "I consider that there are two gifts, one to the mother, without words of limitation superadded; and another to her children, their heirs and assigns. And these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a remainder in fee to the children. In *Oates* v. *Jackson*, the mother was, by the plain force of the expression, comprehended in the limitation in fee." But in *Oates* v. *Jackson* the expression was to A. "and her children"; the distinction is

Rule in Wild's Case.

therefore very slight, and the decision in *Jeffery* v. *Honywood*, is clearly inconsistent with the current of authority, and must be regarded as overruled: see *Broadhurst* v. *Morris*, 2 B. & Ad. 1; *Cormack* v. *Copons*, 17 Beav. 403; *Byng* v. *Byng*, 10 H. L. C. 171.

Contrary intention.

This rule, however, will give way if a contrary indication is indicated by the will; as where a devise of an estate and of certain articles to go as heirlooms therewith was held to be sufficient to rebut a joint tenancy and to confer on the parent an estate tail; *Byng* v. *Byng*, 10 H. L. C. 171. So also, where there was a devise to A. "and his children in succession": *Earl of Tyrone* v. *Marquis of Waterford*, 1 De G. F. & J. 613; and where the devise was to A., "to her and to her children": *Roper* v. *Roper*, L. R. 3 C. P. 32.

Rule as to personalty.

With regard to bequests of personalty to a person and his children the general rule is that the parent and children take jointly unless there is an indication of contrary intention in the will: see the observations of Lord *Cottenham* in *Crockett* v. *Crockett*, 2 Ph. at pp. 555, 556; see also *Pyne* v. *Franklin*, 5 Sim. 458; *Nevill* v. *Nevill*, L. R. 7 Ch. 253 (where the principal decisions on the point are discussed): *Fisher* v. *Webster*, L. R. 14 Eq. 283.

But very slight indications of intention have frequently been held sufficient to avoid the rule and to give to the parent a life interest, with remainder to the children: see *Crawford* v. *Trotter*, 4 Mad. 361; *Morse* v. *Morse*, 2 Sim. 485; *Vaughan* v. *Marquis of Headfort*, 10 Sim. 639; *Dawson* v. *Bourne*, 16 Beav. 29; *Cator* v. *Cator*, 14 Beav. 463; *Parsons* v. *Cooke*, 4 Drew. 296; *Audsley* v. *Horn*, 1 De G. F. & J. 226; *Salmon* v. *Tidmarsh*, 5 Jur. (N. S.) 1380; *Ward* v. *Grey*, 26 Beav. 485; *Armstrong* v. *Armstrong*, L. R. 7 Eq. 522: *Coombe* v. *Hughes*, L. R. 14 Eq. 415. And an executory trust to settle personalty on A. and her children will be carried into effect by directing a settlement in trust for A. for life with remainder to the children: *Cator* v. *Cator*, 14 Beav. 463; *Re Bellasis' Trusts*, L. R. 12 Eq. 218.

For further information as to the nature and

operation of the "Rule in *Wild's Case*," reference may be made to Jarm. Wills, Vol. II., pp. 389 *et seq*; and the notes in Tud. L. C. Conv. pp. 669 *et seq*. Rule in Wild's Case.

### 6. Rule in Shelley's Case.

The rule in *Shelley's Case* is a rule of law, not a rule of construction (*i*). This rule is, that where an estate of freehold is given to a person, and, by the same instrument, an ulterior estate (whether immediately following the first or subject to other remainders intervening) is given to the heirs or the heirs of the body of the same person, the ulterior estate vests in that person himself, in the same manner as if it had been expressly given to him and his heirs, or to him and the heirs of his body. That is, if the gift be to his heirs, he takes a fee-simple; if to the heirs of his body, he takes a fee-tail. Statement of the rule.

The celebrated case of *Perrin* v. *Blake*, 4 Burr. 2579, 1 W. Bl. 672, furnishes a striking instance of the operation of this rule. In that case W. W. devised in the following words:—"Should my wife be enseint with child at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000*l*. &c., and if it be a male, I give and bequeath my estate real and personal equally to be divided between the said infant and my son J. W., when the said infant shall attain the age of twenty-one. Item, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son J. W. and the said infant for and during the term of their natural lives, the remainder to my brother-in-law J. G. and his heirs, for and during the lives of my son J. W. and the said infant, the remainder to the heirs of the body of my said sons J. W. and the said infant, lawfully begotten or to be begotten, the remainder to my daughters, &c." *Perrin* v. *Blake*.

(*i*) Lord *St. Leonards*, however, in *Montgomery* v. *Montgomery*, 3 J. & L., at p. 51, says, "This is a rule of a flexible nature; for

Rule in Shelley's Case.

No other son was born; and the question was, what estate J. W. took under this will. Lord *Mansfield*, C. J., and *Aston* and *Willes*, JJ. (*Yates*, J., diss.), held, that he was tenant for life only; but their judgment was reversed by a majority of the Judges in the Exchequer Chamber, who held, that J. W. took an estate tail. An appeal was brought in the House of Lords, but was compromised.

Since this decision the rule may be regarded as established. Space will not admit of a detailed examination of the nature and operation of this rule in the present Dissertation. A few of the chief practical points arising out of the rule will, however, be here briefly noticed.

Extent and application of the rule.

The rule applies to limitations of estates in copyholds, and to estates *pur autre vie: Busby* v. *Greenslate*, 1 Str. 445; *Doe* d. *Jeff* v. *Robinson*, 8 B. & C. 296; *Low* v. *Burron*, 3 P. Wms. 262; *Forster* v. *Forster*, 2 Atk. 259. Rentcharges are also within the rule: *Drew* v. *Barry*, I. R. 7 Eq. 413, 8 Eq. 260. And a similar rule applies to bequests of personalty to A. for life, with remainder to his executors: see Co. Lit. 54 b.; and see *Holloway* v. *Clarkson*, 2 Hare, 521; *Deval* v. *Dickins*, 9 Jur. 550; *Page* v. *Soper*, 11 Hare, 321.

Rule applies notwithstanding expressions of contrary intention.

No expressions of intention, however explicit, that the first taker is to have only a life interest, will exclude the operation of the rule: *Robinson* v. *Robinson*, 1 Burr. 38; 2 Ves. sen. 225: *Roe* d. *Thong* v. *Bedford*, 4 M. & S. 362; nor will a declaration that the heir is to take by purchase: Harg. L. Tr. 562. Still less will any indications of such intention have that effect to be implied from the interposition of trustees to preserve contingent remainders: *Wright* v. *Pearson*, Amb. 358; or that the first taker is made unimpeachable for waste; *Jones* v. *Morgan*, 1 Br. C. C. 206; *Measure* v. *Gee*,

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if the intention of the testator be *clearly* and *manifestly* contrary to the legal import of the words, the technical rule of law shall give way to this plain intent of the testator." But see the observations of Lord *Cairns* on the rule in *Bowen* v. *Lewis*, 9 App. Ca. at p. 907.

Rule in Shelley's Case.

5 B. & Al. 910; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; or that he has a power of jointuring or granting leases: *Baile* v. *Colman*, 2 Vern. 668; *King* v. *Melling*, 2 Lev. 58; *Broughton* v. *Langley*, 2 Ld. Raym. 873; or that he is to keep buildings in repair: *Jesson* v. *Wright*, 2 Bligh. 1; or from a limitation to A. for life, with remainder to the first heirs of his body who shall attain twenty-one years of age: *Minshull* v. *Minshull*, 1 Atk. 411; *Toller* v. *Attwood*, 15 Q. B. 929.

Rule applies notwithstanding added words of limitation or distribution.

The rule applies, notwithstanding the addition of words of limitation, to the words "heirs" or "heirs of the body." Thus the heirs or heirs of the body will not take by purchase, although the will expressly gives to them an estate for life only: *Doe* v. *Stenlake*, 12 East, 55; *Hugo* v. *Williams*, L. R. 14 Eq. 224; or an estate tail in however explicit terms: *Minshull* v. *Minshull*, 1 Atk. 411; *Legatt* v. *Sewell*, 1 P. Wms. 37; *Douglas* v. *Congreve*, 1 Beav. 59; or an estate in fee simple: *Kinch* v. *Ward*, 2 S. & St. 409; *Measure* v. *Gee*, 5 B. & Al. 910; *Nash* v. *Coates*, 3 B. & Ad. 839. Similarly words of distribution will be rejected: *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; *Jesson* v. *Wright*, 2 Bligh, 1; *Doe* v. *Featherstone*, 1 B. & Ad. 944; *Pierson* v. *Vickers*, 5 East, 548; *Doe* d. *Bosnall* v. *Harvey*, 4 B. & C. 610 (a case of gavelkind lands); see also *Roddy* v. *Fitzgerald*, 6 H. L. C. 823. Nor will the addition of words of limitation and distribution together have the effect of causing the heirs to take as purchasers: *Jordan* v. *Adams*, 9 C. B. (N. S.) 483; see *Mills* v. *Seward*, 1 J. & H. 733; *Anderson* v. *Anderson*, 30 Beav. 209. It has, however, been said that if words of limitation are added which are inconsistent with the course of descent in the ancestor, the heirs or heirs of the body would take by purchase: Fea. C. R. 182; but there is no express authority on the point, though this view was taken where the gift was to A. for life, with remainder to her *issue female* and the heirs of their bodies: *Hamilton* v. *West*, 10 Ir. Eq. 75.

Where the word "heir" is used.

Where the word "heir" is used, in the singular number, without added words of limitation, the

Rule in Shelley's Case.

"Rule in Shelley's Case" will apply: *Dubber* v. *Trollope*, Amb. 453; *Blackburn* v. *Stables*, 2 Ves. & B. 367; *Fuller* v. *Chamier*, L. R. 2 Eq. 682; so also, if the devise is to A. for life, and after his death to the "heir of his body for ever": *Pawsey* v. *Lowdall*, Sty. 249; *Wilkins* v. *Whiting*, 1 Bulstr. 219; *Clark* v. *Day*, Cro. Eliz. 314. But if words of limitation are superadded, the heir or heir of the body will take by purchase. Thus, a devise to A. for life, and after his death "to the heir male of his body lawfully begotten during his life," gives to A. a life estate only, with remainder for life to the person answering the description of the heir of the body at his death: *White* v. *Collins*, 1 Com. Rep. 289. So also if the words of limitation are in fee or in tail: *Archer' Case*, 1 Rep. 66; *King* v. *Melling*, 1 Vent. 214; *Willis* v. *Hiscox*, 4 My. & Cr. 197; *Greaves* v. *Simpson*, 12 W. R. 773; even though there be a gift over if A. dies without any son of his body: *Chamberlayne* v. *Chamberlayne*, 6 E. & B. 625.

What words will import the rule.

It may be here remarked, that to bring a case within the rule, it is not necessary that the word heirs of the body should be used; and synonymous words will give to the first taker an estate tail, *e. g.*, "seed": Co. Litt. 9 b.; "son": *Robinson* v. *Robinson*, 2 Ves. 225; *Mellish* v. *Mellish*, 3 B. & C. 520; "lawful issue": 5 Beav. 241; "offspring": *Young* v. *Davies*, 2 Dr. & Sm. 167; "family according to seniority": *Lucas* v. *Goldsmid*, 29 Beav. 657; or even "children," if followed by a gift over on death "without issue": *Bowen* v. *Lewis*, 9 App. Ca. 890 (*per* Earl *Cairns*, and Lords *Blackburne* and *Fitzgerald*, diss. Earl of *Selborne*, C., and Lord *Bramwell*). On the other hand, the testator may exclude the operation of the rule by expressly or impliedly indicating that he uses the words "heirs" or "heirs of the body" in a special sense. As where a testator gave property to A. and the heirs of his body, "that is to say his first, second, and other sons": *Lowe* v. *Davies*, 2 Ld. Raym. 1561; see *Fetherston* v. *Fetherston*, 3 Cl. & F. 67. So also if the testator uses the words "heirs of the body" referring to the first taker as their father: *Jordan* v. *Adams*, 9 C. B.

(N. S.) 483 ; or he may explain his meaning by reference to other clauses in the will : see *Meredith* v. *Meredith*, 10 East, 503 ; *East* v. *Twyford*, 4 H. L. 517.

Rule in Shelley's Case.

The "Rule in Shelley's Case" applies generally to cases where the limitations are to A. for life with remainder to his "issue." But it would seem (notwithstanding the *dictum* to the contrary of Lord *Wensleydale* in *Roddy* v. *Fitzgerald*, 6 H. L. C. 882) that where this word occurs in a will, the rule will be applied with less strictness than where the technical expression "heirs of the body" is used : see *Morgan* v. *Thomas*, 9 Q. B. D. 643 (*k*).

Operation of the rule where the word "issue" is used.

Thus, it has been repeatedly held that if words both of limitation and distribution are added to the word "issue" in a devise to A. for life with remainder to his issue, the issue will take as purchasers, whether there is a gift over in default of issue or not : *Lees* v. *Mosley*, 1 Y. & C. 589 ; *Tate* v. *Clarke*, 1 Beav. 100 ; *Crozier* v. *Crozier*, 2 Dr. & W. 373 ; *Greenwood* v. *Rothwell*, 5 M. & Gr. 628 ; 6 Beav. 492 ; *Slater* v. *Dangerfield*, 15 M. & W. 263.

Words of both limitation and distribution.

Added words of limitation alone will not generally exclude the rule, so as to make the issue take as purchasers : *Roe* d. *Dodson* v. *Grewe*, 2 Wils. 322 ; *King* v. *Burchell*, 1 Eden, 424 ; *Dean* v. *Puckey*, 5 T. R. 299 ; *Frank* v. *Stovin*, 3 East, 548 ; *Griffiths* v. *Evan*, 5 Beav. 241 ; *Elton* v. *Eason*, 19 Ves. 73 ; *Fetherston* v. *Fetherston*, 3 Cl. & F. 67 ; 9 Bli. 237. But an exception has been made where the added words of limitation alter the course of descent : *Doe* d. *Cooper* v. *Collis*, 4 T. R. 294 ; *Greenwood* v. *Rothwell*, 5 M. & Gr. 628 ; see *Hamilton* v. *West*, 10 Ir. Eq. R. 75, *ante*, p. 637 ; *Dodds* v. *Dodds*, 10 Ir. Ch. R. 476 ; 11 Ch. R. 374. And it would seem that, at the present day, the Court will seize upon any expressions in the context showing that the testator used the word issue as synonymous with children, so as to oust the operation of the rule.

Words of limitation only.

(*k*) It has frequently been held, by force of the context, that the word issue must be taken to mean children, and not to bear its strict legal and technical meaning of descendants : see *ante*, p. 609.

Rule in Shelley's Case.

Thus, in the recent case of *Morgan* v. *Thomas*, 9 Q. B. D. 643, where a testator devised land to A. for life, "and after his decease to his lawful *issue* and their heirs for ever, if any, and if he shall die *without leaving any children* born in wedlock" then over, it was unanimously held by the Court of Appeal (*Jessel*, M. R., *Hannen*, J., and *Lindley*, L. J.), affirming the decision of *Cave*, J. (8 Q. B. D. 575), that the devise gave to A. an estate for life only, and that as he died without leaving children, the gift over took effect; and the appeal was dismissed with costs. See also the observations of *Wood*, V.-C., in *Kavanagh* v. *Morland*, Kay, at p. 24. But in a subsequent case in the House of Lords, a testatrix devised lands to A. for life "and after his decease to his legitimate *child or children*, if any, but if he dies without *issue*," then over; it was held by Earl *Cairns* and Lords *Blackburne* and *Fitzgerald*, affirming the decision of the Court of Appeal, that A. took an estate tail; the Earl of *Selborne*, C., and Lord *Bramwell* dissented, being of opinion that A. took only an estate for life, with remainder to his children in fee as purchasers: *Bowen* v. *Lewis*, 9 App. Ca. 890.

Words of distribution only.

Similarly, added words of distribution alone have been held not to make the issue take as purchasers: *Doe* d. *Blandford* v. *Applin*, 4 T. R. 82; *Doe* d. *Cook* v. *Cooper*, 1 East, 229; *Ward* v. *Bird*, 1 Y. & J. 512; *Harrison* v. *Harrison*, 7 M. & Gr. 938; *Kavanagh* v. *Morland*, Kay, 16; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823. But in such cases also the issue will be held to take as purchasers, if an intention to that effect is indicated by the context of the will: *Montgomery* v. *Montgomery*, 3 J. & L. 47.

Implied and contingent limitations.

The rule will apply not only where there are express limitations to a person and his heirs or the heirs of his body, but where such limitations arise by implication: see Jarm. Wills, Vol. II., p. 339. Also where a limitation is contingent; as if lands be given to A. and B., so long as they shall jointly live, the remainder to the right heirs of him that dieth first, and warrant the land *in formâ prædicta*: A. dieth, his heir shall have the warranty; and yet

Rule in Shelley's Case.

the remainder vested not during the life of A., for the death of A. must precede the remainder, and yet shall the heir of A. have the land by descent: Co. Lit. 378, b.

Cases where the rule does not apply.

The definition of a remainder ("a remnant of an estate in lands, &c., expectant on a particular estate, created together with the same at one time," Co. Litt. 143, a.), plainly excludes the application of the rule to—1st, the case of limitations created by different instruments; 2nd, the case of limitations differing in quality, one being legal and the other equitable; and 3rd, the case of an *executory* limitation, by way of trust.

Limitations in different instruments.

1. In order to let in the application of the rule in *Shelley's Case*, the limitations to the ancestor, and to his heirs, must be created by the same instrument: *Moore* v. *Parker*, Lord Raym. 37, Skinn. 558. But for this purpose a will and a schedule to it are considered as one instrument: *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698. And Mr. Jarman observes, that the same principle undoubtedly applies to a will and codicil, or several codicils: Jarm. Wills, Vol. II., p. 334.

Limitations partly legal and partly equitable.

2. The rule applies equally to legal and equitable limitations: *Pitt* v. *Jackson*, 2 Br. C. C. 51; *Reynell* v. *Reynell*, 10 Beav. 21; *Re White and Hindle's Contract*, 7 Ch. D. 201. But the limitations must be either both legal, or both equitable: *Right* v. *Creber*, 5 B. & C. 866; *Collier* v. *McBean*, L. R. 1 Ch. 81.

Executory trusts.

3. Executory trusts (*l*) are not generally within

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What are executory trusts.

(*l*) A trust is said to be executory or directory where the limitations do not immediately confer on the beneficiaries a complete and final equitable interest, but serve as instructions to a third person for the settlement of the property by means of formal limitations for the purpose of effectuating the intentions of the testator: see Jarm. Wills. Vol. II. p. 344; Lewin on Trusts, 111. "All trusts are in a sense executory, because a trust cannot be executed, except by conveyance, and therefore there is something

Rule in Shelley's Case.

the operation of the rule. Thus, where there was a devise to trustees to convey land to the use of A. for life, remainder to her husband for life, remainder to the heirs of her body, Lord *Talbot* held that though A. would have taken an estate tail if the devise had been immediate, yet that the trust, being executory, was to be executed in a more careful and more accurate manner; and that a conveyance to A. for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters, would best serve the testator's interest: Lord *Glenorchy* v. *Bosville*, Ca. temp. Talbot 3; see the notes on this case in Wh. & Tud. L. C. Eq. 1. See also *Papillon* v. *Voice*, 2 P. Wms. 471; *Leonard* v. *Earl of Sussex*, 2 Vern. 526; *White* v. *Carter*, 2 Ed. 366; *S. C.* Amb. 670; *Roberts* v. *Dixwell*, 1 Atk. 607; *Parker* v. *Bolton*, 5 L. J. Ch. (N. S.) 98; *Shelton* v. *Watson*; and see these cases stated and considered in Jarm. Wills, Vol. II., pp. 344 *et seq.*

If, however, the testator has been "his own conveyancer," his limitations must have their ordinary legal meaning, notwithstanding that the operation of the "Rule in Shelley's Case" may thereby be let in. So where a testator bequeathed money to be laid out in the purchase of land to be settled on A. and the heirs of his body: it was held, that the testator must be taken to have intended to create an estate tail: *Seale* v. *Seale*, 1 P. Wms. 290; see also *Blackburn* v. *Stables*, 2 Ves. & B. 367; *Marshall* v. *Bousfield*, 2 Mad. 166. And where a testator declared uses of certain lands, which in effect gave the first taker an

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always to be done. But that is not the sense which a Court of Equity puts upon the term 'executory trusts.' A Court of Equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner:—Has the testator been what is called his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given you, and convert them into legal estates?" per Lord *St. Leonards* in *Egerton* v. *Brownlow*, 4 H. L. C. 210.

Rule in Shelley's Case.

estate tail therein, and bequeathed money to be laid out in the purchase of lands to remain and be to the same uses as the lands devised, it was held that the lands purchased were to be held in tail: *Austen* v. *Taylor*, 1 Ed. 361; Amb. 376; and see Mr. Jarman's observations on that case, Jarm. Wills, Vol. II., pp. 347 *et seq.* As to the effect of a direction to make a strict entail, see *Graves* v. *Hicks*, 11 Sim. 536; *Sealey* v. *Stawell*, I. R. 2 Eq. 326. And as to directions to settle property to go with a title, see *Woolmore* v. *Burrows*, 1 Sim. 512; *Banks* v. *Baroness le Despenser*, 10 Sim. 576; *Lord Dorchester* v. *Earl of Effingham*, *ib.* 587, n.; *Sackville West* v. *Lord Holmesdale*, L. R. 4 H. L. 543.

It is to be observed that the rule does not operate so as to destroy intermediate contingent remainders: *Lewis Bowles' Case*, 11 Rep. 80. And if the limitation to the heirs of a person taking a prior estate of freehold, not by way of simple remainder, but of executory devise or shifting use, the heir will apparently take as purchaser: *Lloyd* v. *Carew*, Pr. Ch. 72; *Coope* v. *Arnold*, 4 De G. M. & G. 589; *Crofts* v. *Middleton*, 8 De G. M. & G. 192; but see the observations of *Malins*, V.-C., in *Re White and Hindle's Contract*, 7 Ch. D. at p. 203.

Doctrine of general and particular intention.

The doctrine of general and particular intention with regard to expressions controlling the words heirs of the body was formerly regarded as of great importance and gave rise to a long series of decisions indicating much conflict of judicial opinion. This doctrine was in its origin merely descriptive of the operation of the "Rule in Shelley's Case," and is fully considered by Mr. Jarman (Jarm. Wills, Vol. II., pp. 484 *et seq.*), who thus sums up his examination of the cases bearing on the subject:—"It is clear that the doctrine of general and particular intention had existed only in name; the cases in which it was professed to be applied being clearly referable to other grounds, and in those which seemed to call for its application, the doctrine being rejected." Lord *Denman* thus explains the meaning of the supposed rule so far as it can now be carried:—"Technical words or words of known legal import must

Rule in Shelley's Case.

have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense" : *Doe* v. *Gallini*, 5 B. & Ad. 640.

# CHAPTER XVII.

## GIFTS TO ILLEGITIMATE CHILDREN.


| | PAGE | | PAGE |
|---|---|---|---|
| *Gifts to Children* in esse ..... | 645 | *Gifts to Future Children* ..... | 655 |
| *Gifts to Child* en ventre sa mère. | 653 | | |


**Gifts to Illegitimate Children.**

Children, *primâ facie*, means legitimate children.

*Gifts to Children* in esse.]—Illegitimate children (*a*) may take under any description which they have acquired by reputation (*b*), and which adequately designates them, collectively or individually, as objects of gift: *Metham* v. *Duke of Devon*, 1 P. Wms. 529. The word "children," however, or any other term descriptive of issue, of whatever class, imports legitimate issue, and those only; and, in order to extend it to persons of illegitimate birth, it must be shown that, by necessary or irresistible implication, such was the intention of the testator: see *Hart* v. *Durand*, 3 Anst. 684; *Cartwright* v. *Vawdry*, 5 Ves. 530; *Re Ayle's Trusts*, 1 Ch. D. 282; *Ellis*

(*a*) If the testator is an Englishman, the legitimacy of his children will be determined by the laws of this country, unless he is *bonâ fide* domiciled in a foreign country: *Boyes* v. *Bedale*, 1 H. & M. 798; *Shaw* v. *Gould*, L. R. 3 H. L. 55. See also *Barlow* v. *Orde*, L. R. 3 P. C. 164. So also with regard to the children of a Jew, being a British subject and domiciled in England: *Levy* v. *Solomon*, 25 W. R. 842. As to wills of foreigners, see *Skottowe* v. *Young*, L. R. 11 Eq. 474; *Re Goodman's Trusts*, 17 Ch. D. 266; *Atkinson* v. *Atkinson*, 21 Ch. D. 100; *Re Andros*, 24 Ch. D. 637. And see sub tit. "LEGACY DUTY," *ante*, p. 204, and sub tit. "SUCCESSION DUTY," *ante*, p. 251.

(*b*) "In the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not the *fact* (for that the law will not inquire into), *but the reputation of the fact*, which entitles them." Jarm. Wills, Vol. II. p. 217.

Gifts to Illegitimate Children.

v. *Houston*, 10 Ch. D. 236 (*c*). And the circumstance, that no legitimate issue have in event existed to advance their superior claim, is immaterial, since it would be conclusive against the illegitimate children that their claim *might* have come into competition with, and have been excluded by, those of legitimate issue. Hence it follows, that illegitimate children can never be let in under a gift to the children simply of a living person, other than the testator; for, since such a gift, by the established construction (*ante*, p. 615), would include children born in the interval between the making of the will and the death of the testator, the fact of the non-existence of any other than illegitimate children at the former period raises no necessary inference that the testator did not contemplate such a change of circumstances as would supply the gift with legitimate objects. And if a married testator, having only illegitimate children, whom he has always recognised and treated as his own, makes a gift in favour of his children generally, however plausible may be the conjecture that he intended the illegitimate children, yet it is only conjecture; and, consequently, the general rule prevails: *Godfrey* v. *Davis*, 6 Ves. 43; *Harris* v. *Lloyd*, 1 T. & R. 310. See as to unmarried testators, *post*, p. 650.

Illegitimate children let in by expressed or implied intention.

So, where a testator gives to his children by an unmarried woman with whom he is then living, or has previously lived, still it would be presumed that he contemplated marrying her: *Kenebel* v. *Scrafton*, 2 East, 530; see *Arnold* v. *Preston*, 18 Ves. 288; *Dover* v. *Alexander*, 2 Hare, 275; *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657. And if the testator were married at the time, the rule would be the same, as he might contemplate surviving his wife and then marrying the woman in question. But if the contents of the will indicate that the testator expected his wife to survive him, (and a legacy to her of course would be such an indication),

(*c*) The same rule applies with regard to the expression, "next of kin:" *Re Standley's Estate*, L. R. 5 Eq. 303.

this is considered to negative his supposed contemplation of marriage with the mother of the children, and lets in illegitimate children: *Wilkinson* v. *Adam*, 1 Ves. & B. 425 (*d*). The

Gifts to Illegitimate Children.

(*d*) The following is Mr. Jarman's statement of this important case of *Wilkinson* v. *Adam*, and the rule he deduces from it:—"A testator, being married, but having children by a woman named Ann Lewis, devised to his wife for life a certain mansion-house, and, after her decease, to Ann Lewis (who then lived with him), for life, provided she continued single and unmarried; and, subject thereto, he devised the whole of his estate (after limiting a term of years thereout) *in trust for the children which he might have by the said Ann Lewis*, share and share alike, and to his, her, and their heirs for ever; and, in default of such child or children, over. He also bequeathed to Ann Lewis an annuity for the care, management, and guardianship of each of the children. By a codicil (but which, being unattested, was inoperative to affect the construction of the devise), the testator declared that his meaning was to include three children of the said Ann Lewis (naming them). The question was, whether the illegitimate children of the testator by Ann Lewis, living at the time of the making of the will, could take under the devise in the will. It was contended, on the authority of the preceding cases, that the testator must be considered to contemplate the events of his wife dying and his marrying Ann Lewis, and having legitimate children by her; that the intention was clear, that after-born children should take, and it would be extremely difficult on the words to hold the devise good as to those already born, and not as to those afterwards born. But Lord *Eldon*, assisted by *Thompson*, B., and *Le Blanc*, J., and *Gibbs*, J., held that the three children were entitled, by the effect of the whole will. The Judges grounded their opinion on the manner in which the testator described the children themselves, and Ann Lewis, their mother, as living with him whilst his wife was then alive, the mode in which he appointed her guardian of such children, the limiting her annuity, and her compensation for the guardianship, to the time of her continuing single and unmarried, with many other passages in the will; and they laid particular stress on the devise of the mansion to the testator's wife for life, and, after her decease, to Ann Lewis for her life, and then to the children; for, supposing these devises to take place in the order in which they stood, *the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate.* Lord *Eldon* concurred generally with the Judges as to the illegitimate children being intended; and, with regard to the objection that they could not take as a class, though they might by a description amounting to *designatio personarum*, his Lordship considered that as decided by *Metham* v. *Duke of Devon*, 1 P. Wms. 529, whatever might have been his opinion if it were *res integra*. In concluding an elaborate judgment, his Lordship expressed his opinion, that it was impossible that the testator, a married man, with a wife, who,

Gifts to Illegitimate Children.

dissolution of the marriage, by a divorce, even in such a case, offers a scheme for reconciling the testator's expectation of his wife's survivorship of himself with the possibility of his marrying the woman in question. But, in *Wilkinson* v. *Adam*, this was either overlooked, or (which is more probable, remembering by whom it was decided (*e*) ), was considered, in those days, as being too much out of the ordinary course of transactions to be presumed to have entered into the testator's calculation.

The following cases well exemplify the rejection of conjectural grounds for including illegitimate progeny in gifts to children.

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he thought, would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean anything but illegitimate children. They took, therefore, by necessary implication, on the face of the will.

"Lord *Eldon's* doctrine, that the intention to give to illegitimate children (as distinguished from legitimate children) must appear on the face of the will, is not to be understood as precluding all inquiry into the state of the testator's family. Thus, in the case of a devise to "my children now living," *Blundill* v. *Dunn*, cit. 1 Mad. 433, or "to the children of A.," a *deceased person, Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419, it is not known, by a mere perusal of the will, whether legitimate or illegitimate children were intended; and yet when it is ascertained that there were no other than the latter objects in existence, the conclusion, that he meant illegitimate children, is irresistible.

"The characteristic of these cases is, that, according to the events existing *at the making of the will*, legitimate children never could have claimed under the bequest, and, therefore, could not have been in the testator's contemplation. The rule (expressed in accommodation to the cases in question) may be stated thus: *in order to let in illegitimate children under a gift to children, it must be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.* This, it is submitted, is the spirit and meaning of Lord *Eldon's* position in *Wilkinson* v. *Adam*, and forms a test by which the claim of illegitimate children is always to be tried. Unfortunately, however, this principle has not been invariably adhered to: and even the anxious efforts of Lord *Eldon*, to place the doctrine on a firm and intelligible basis, has not had the effect of securing uniformity of decision on this important subject." Jarm. Wills, Vol. II. pp. 226 *et seq.*

(*e*) In a note to p. 343 in the last edition of this Work it was stated that the editor had been informed that the point was adverted to, though it is not noticed in the Report.

**Gifts to Illegitimate Children.**

Mere conjecture does not entitle illegitimate children.

A testator, having four children, three of whom were legitimate and one illegitimate, gave his property to all and every the child and children whom he might happen to leave at his death, and showed, by expressions in the direction concerning maintenance, that he contemplated a division of the property into fourths: Lord *Rosslyn* held that the illegitimate child was not entitled to share with the legitimate children: *Cartwright* v. *Vawdry,* 5 Ves. 530; and Lord *Eldon* has expressed his entire acquiescence in the decision. See *Wilkinson* v. *Adam,* 1 Ves. & B. 464; see also *Re Wells' Estate,* L. R. 6 Eq. 599.

So, where a testator made bequests in favour of his four illegitimate children (describing them by name, and as having been baptized as the children of himself and A. B.), *together with every other child of the body of the said A. B. living at his decease, or born and living within nine calendar months afterwards;* it was held, that illegitimate children, born after the making of the will, were not entitled, there being nothing "to show by necessary implication that the testator intended that illegitimate children should take:" *Mortimer* v. *West,* 3 Russ. 370. Applying to this case the test before suggested, we shall find, that, if the testator, or any one else, had married A. B., the children of such marriage would have taken under the bequest in question, and, consequently, it was properly held that illegitimate children could not.

Again, where a testator gave the residue of his property equally between the children of his son W. and of two other children, it was held, that an illegitimate child of W. was not entitled to share in the residue, though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son W.: *Bagley* v. *Mollard,* 1 Russ. & My. 581. And, *à fortiori,* will such a child not be let in by the testator's recognition of him or her in documents dehors the will: *Wilkinson* v. *Adam,* 1 Ves. & B. 422. See also *Osmond* v. *Tyndall,* 5 Ves. 534; *Arnold* v. *Preston,* 18 Ves. 288; *Harris* v. *Lloyd,* T. & R. 310; *Warner* v.

**Gifts to Illegitimate Children.**

*Warner*, 15 Jur. 141; *Durrant* v. *Friend*, 5 De G. & S. 343; *Dorin* v. *Dorin*, L. R. 7 H. L. 568.

Necessary implication in favour of illegitimate children.

But if, according to events existing *at the time of the making of the will*, the testator must necessarily have meant illegitimate children, such children may take under the bequest; as, where the gift is "to my son John," the testator having only an illegitimate son of that name: *River's Case*, 1 Atk. 410; or, to the children of a person who has previously died, leaving no other than illegitimate children, which fact appears to have been known to the testator: *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419; *Edmunds* v. *Fessey*, 29 Beav. 233. So, where the gift was to a woman, with whom the testator was cohabiting at the date of his will, until her marriage, and on her death *or marriage*, to her children: *Re Connor*, 2 J. & L. 456. So also where an unmarried testatrix describing herself as a spinster, bequeathed her property to her children: *Clifton* v. *Goodbun*, L. R. 6 Eq. 278. And it would seem that the same principle would apply to a bequest by a bachelor to his children, for, inasmuch as his will would be revoked by marriage (see 1 Vict. c. 26, sect. 18, *ante*, p. 376), it is impossible that he could have intended any but illegitimate children to take thereunder: see *Pratt* v. *Matthew*, 22 Beav. 328. And the same principle would apply equally to a gift to the children even of a living person, the terms of which exclude after-born children, as to children "now living:" *Blundell* v. *Dunn*, cit. 1 Mad. 433; see *Gabb* v. *Prendergast*, 1 K. & J. 439; *Dover* v. *Alexander*, 2 Hare, 282 (*f*). And even where there was no such exclusion it was held that children begotten at the date of the will took: *Holt* v. *Sindrey*, L. R. 7 Eq. 170. Where the gift is to the children of a woman standing within the prohibited degrees of consanguinity or affinity to the testator, it is of course clear that illegitimate children must have been in-

(*f*) Though legitimate and illegitimate children cannot take under the same description, they may take under a *designatio personarum;* as where a testator, having four children, two of each kind, gives to his four children *then living*.

Gifts to Illegitimate Children.

tended to take, as the parties are incapable of entering into wedlock: see *Re Goodwin's Trust*, L. R. 17 Eq. 345; but the decision in that case was based entirely on the proof of reputation.

If there are no legitimate children in existence at the date of the will, illegitimate children will take if expressions used in the will sufficiently indicate the intention of the testator that persons then in existence shall take. So where a testator bequeathed a legacy to the "two youngest daughters" of his unmarried sister, describing her by her maiden name, it was held that the two youngest of her three illegitimate children, living at the date of the will, were entitled to the legacy: *Savage* v. *Robertson*, L. R. 7 Eq. 176; and see *Laker* v. *Hordern*, 1 Ch. D. 644; but see *Durrant* v. *Friend*, 5 De G. & S. 343.

Existence of legitimate children fatal to claims of illegitimate children.

It has, however, been repeatedly decided, that, under a gift to the children of a deceased person, the existence, or even legal possibility, of legitimate children is fatal to the claim of illegitimate children: *Godfrey* v. *Davis*, 6 Ves. 43; *Re Davenport's Trusts*, 1 Sm. & G. 126; *Kelly* v. *Hammond*, 26 Beav. 36; *Dorin* v. *Dorin*, L. R. 7 H. L. 568; even though there is an extreme improbability from the old age of the parent or other circumstances that there will ever be legitimate children: *Re Overhill's Trust*, 1 Sm. & G. 362; *Paul* v. *Children*, L. R. 12 Eq. 16. See also *Swaine* v. *Kinnerley*, 1 Ves. & B. 469; *Hart* v. *Durand*, 3 Anst. 684. These last two cases carried the rule so far as to make the existence of a *single* legitimate child a ground for excluding illegitimate children, *though the gift was to children in the plural;* but these decisions appear to carry the exclusion of illegitimate children too far, and to this extent they have not been followed. Thus, in the case of *Gill* v. *Shelley*, 2 Russ. & My. 336 (stated in Wigram, Wills, pl. 55), where the testatrix gave her real and personal estate to her husband, J. M., for his life, and directed that, after his death, such residue should be divided amongst certain classes of persons mentioned in her will, adding, "amongst whom I include the children of the *late* Mary Gladman." Mary

Gifts to Illegitimate Children.

Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir *J. Leach*, M. R., said, that if *Swaine* v. *Kennerley*, and *Hart* v. *Durand*, had not been distinguishable from the case before him, he should have felt no hesitation in overruling them; and decreed that the illegitimate child was entitled to share in the residue.

The only obvious distinction between these cases and *Gill* v. *Shelley* is, that in them the bequest was to *child* and children; but which, it is conceived, makes no real difference; since the testator evidently uses the singular number, not with a view to the *then* existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. It is apprehended, therefore, that the cases of *Swaine* v. *Kennerley* and *Hart* v. *Durand* may be considered as overruled: see *Leigh* v. *Byron*, 1 Sm. & Gif. 486; *Edmunds* v. *Fessey*, 29 Beav. 233. But see *contra*, *Adney* v. *Greatrex*, 17 W. R. 637.

Illegitimate children may take by name.

Of course, a gift to the children even of a living person, described as consisting of a definite number, will include illegitimate children if they are required to complete the numerical description: *Wilkinson* v. *Adam*, 1 Ves. & B. 467. Such a gift, indeed, seems to be undistinguishable in principle from a gift to illegitimate children *by names* which they have acquired by reputation, which is notoriously good: *Rivers's Case*, 1 Atk. 410; see also *Mortimer* v. *West*, 3 Russ. 370; and where a testator has once given legacies to his children by name, including an illegitimate child, and then makes further provision for his "said children," this expression will include the illegitimate child: *Evans* v. *Davies*, 7 Hare, 498; see *Hartley* v. *Tribber*, 16 Beav. 510; *Owen* v. *Bryant*, 2 De G. M. & G. 697. And it is also clear that illegitimate children may take as a class, if sufficiently indicated, and ascertained by reputation: *Metham* v. *Duke of Devon*, 1 P. Wms. 529; *Wilkinson* v. *Adam*, 1 Ves. & B. 422; *Bentley* v. *Blizard*, 4 Jur. N. S. 652; and that, upon the context of the will, even

Gifts to Illegitimate Children.

together with legitimate children: *Barnett* v. *Tugwell*, 30 Beav. 232; *Holt* v. *Sindrey*, L. R. 7 Eq. 174; *Lepine* v. *Bean*, L. R. 10 Eq. 160; *Dorin* v. *Dorin*, L. R. 17 Eq. 474; *Re Humphries*, *Smith* v. *Millidge*, 24 Ch. D. 691; *Re Bryon*, *Drummond* v. *Leigh*, 30 Ch. D. 110. And even the designation of them as *legitimate* children will not affect their claim, being merely an inaccurate superfluous addition to the preceding terms of description: *Standen* v. *Standen*, 2 Ves. jun. 589; see *Bayley* v. *Snelham*, 5 Ves. 534, n.; *Hill* v. *Crook*, L. R. 6 H. L. 265; in both which cases the gift was to the children of a woman described as the "wife" of a person, but to whom he was not legally married. So, a gift to the *children* of A. in a will where illegitimate children of A. were named for the purpose of another bequest, was held to include the illegitimate children where A. had only one legitimate child. But, in the same will, a gift to the children of B. was held not to include illegitimate children, B. having several legitimate children: *Meredith* v. *Farr*, 3 Y. & C. C. C. 525. See *Dover* v. *Alexander*, 2 Hare, 281; *Edmunds* v. *Fessey*, 29 Beav. 233; *Re Wells' Estate*, L. R. 6 Eq. 599; *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372.

In some instances feelings of compassion seem to have induced a relaxation of the strict rule of construction exemplified in the class of cases stated, *ante*, p. 649. As where an unmarried testator, resident in India, bequeathed in the words following: "To my children the sum of pounds sterling 5000. To the mother of my children the sum of sicca rupees 6000:" *Beachcroft* v. *Beachcroft*, 1 Mad. 430. See also *Fraser* v. *Pigott*, You. 354; *Laker* v. *Hordern*, 1 Ch. D. 644. But these decisions are not to be too strongly relied on.

Gift to illegitimate child *en ventre sa mère.*

*Gift to child* en ventre sa mère.]—It is clear that a gift to an illegitimate child with which a particular woman is pregnant, is valid if the infant is described as the child of the woman only, without reference to the father: *Gordon* v. *Gordon*, 1 Mer. 141; *Dawson* v. *Dawson*, 6 Mad. 292. Such a gift is sufficiently certain, and has no immoral tendency. It is, how-

Gifts to Illegitimate Children.

ever, doubtful whether a gift to a child with which an unmarried woman is pregnant, described as the child of a particular man, is valid. Its validity depends on the question being, whether a testator can fairly be considered as meaning to incur the risk of the child not having been procreated by the person whom he describes as the father (whether himself or another), or intends to make the fact an essential ingredient in the qualification. The latter hypothesis would be fatal to the gift: *Earl* v. *Wilson*, 17 Ves. 528. This decision has been questioned in *Evans* v. *Massey*, 8 Pri. 22; but the two cases are clearly distinguishable, as the will in the latter case contained expressions indicating beyond doubt an intention of the testator that an unborn child of which he was the putative father should participate: see the statement of the case and observations thereon in Jarm. Wills, Vol. II., pp. 240 *et seq.*

Whether an unborn child can take by reputation.

It has been laid down by Lord *Mansfield*, C., in *Metham* v. *Duke of Devon*, 1 P. Wms. 529, and by Lord *Eldon*, C., in *Gordon* v. *Gordon*, 1 Mer. 152, that a natural child can have no reputation as to its paternity, until it comes into existence; and *James*, L. J., in *Occleston* v. *Fullalove*, L. R. 9 Ch. at p. 158, expressed the same opinion. But the contrary view has been taken by Lord *St. Leonards* in *Re Connor*, 2 J. & L. at p. 460; and by Lord *Romilly*, M. R., in *Pratt* v. *Matthew*, 22 Beav. at p. 339. And in *Crook* v. *Hill*, 3 Ch. D. 773 (a case arising under the same will as *Hill* v. *Crook*, *ante*, p. 653), where the so-called "wife" had a child born after the testator's death, *Hall*, V.-C., held, "that such child was included in the class described as the children of my daughter Mary Crook."

It is, however, clear that a child unborn at the date of the will may after he comes *in esse* and before the testator's death acquire the reputation of being the child of its putative father, so as to entitle it to take equally with other illegitimate children: *Occleston* v. *Fullalove*, L. R. 9 Ch. 147; *Re Goodwin's Trust*, L. R. 17 Eq. 345. The decision to the contrary, in *Howard* v. *Mills*, L. R. 2 Eq. 391, is overruled.

**Gifts to Illegitimate Children.**

*Gifts to future children.*]—It is no objection to a gift to existing illegitimate children, that they are described as the children of both their reputed mother and father, since the reputation would be conclusive in regard as well to the male as to the female parent; but a gift to the *future* illegitimate children of a man or of a woman by a particular man is clearly bad: *Metham* v. *Duke of Devon*, 1 P. Wms. 529.

Rule as to reference to the male parents.

A gift to the future illegitimate children of a woman, even without reference to the father, cannot apparently be sustained, at all events as regards children not procreated at the time of the testator's death: see *Blodwall* v. *Edwards*, Cro. Eliz. 510; *Re Connor*, 2 J. & L. 459; *Crook* v. *Hill*, 3 Ch. D. 773. Such a gift, though free from objection on the ground of uncertainty, might seem to be obnoxious to the principle of the reasoning which has been applied to, and has been held to vacate, bonds given to a kept mistress, in consideration of future cohabitation. (As to which, *vide ante*, Vol. II., p. 326). It would be idle to deny that a prospective provision for illegitimate offspring tends to promote the illicit connection from which they arise; and, perhaps, when the ground of the acknowledged invalidity of a gift to the future illegitimate children of a *man* is examined, it will be found to possess little force beyond what is derivable from this consideration; for, if the objects of a gift to the existing illegitimate children of a man are ascertainable by reputation, why may it not be equally resorted to in fixing the objects of a gift to his future offspring? It is true, that reputation cannot take place until after birth; but it seems to be wholly unimportant, so far as concerns the ultimate ascertainment of the objects of the gift, whether the name and filial character are thus acquired before or after the making of the will. It is true, also, that subsequently born children cannot have been known to the testator; but his recognition of them is not essential to the claims of illegitimate children, except as it may happen to constitute part of their evidence of reputation, which it necessarily does where the gift is to the testator's

Whether gift to future illegitimate children is valid.

**Gifts to Illegitimate Children.**

own offspring. It should seem, then, that something more is meant by the old writers, who have denounced the gifts in question as illegal (*vide ante*, p. 343), than to raise the objection of uncertainty; they must be considered as taking the higher ground which has been suggested; and hence would flow this important practical result,—that gifts to the future illegitimate progeny of a women, no less than of a man, are invalid. If, on the other hand, the whole gist of the objection to the future gifts in question lies in their uncertainty, it cannot apply indiscriminately to *all* gifts to the unborn illegitimate children of a man, but must be confined to such as make the fact of the filial relation to the *male* parent (which cannot, properly, be the subject of inquiry) a part of the qualification; for, if it is clearly evinced that *reputation* alone is to entitle them, it seems impossible to view such gifts as standing in a less favourable plight than gifts to the future illegitimate children of a woman.

It should be observed, however, that a gift to the future illegitimate children, restricted to such as are born in the testator's lifetime, might, it is conceived, be maintained on principle, consistently with the invalidating principle contended for in the preceding observations; because, as the gift does not extend to objects born after the will takes effect, at no point of time can it be said to offer encouragement to incontinency. And the efficacy of a gift so expressed seems to be established by the decision of the Court of Appeal in the case of *Occleston* v. *Fullalove*, L. R. 9 Ch. 147; see also *Perkins* v. *Goodwin*, W. N. 1877, p. 111.

# CHAPTER XVIII.

## GIFTS TO NEXT OF KIN, &c.


PAGE

1. GIFTS TO NEXT OF KIN.
*Construction of such Gifts...* 657
*Period for ascertaining the Class*..... 661

2. GIFTS TO RELATIONS..... ..... 663

3. GIFTS TO REPRESENTATIVES, EXECUTORS, &c.
*Construction of such Gifts...* 667

PAGE

*Whether Executors, &c., take beneficially* ..... 670

4. GIFTS TO "FAMILY" AND "HOUSE" ..... 672

5. GIFTS TO "HEIR" IN RELATION TO PERSONALTY. 674

6. GENERAL REMARKS ON GIFTS TO CLASSES ..... 676


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### 1. GIFTS TO "NEXT OF KIN."

**Gifts to Next of Kin.**

"Next of kin" construed nearest relations.

*Construction of Gifts to Next of Kin.*]—Gifts to next of kin have raised the question, whether they are confined to the persons taken strictly as next of kin under the Statutes of Distribution, or extend to those to whom the statutes admit to share in the personal estate as the representatives of next of kin. The latter construction was supported by the respectable names of *Buller*, J. (*Phillips* v. *Garth*, 3 Br. C. C. 64), Lord *Kenyon* (*Stamp* v. *Cooke*, 1 Cox, 236), and Lord *Loughborough* (*Lowndes* v. *Stone*, 4 Ves. 649), and perhaps at one period might have been regarded as prevailing; but at present the weight of authority is in favour of the stricter, and, as it is conceived, the sounder construction, which rests on dicta and decisions by Lord *Thurlow* (*Phillips* v. *Garth*, 3 Br. C. C. 64), Lord *Eldon* (*Garrick* v. *Lord Camden*, 14 Ves. 385), and Sir *W. Grant* (*Smith* v. *Campbell*, 19 Ves. 404). See also the decision in *Brandon* v. *Brandon*, 3 Swanst. 312, by Sir *T. Plumer*, M. R., to the same effect. In the case of *Elmsley* v. *Young*, where a fund was settled by indenture, upon trust, after failure of certain previous

*Elmsley* v. *Young.*

Gifts to Next of Kin.

trusts, for such persons as should, at the decease of A., be his *next of kin*, and A. died, leaving a brother and the children of a deceased brother; Sir *J. Leach*, M. R., held, that the children of the deceased brother were entitled to a moiety of the fund, on the ground that where the words "next of kin" are used *simpliciter* and without explanatory context, they are to be understood as next of kin according to the Statute of Distributions: 2 My. & K. 82. But the case was then brought by appeal before Lords Commissioners *Shadwell* and *Bosanquet*, who, after a full examination of the conflicting authorities, held, that the trust applied to the next of kin in the strictest sense of the term, excluding persons entitled by representation under the statute, and, consequently, that A.'s surviving brother was entitled to the whole fund: 2 My. & K. 780. It is now settled that under a devise or bequest to the next of kin of A., his nearest blood relations of equal degree are entitled to participate: see *Halton* v. *Foster*, L. R. 3 Ch. 505. Relations of the half-blood are equally entitled with those of the whole blood: *Collingwood* v. *Pace*, 1 Vent. 424; *Brown* v. *Wood*, Alleyn, 36; *Cotton* v. *Scarancke*, 1 Mad. 45; *Grieves* v. *Rawley*, 10 Hare, 63; but not a husband or wife: *Watt* v. *Watt*, 3 Ves. 244; *Nicholls* v. *Savage*, cit. 18 Ves. 53; *Re Parry, Leak* v. *Scott*, W. N. 1888, p. 179; or relations by affinity: *Maitland* v. *Adair*, 3 Ves. 231.

*Withy* v. *Mangles.*

In the case of *Withy* v. *Mangles*, 10 Cl. & F. 215, where the ultimate limitation of personal property under a marriage settlement was "upon trust for such person or persons as at the time of the death of E. M. should be her next of kin;" and E. M. died, leaving a child, and a father and mother; the House of Lords, affirming the decision of Lord *Langdale*, M. R. (4 Beav. 358), decided, that under this limitation, the father, mother, and child, being of an equal degree of kindred to the testatrix, were, notwithstanding the preference given by the Statutes of Distribution to the child over the parents, equally entitled and took as her next of kin. See also *Cooper* v. *Denison*, 13 Sim. 290.

**Gifts to Next of Kin.**

Joint tenancy created unless a contrary intention appears.

A gift to next of kin *simpliciter* creates a joint tenancy among the persons entitled: *Withy* v. *Mangles*, 10 Cl. & F. 215; *Baker* v. *Gibson*, 12 Beav. 101; *Lucas* v. *Brandreth*, 21 Beav. 274. So also if the gift is to "legal next of kin:" *Harris* v. *Newton*, 25 W. R. 228.

Of course, however, effect will be given to words such as "equally," or "in equal shares," or other expressions indicating an intention that the donees shall take as tenants in common; and in such a case the mode of distribution is *per capita*, and not *per stirpes*: *Dugdale* v. *Dugdale*, 11 Beav. 402; see *Rook* v. *Att.-Gen.*, 31 Beav. 313.

Effect of reference to Statutes of Distribution.

If a gift to next of kin contains express reference to the Statutes of Distribution or to an intestacy, all kindred entitled under the statute, including persons taking by representation thereunder, will be admitted: *Garrick* v. *Lord Camden*, 14 Ves. 372; *Nicholls* v. *Haviland*, 1 K. & J. 504; *Bullock* v. *Downes*, 9 H. L. C. 1; to the exclusion of a husband: *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 Beav. 537; *Bailey* v. *Wright*, 18 Beav. 49; see *Milne* v. *Gilbart*, 2 De G. M. & G. 715; 5 De G. M. & G. 510; and of a wife: *Cholmondeley* v. *Lord Ashburton*, 6 Beav. 86; *Kilner* v. *Leech*, 10 Beav. 362; unless the context requires their inclusion; see *Re Collins' Trusts*, W. N. 1877, p. 87. And a reference to the statutes will also regulate the mode of distribution, and the donees will accordingly take *per stirpes*, as tenants in common: *Bullock* v. *Downes*, 9 H. L. C. 1; *Re Ranking's Settlement*, L. R. 6 Eq. 601; unless a contrary intention is expressed or necessarily implied: see *Phillips* v. *Garth*, 2 Br. C. C. 69; but a mere direction that the donees shall take as tenants in common will not be construed as expression of such intention: *Mattinson* v. *Tanfield*, 3 Beav. 131; *Lewis* v. *Morris*, 19 Beav. 34; see also *Holloway* v. *Radcliffe*, 23 Beav. 163; *Fielden* v. *Ashworth*, L. R. 20 Eq. 410.

Where there was a gift to the next of kin according to the Statutes of Distribution at the death of A., exclusive of B., who was the testator's sole next of kin, it was held that there was a good bequest to

Gifts to Next of Kin.

the persons who would have been the testator's next of kin at the death of A., if B. had also been then dead: *White* v. *Springett*, L. R. 4 Ch. 300; see also *Re Taylor*, *Taylor* v. *Ley*, W. N. 1885, 158; 52 L. T. 210.

As to the construction of gifts to next of kin *ex parte paternâ* or *ex parte maternâ*, see *Say* v. *Creed*, 5 Hare, 580; *Gundry* v. *Pinniger*, 1 De G. M. & G. 502; *Boys* v. *Bradley*, 5 H. L. C. 873.

Next of kin of a particular name.

Gifts to next of kin of a particular name *primâ*, mean persons entitled to the name by birth, and bearing the name at the testator's death: *Jobson's Case*, Cro. Eliz. 576; *Leigh* v. *Leigh*, 15 Ves. 100; but the rule is one of construction and will give way if the context indicates a different intention: *Repington* v. *Roberts*, 19 Ch. D. 520; see *Pyot* v. *Pyot*, 1 Ves. sen. 335; *Carpenter* v. *Bott*, 15 Sim. 606.

"Next of kin by way of heirship."

A devise of land to "next of kin by way of heirship" goes to the testator's heir at law: *Williams* v. *Ashton*, 1 J. & H. 115. And a gift to the "heirs and next of kin" of a person would apparently go to the heir-at-law and next of kin respectively, according to the nature of the property: *Lowndes* v. *Stone*, 4 Ves. 649. See *Re Hartley*, *Stedman* v. *Dunster*, W. N. 1886, p. 10. In *Re Thompson's Trusts*, 9 Ch. D. 607, a bequest of personalty to the "heirs *or* next of kin" of A. was construed as a gift to the statutory next of kin of A.

Effect of addition of words "unmarried" or "without having been married."

The primary meaning of the word "unmarried" is "never having been married:" *Dalrymple* v. *Hall*, 16 Ch. D. 715; *Re Sergeant*, *Masters* v. *Walley*, 26 Ch. D. 575. But this construction will give way to any context showing a different intention. Thus, where the gift is to the next of kin of A., or to the persons entitled to her estate under the Statutes of Distribution, as if she had died intestate and unmarried, this expression will be construed as meaning without leaving a husband surviving, and the children (if any) or nearest blood relations will take to the exclusion of the husband (if any): *Re Sanders' Trusts*, 3 K. & J. 152; *Re Norman's Trusts*, 3 De G. M. & G. 965; *Clarke* v. *Colls*, 9 H. L. C. 601; *Halton* v. *Foster*, L. R. 3 Ch. 505. See also *Wilson* v. *Atkin-*

Gifts to Next of Kin.

*son*, 4 De G. J. & S. 455, where it was held by *Knight-Bruce*, L. J., and *Turner*, L. J., that upon the context of a marriage settlement the words "without having been married" must be read "without having been married to the then intended husband." In two recent cases *Fry*, J., adopted the same construction without any aid from the context: see *Re Ball's Trusts*, 11 Ch. D. 270; *Upton* v. *Brown*, 12 Ch. D. 872. But in the subsequent case of *Emmins* v. *Bradford*, 13 Ch. D. 493, where the words were, "without ever having *been married*," *Jessel*, M. R., disapproved of these decisions, and held that the words must be construed strictly, so that the persons took who would have been the next of kin of A., if she had died a spinster, to the exclusion of her children. See also *Re Watson's Trusts*, 55 L. T. 316.

Period at which the objects of the gift are to be ascertained.

*Period for Ascertaining the Class.*]—Having ascertained generally who are the objects of gifts to next of kin, the next step is to inquire at what period the description is to be applied; and here attention may be directed to the difference, in point of construction, between gifts to children and gifts to other classes; the former, admitting an accession of fresh objects in the interval between the period of vesting and of possession or distribution (*ante*, p. 615); while, in regard to the latter, when the period of vesting has arrived, there can be no future accessions. Thus, if a devise or bequest is made to A. for life, and after his decease to his children, this lets in the children living at the testator's decease, and those who come into existence during A.'s life; on the other hand, where the gift is to A. for life, and after his decease to the testator's relations, the later gift takes effect in favour of relations living at his decease, to the exclusion of those who might happen to come *in esse* during the life of A.: *Dow* v. *Lawson*, 3 East, 278; *Cruwys* v. *Colman*, 9 Ves. 319; *Pope* v. *Whitcombe*, 3 Mer. 689; *Forbes* v. *Ball*, Id. 437.

Next of kin of a deceased person.

Where the gift is to the next of kin of a person who dies before the testator, the entire property (at least where there are no words expressly or impliedly

Gifts to Next of Kin.

severing the joint tenancy: see *Re Ham's Trust*, 2 Sim. (N. S.) 106), vests in such of the objects as survive the testator: *Bridge* v. *Abbott*, 3 Br. C. C. 224; *Vaux* v. *Henderson*, 1 J. & W. 388, n.; *Phillips* v. *Evans*, 4 De G. & S. 188; *Re Gryll's Trusts*, L. R. 6 Eq. 589; *Leighton* v. *Price*, W. N. 1887, p. 216; and see *Re Philps' Will*, L. R. 7 Eq. 151; *Clowes* v. *Hilliard*, 4 Ch. D. 413. If it be to the next of kin or relations of a living person, of course the description cannot be applied at the death of the testator, or at any other period, during the life of such person: *Cruwys* v. *Colman*, 9 Ves. 319. It must await his death, and will vest in those who first answer the description, whether the distribution takes place then or subsequently: *Danvers* v. *Earl of Clarendon*, 1 Vern. 35; see *Smith* v. *Palmer*, 7 Hare, 225; *Walker* v. *Marquis of Camden*, 16 Sim. 329; *Gundry* v. *Pinniger*, 1 De G. M. & G. 502. Of course the testator may expressly fix any time as the period for ascertaining the next of kin: *Pinder* v. *Pinder*, 28 Beav. 44; *White* v. *Springett*, L. R. 4 Ch. 300; *Re Taylor*, *Taylor* v. *Ley*, W. N. 1885, p. 158; 52 L. T. 839.

Next of kin who shall be living, &c.

But it is clear that the circumstance of the gift being restricted to objects existing at a future period, as to next of kin who shall be living at the end of ten years from the testator's decease, makes no further variation in the construction than that of engrafting into their qualification this additional ingredient; for it has been well observed, that the testator means some class of persons, of whom it is doubtful whether they will live to the future period or not. Hence, it is a gift to such of the next of kin at the testator's decease as shall be living at the future period: *Spink* v. *Lewis*, 3 Br. C. C. 355; *Bishop* v. *Cappel*, 1 De G. & S. 411.

The circumstance of the legatee for life being *one* of the next of kin at the testator's decease, has been decided not to form a ground for deferring to a future period the ascertainment of the objects of the gift, which therefore applies as ordinarily to next of kin at the testator's decease: *Holloway* v. *Holloway*, 5 Ves. 399; *Doe* v. *Lawson*, 3 East, 278; *Lasbury*

Gifts to Next of Kin.

v. *Newport*, 9 Beav. 376 ; *Re Barker's Trust*, 1 Sm. & Gif. 118 ; *Wilson* v. *Pilkington*, 11 Jur. 537 ; *Starr* v. *Newberry*, 23 Beav. 436 ; *Bullock* v. *Downes*, 9 H. L. C. 1 ; *Mortimore* v. *Mortimore*, 4 App. Ca. 448. A distinction has sometimes been taken, where the legatee for life is the *sole* next of kin, in which case the gift is held to embrace next of kin at the period of distribution, *i.e.*, the decease of the legatee for life : *Jones* v. *Colbeck*, 8 Ves. 38 ; *Briden* v. *Hewlett*, 2 My. & K. 90. And where the gift to next of kin is to take effect in defeazance of a prior gift to a person, who, in the event of his surviving the testator, would be his sole next of kin, the term was construed to mean persons answering the description at a future period, and that period in general would be when the executory gift vests in possession : *Miller* v. *Eaton*, G. Coop. 272 ; see also *Butler* v. *Bushnell*, 3 My. & K. 232. But this distinction may now be regarded as exploded, and it is quite clear that at the present time the fact of the donee for life, whether of real or personal estate, being the sole next of kin of the testator, would not be sufficient to exclude him from a gift to the next of kin : see *Pearce* v. *Vincent*, 2 My. & K. 800 ; *Urquhart* v. *Urquhart*, 13 Sim. 613 ; *Ware* v. *Rowlands*, 15 Sim. 587 ; *Grifferth* v. *Badham*, 9 Beav. 370 ; *Baker* v. *Gibson*, 12 Beav. 101 ; *Re Barker's Will*, 1 Sm. & Gif. 118 ; *Gorbell* v. *Davison*, 18 Beav. 556.

The principles above considered equally apply to the period when other classes, such as relations, are to be ascertained.

### 2. Gifts to "Relations."

"Relations," how construed.

Gifts to relations were at first attempted to be impugned on the ground of uncertainty, and such, indeed, must necessarily have been their fate, unless a line could have been drawn restrictive of their almost illimitable range of objects. This has been effected by confining the gift to the relations who would take the personal estate under the Statutes of Distribution ; *Thomas* v. *Hole*, Cas. temp. Talb.

Gifts to Relations.

251; *Harding* v. *Glyn*, 1 Atk. 469; *Rayner* v. *Mowbray*, 3 B. C. C. 234; which construction is now applied as well to gifts of real, as to those of personal estate; *Doe* v. *Over*, 1 Taunt. 263; and is not varied where the term is "near" relations: *Withorne* v. *Harris*, 2 Ves. sen. 527. See also *Smith* v. *Campbell*, 19 Ves., at p. 403.

"Nearest relations."

But a gift to *nearest relations* is confined to the next of kin, properly so called, exclusively of persons whom the statutes admit *jure representationis*: *Pyot* v. *Pyot*, 1 Ves. sen. 335; *Marsh* v. *Marsh*, 1 Br. C. C. 293; *Smith* v. *Campbell*, 19 Ves. 400; unless where the testator subjoins explanatory expressions, showing that he used the term in a wider sense. Thus a gift to nearest relations, "as sisters, nephews, and nieces," has been held to let in all the objects of distribution under the statute: *Stamp* v. *Cooke*, 1 Cox, 234.

Admissions of relations of half blood

As relations by the half blood are within the statute, so they are clearly comprehended in gifts to next of kin and relations; and a legacy to the next of kin of A. "of her own blood and family, as if she had died sole, unmarried and intestate," has received the same construction: *Cotton* v. *Scarancke*, 1 Mad. 45. Of course, a gift to next of kin or relations simply, does not extend to relations by affinity; *Maitland* v. *Adair*, 3 Ves. 231; *Harvey* v. *Harvey*, 5 Beav. 134; *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372; nor to relatives, other than descendants, of persons born out of wedlock: *Re Standley's Estate*, L. R. 5 Eq. 303; *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372; secus where the term is "relations by blood *or marriage*": *Devisme* v. *Mellish*, 5 Ves. 529; or to relations "on both sides": *Frogley* v. *Phillips*, 3 De G. F. & J. 466. A gift to next of kin or relations does not include the husband or wife: *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 Ves. 537; *Bailey* v. *Wright*, 18 Ves. 49; even though it be "among my next of kin, *as if I had died intestate*": *Garrick* v. *Lord Camden*, 14 Ves. 372; and see *ante*, p. 659.

—by affinity.

Gift to deserving or poor relations.

A bequest to the most deserving of the testator's relations, *Doyley* v. *Att.-Gen.*, 4 Vin. Ab. 485, pl. 16,

Gifts to Relations.

2 Eq. Ca. Ab. 194 (E), pl. 15, or, it seems, to the testator's *poor* relations, receives the same construction as a gift to relations simply; *Widmore* v. *Woodroffe*, Amb. 636; *Anon.* 1 P. Wms. 327 (*a*); though in earlier cases gifts to poor relations seem to have been extended to necessitous persons, being relations, beyond the statute: *Jones* v. *Beale*, 2 Vern. 381; but see *Goodinge* v. *Goodinge*, 1 Ves. sen. 231. In one instance, a gift to the "poorest" relations was treated as charity, to be administered within the limits of the statute: *Isaac* v. *Defriez*, Amb. 595; as was a bequest for the purpose of "putting out our poor relations apprentices"; *White* v. *White*, 7 Ves. 423. In a later case, Sir *J. Leach*, M.R., held that a devise of real estate to trustees, in trust to pay the rents "to such of my poor relations as my trustees shall think most deserving," was a charitable trust, and as such void within the statute 9 Geo. 2, c. 36 (stated *ante*, Vol. IV. pp. 2 *et seq.*). *Hale* v. *Att.-Gen.*, Rolls, 28th July, 1829. See also *Brunsden* v. *Woolredge*, Amb. 507; *Mahon* v. *Savage*, 1 Sch. & L. 111; *Att.-Gen.* v. *Price*, 17 Ves. 371; *Gillam* v. *Taylor*, L. R. 16 Eq. 581.

Power to appoint to relations.

It is to be observed, that a power of appointment created in favour of relations is not restricted to next of kin or their representatives, but the donee may appoint to more remote relations: *Harding* v. *Glyn*, 1 Atk. 469; *Mahon* v. *Savage*, 1 Sch. & L. 111; *Forbes* v. *Ball*, 3 Mer. 437; *Grant* v. *Lynam*, 4 Russ. 292. But if, from his neglect to exercise the power, the execution of the trust devolves upon the Court, the ordinary construction prevails, as the

(*a*) In this case (*Anon.*, 1 P. Wms. 327) the testator devised the surplus of his personal estate to his *poor relations;* and the Countess of Winchelsea being a relation, as near as any to the testator, she was a party to the suit and claimed a share; and it was decreed she was entitled thereto, in regard the word "poor" was frequently used as a term of endearment and compassion, rather than to signify an indigent person; as one says, my poor father, my poor child, &c. It seems, indeed, from the report that the Earl and Countess of W. had not an estate any way proportionable to their position, but the decision is no authority on the question as to the meaning of the expression "poor relations."

Gifts to Relations.

discretion involved in the power being personal to, expires at the decease of, the donee, and the Court merely executes the trust, which, either expressly or by implication, follows the power: *Cole* v. *Wade*, 16 Ves. 27.

Distribution *per capita*.

It seems that in the absence of any reference to the Statutes of Distribution, that, under a gift to "relations," the distribution among the statutory next of kin and representatives of next of kin is *per capita*, as joint tenants: see *Tiffin* v. *Longman*, 15 Beav. 275; *Eagles* v. *Le Breton*, L. R. 15 Eq. 148. If the testator has introduced into the gift expressions pointing at equality in the distribution, which are considered to require a distribution *per capita*, a distribution according to the statutes is necessarily negatived, so that the children of deceased brothers and sisters take an equal portion with their uncles and aunts, and not their parents' shares merely: *Thomas* v. *Hole*, Cas. temp. Talb. 251; *Green* v. *Howard*, 1 Br. C. C. 31; *Phillips* v. *Garth*, 3 Id. 64; *Rayner* v. *Mowbray*, Id. 234; *Butler* v. *Stratton*, Id. 369; see also *Elliott* v. *Davenport*, 1 P. Wms. 83.

Effect of reference to Statutes of Distribution.

If, however, there is a reference to the statutes either in express terms, or by necessary implication, relations will take under a gift to them, in the manner and proportions directed by the statutes, *i.e.*, *per stirpes*, as tenants in common: *Fielden* v. *Ashworth*, L. R. 20 Eq. 410. A testator gave a trust fund after his wife's death to his cousins then living and the issue of such as should be then dead, in a course of distribution according to the stocks; at the wife's death one cousin was living, and fifteen were dead leaving children or issue; it was held that the words applied not to the cousins themselves, but only to the issue; and that the fund was divisible into sixteen shares: *Re Wilson, Parker* v. *Winder*, 24 Ch. D. 664.

### 3. Gifts to "Representatives," "Executors," and "Administrators."

"Legal representatives," how construed.

*Construction of such Gifts.*]—The term, "legal representatives," or personal representatives, used in relation to personal estate, properly designates the executors or administrators, who are, with respect to personalty, the representatives of the deceased testator or intestate: *Re Wyndham's Trusts*, L. R. 1 Eq. 290; *Re Best's Settlement*, L. R. 18 Eq. 686. But, in numerous instances, where an intention is indicated that the donees shall take beneficially, and not in a fiduciary capacity, the term has been applied to next of kin. Thus, in the case of *Bridge* v. *Abbot*, 3 Br. C. C. 224, where a testatrix bequeathed to certain persons, and, in case of the death of any of them before her, to his or her *legal representatives*, the next of kin were held to be entitled. See *Long* v. *Blackall*, 3 Ves. 486. So also, in *Jennings* v. *Gallimore*, 3 Ves. 146, where the expression was somewhat varied, being "*legal representatives according to the course of administration.*" See also, *Re Gryll's Trusts*, L. R. 6 Eq. 589; *Briggs* v. *Upton*, L. R. 7 Ch. 376.

In *Cotton* v. *Cotton*, 2 Beav. 67, the bequest was substitutional, viz., to A. or his "*legal representatives.*" A. was dead at the date of the testator's will, having bequeathed his property on certain trusts. The several points argued were: first, whether the fund was subject to the trusts of A.'s will; secondly, whether his executors took beneficially as his "legal representatives"; and, thirdly, whether the fund was divisible among the nearest of kin of A. (thus excluding the widow), or among his next of kin, according to the Statute of Distributions. Lord *Langdale*, M.R., held that A.'s next of kin according to the Statute of Distributions were entitled to the fund. See also *Machell* v. *Newman*, W. N. 1886, p. 130; 55 L. T. 85.

The same construction is generally adopted where the gift to representatives is accompanied by words of distribution, as "share and share alike," &c., or

Gifts to Representatives, Executors, and Administrators.

other indications of intention: *Smith* v. *Palmer*, 7 Hare, 225; *Wilson* v. *Pilkington*, 11 Jur. 587; *Holloway* v. *Ratcliffe*, 23 Beav. 163; *King* v. *Cleaveland*, 4 De G. & J. 477; *à fortiori*, if the words used are "*next* legal representatives": *Booth* v. *Vicars*, 1 Coll. 6: or if the words "executors," &c., are mentioned in the will: *Walker* v. *Makin*, 6 Sim. 148; *secus*, if the words legal representatives elsewhere necessarily mean executors: *Dixon* v. *Dixon*, 24 Beav. 129. Where the next of kin take under the description of "representatives," they take *per stirpes*: *Booth* v. *Vicars*, 8 Jur. 76.

Legal personal representatives.

In *Hinchcliffe* v. *Westwood*, 12 Jur. 618, where a testator gave the interest of 1000*l.* to his daughter for life, and after her death to her children; but if she died without leaving any issue, he gave the capital to his sons in equal shares, and in case of the decease of any of them in his daughter's lifetime he gave his or their share or shares to his or their *legal personal representative or representatives.* The daughter died without ever having been married, and two of the sons died in her lifetime: *Knight Bruce*, V.-C., held that their executors were entitled and not their next of kin. But this expression cannot, as it would seem, have a greater force than "executors or administrators," as to which see *infra.*

Personal representatives.

Where a testator bequeathed a sum of 1000*l.*, in trust to pay the interest to his daughter for her separate use, and directed that after her decease the same should pass by any will or disposition she might under her hand and seal make thereof, and for want thereof *should go to her personal representatives;* it was held, that, in default of appointment, the legacy devolved to the husband of the daughter, as her administrator and personal representative: *Sabberton* v. *Skeels*, 1 Russ. & M. 587. But in *Baines* v. *Ottery*, 1 My. & K. 465, the words in question were construed to mean next of kin; see also *Robinson* v. *Smith*, 6 Sim. 47; *Nicholson* v. *Wilson*, 14 Sim. 459; *Walker* v. *Marquis of Camden*, 16 Sim. 329; see *per Wickens*, V.-C., in *Briggs* v. *Upton*, L. R. 7 Ch. 378 n. In

Gifts to Representatives, Executors, and Administrators.

*Atherton* v. *Crowther*, 19 Beav. 448, on the context of the will, it was held that "personal representatives meant descendants. In *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359, the words "*next* personal *representatives*" were construed "nearest of kin," so that a brother and sister took to the exclusion of a niece.

"Executors or administrators," held to mean *next of kin.*

In *Palin* v. *Hills*, 1 My. & K. 470, where a testator, after bequeathing certain pecuniary legacies, declared that, in case of the death of any or either of the legatees, his or her legacy should go to *his or her executors or administrators*, Lord *Brougham*, C., reversing a decree of Sir *J. Leach*, M.R., decided in favour of the next of kin, on the authority of the case of *Bridge* v. *Abbot:* his Lordship thinking that a gift to executors or administrators was wholly undistinguishable from a gift to legal representatives: see also *Bulmer* v. *Jay*, 3 My. & K. 197. But see *Wallis* v. *Taylor*, 8 Sim. 241, *post*, p. 671.

In the case of a gift to A. *and his executors, &c., or legal, or personal representatives*, the latter are obviously words of limitation merely, and will vest the absolute interest in A.: *Lugar* v. *Harman*, 1 Cox, 250; *Taylor* v. *Beverley*, 1 Coll. 108; *Appleton* v. *Rowley*, L. R. 8 Eq. 139. And where a legacy was given to be divided among children who should be living at a future period, and the *legal representative or representatives* of him, her, or them who should be then dead, Sir *J. Leach*, V.-C., considered that the words were used in this sense, and operated as words of limitation, and that a vested interest was given to the children, at least, on their attaining twenty-three: *Price* v. *Strange*, 6 Mad. 159 (which compare with *Horsepool* v. *Watson*, 3 Ves. 383). So if the gift is to A. for life, and after his death to his executors, &c., or legal or personal representatives, will give to A. an absolute interest: see Co. Lit. 54 b.; *Socket* v. *Wray*, 4 Br. C. C. 483; *Saberton* v. *Skeels*, 1 Russ. & M. 587, *supra; Alger* v. *Parrott*, L. R. 3 Eq. 329. And on the donee's bankruptcy, his trustee will be entitled: *Re Seymour's Trusts*, John. 472; see *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559; *Webb* v. *Sadler*, L. R. 8 Ch. 419. And the construction will not be altered by reason

Gifts to Representatives, Executors, and Administrators.

of the interposition of a trust for children: *Re Wyndham's Trusts,* L. R. 1 Eq. 290; *Re Best's Trusts,* L. R. 18 Eq. 686; or by a forfeiture clause on bankruptcy, &c.: *Webb* v. *Sadler,* L. R. 8 Ch. 419; unless such provisions take effect. The word "assigns" superadded is conclusive that an absolute interest is to be taken: *Grafftey* v. *Humpage,* 1 Beav. 46; see *Re Newton's Trusts,* L. R. 4 Eq. 171.

Executors or adminstrators not entitled for their own benefit.

*Whether Executors, &c., take beneficially.*]—In the early case of *Evans* v. *Charles,* 1 Anstr. 128, an administrator was held to be entitled under the description of "personal representative" of a person who was dead when the will was made, and *for his own benefit.* The latter branch of the decision has, however, been much disapproved of. (See *Price* v. *Strange,* 6 Mad. 161). It is not only inconsistent with the principle of Lord *Eldon's* reasoning in the well-known case of *Ripley* v. *Waterworth,* 7 Ves. 425, but it is at variance with and may be considered as overruled by the late case of *Collier* v. *Squire,* 3 Russ. 467, where, by a marriage settlement, a sum of stock was settled upon trust for the intended wife for life, and after her decease for the intended husband, his executors, administrators, or assigns, in case he should survive her; but, in case he should die before her, then to transfer the stock as the husband should by deed or will appoint, and in case he made no appointment, then *to his executors or administrators.* The husband died in the lifetime of the wife, having left a will, but made no appointment of the fund, which was held to belong to his executrix, *as part of his general personal estate.* See also *Wellman* v. *Bowring,* 1 S. & St. 24, 2 Russ. 374, 3 Sim. 328. These cases have also overruled *Churchill* v. *Dibben,* Sugd. Pow. 313.

In *Andrew* v. *Andrew,* 1 Coll. 686, *Knight Bruce,* V.-C., held that the executors were not entitled to a beneficial interest in the testator's residuary personal estate. See also *Long* v. *Watkinson,* 17 Beav. 471; *Leak* v. *Macdowall,* 33 Beav. 238; *Alger* v. *Parrott,* L. R. 3 Eq. 328; *Bird* v. *Harris,* L. R. 9 Eq. 204; *Travers* v. *Travers,* L. R. 14 Eq. 275; *Trethewy* v

*Helyar*, 4 Ch. D. 53. And the same rule applies to a gift of real estate to executors, who will take it, in their fiduciary capacity, as part of the donee's personal estate: *Wellman* v. *Bowring*, 4 Russ. 374; 3 Sim. 328; see *Dixon* v. *Dixon*, 24 Beav. 135. But this rule will give way to expressions in the context of the will indicating an intention that the executors are to take beneficially: see *Clarke* v. *Hilton*, L. R. 2 Eq. 810; *Williams* v. *Arkle*, L. R. 5 H. L. 606.

**Gifts to Representatives, Executors, and Administrators.**

But if the testator expressly gives property to the executors or administrators of a person who are expressed to take for their own benefit, they will do so, however improbable it may seem that such could have been the intention. In *Sanders* v. *Franks*, 2 Mad. 147, leaseholds were bequeathed to A. for life, and after her decease to such persons as she should by will appoint, and in default to the executors or administrators of A., *to and for his, her, or their own use and benefit;* Sir *T. Plumer*, V.-C., held an administrator to be entitled for his own benefit by the force of these words. See *Wallis* v. *Taylor*, 8 Sim. 241, where a testatrix bequeathed a fund to trustees, for the separate use of her daughter for life, and after her decease, upon trust to transfer the principal to her executors or administrators, *to and for his, her, or their use and benefit absolutely for ever*, and Sir *L. Shadwell*, V.-C., held that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit. "In this case," observes Mr. Jarman, "the point of contention was not so much whether the administrator was entitled in his own right beneficially, or in his representative character (this being, in regard to a husband-administrator, a matter of no importance, unless there are creditors, as he retains the property for his own benefit); but whether, according to the case of *Palin* v. *Hills*, the bequest was not to be construed as applying to the next of kin. The testator's intimation, that the legatees should take for their own benefit, was not only consistent with, but perhaps was rather favourable to, this construction, as tending to show that the testator had in

Gifts to Representatives, Executors, and Administrators.

view persons who might reasonably be presumed to be intended as beneficial objects of gift:" Jarm. Wills, Vol. II., p. 119.

### 4. Gifts to "Family" and "House."

Construction of word "family" as regards real estate.

The word "family" and "house" are of equivocal import, often varying their meaning according to the subject-matter. In *Chapman's Case*, 3 Dyer, 333, it was held that the words "or else to remain to the house," in relation to real estate, signified family, "which should be intended the chief and most worthy and eldest person in the family, *i.e.* the heir. So, in *Counden* v. *Clerke*, Hob. 33, it is laid down, that, if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house. The same construction prevailed in a more recent case, where a testator devised all his lands, as well freehold as leasehold and copyhold, unto his mother, C. A., and her heirs for ever, in the fullest confidence, that, after her decease, she would devise the property to his *family;* Sir *W. Grant*, M.R., was of opinion that the effect of this devise was to limit the property to the mother for life, with reversion to the testator's heir-at-law at his death: *Wright* v. *Atkyns*, 17 Ves. 255; and Lord *Eldon*, on appeal, confirmed his Honour's decision: 19 Ves. 299. The case being carried by appeal to the House of Lords, it was, however, there held that the mother took an estate in fee: see *Wright* v. *Atkyns*, T. & R. 143.

To C.'s "family, to go in heirship for ever."

So, where A. devised lands unto his sister *C.'s family, to go in heirship for ever*, it was held that the eldest son and heir apparent of C. was entitled; though, in another part of the will, the word "family," applied to personal property, meant children; there being, it was said, no objection to the same word when applied to a different subject receiving a different construction: *Doe* d. *Chattaway* v. *Smith*, 5 M. & S. 126. See also *Griffiths* v. *Evan*, 5 Beav. 241. In *Lucas* v. *Goldsmid*, 29 Beav. 657, a gift to the testator's sons for life and then to go

Gifts to Family, &c.

"to their respective families according to seniorities," was construed as a gift to the sons as tenants in common in tail.

As to personal estate.

The construction whereby "family" is deemed to mean "heir" is, of course, confined to real estate. In two cases where the subject of gift was personalty only (*Harland* v. *Trigg*, 1 Br. C. C. 142, and *Robinson* v. *Waddilove*, 8 Sim. 134), and in another case, where the gift was of mixed property (*Doe* v. *Joinville*, 3 East, 172), gifts to a "family" were held to be void for uncertainty.

As to mixed property.

In a case cit. 1 Taunt. 266, it is said to have been decided at the Rolls, in 1732, that under a limitation to the family of J. S., the real estate descends to the heir-at-law, and the personal estate goes to the next of kin. The authority of this case was denied by Lord *Eldon* in *Wright* v. *Atkyns*, 19 Ves. 299; but a contrary opinion was expressed by Lord *Cottenham* in *White* v. *Briggs*, 15 Sim. 17; and see *Wingfield* v. *Wingfield*, 9 Ch. D. 658, where the gift was of mixed property to brothers and sisters, and their *heirs*.

"Family" held to mean children.

The word *family* has generally been construed to mean "children." Thus, in the case of *Barnes* v. *Patch*, 8 Ves. 604, a testator gave the remainder of his estate to be equally divided between "brother L.'s and sister E.'s *families*," and Sir *W. Grant*, M.R., decided that the will (which was held to carry real estate) vested the property in the *children* of the brother and sister, who took *per capita*. See also *Woods* v. *Woods*, 1 My. & Cr. 401. And it may now be regarded as settled that this construction must be adopted in the absence of strong indication of contrary intention to be gathered either from the context of the will, or the circumstances of the case: *Wood* v. *Wood*, 3 Hare, 65; *Gregory* v. *Smith*, 9 Hare, 708; *Re Terry's Will*, 19 Beav. 580; *Reay* v. *Rawlinson*, 29 Beav. 88; *Burt* v. *Hellyar*, L. R. 14 Eq. 160; *Pigg* v. *Clarke*, 3 Ch. D. 672; *Re Hutchinson and Tenant*, 8 Ch. D. 540.

"Family" synonymous with *relations*.

In some instances, however, "family" has been treated as synonymous with *relations*. Thus, in the case of *Cruwys* v. *Colman*, 9 Ves. 319, a testatrix

Gifts to Family, &c.

made her only sister whole and sole executrix to everything she had for her own life, and willed that at her own death she bequeathed to those of her own *family* what she had it in her own power to dispose of that was the testatrix's; Sir *W. Grant*, M.R., held that the words "her own family," were equivalent to her own *relations;* observing, that the word family might, according to the context, have different significations in different wills. See *Grant* v. *Lynam*, 4 Russ. 292; see also *Snow* v. *Teed*, L. R. 9 Eq. 622, where a testamentary power to appoint among the donee's family or next of kin "was held to be capable of extension to any relative." The word is of flexible meaning: per *Kindersley*, V.-C., in *Green* v. *Marsden*, 1 Drew. 651; and accordingly it has been held to include ancestors: *James* v. *Lord Wynford*, 3 Sm. & Gif. 350; see *Lucas* v. *Goldsmid*, 29 Beav. 660; and descendants of every degree: *Williams* v. *Williams*, 1 Sim. (N. S.) 358; see also the observations of *Jessel*, M.R., in *Pigg* v. *Clarke*, 3 Ch. D. 674.

### 5. Gifts to "Heir" in Relation to Personalty.

"Heir," in relation to personalty, how construed.

*Heir*, though a word of well-defined and technical meaning, often denotes, in relation to personalty (where the gift is by way of substitution), those who by law succeed thereto on the decease of an intestate owner, who, in a general, popular sense, may be considered the "heir," in respect of such property. Thus, where a testator bequeathed to A. 200*l.*, "and, failing him by decease before me, *to his heirs*," the legacy was held to belong to the next of kin of A. living at the death of the testator: *Vaux* v. *Henderson*, 1 J. & W. 388, n.; see also *Holloway* v. *Holloway*, 5 Ves. 399; *Gittings* v. *M'Dermott*, 2 My. & K. 69; see also *Jacobs* v. *Jacobs*, 16 Beav. 557; *Re Porter's Trusts*, 4 K. & J. 188; *Re Philp's Will*, L. R. 7 Eq. 151; *Parsons* v. *Parsons*, L. R. 8 Eq. 260; *Finlason* v. *Tatlock*, L. R. 9 Eq. 258. *A fortiori* where the gift is of personalty "to be divided amongst the heirs" of A.: *Re Steven's Trusts*, L. R. 15 Eq. 110;

Gifts to Heir.

see also *Low* v. *Smith*, 2 Jur. N. S. 344. In *Re Newton's Trusts*, L. R. 4 Eq. 171, *Wood*, V.-C., held that where a testatrix, after bequeathing six shares of her personal estate to living brothers and sisters, bequeathed the remaining one-seventh share to the heirs of his sister D., "now deceased," *Wood*, V.-C., held, that the gift was quasi substitutional, and that the share went to the next of kin of D. As to a gift to heirs of property consisting partly of realty and partly of personalty, see *Herrick* v. *Franklin*, L. R. 6 Eq. 593; *Wingfield* v. *Wingfield*, 9 Ch. D. 658; *Keay* v. *Boulton*, 25 Ch. D. 212.

Mixed fund.

Cases where gifts to "heirs" have been strictly construed.

But these cases must not be understood to warrant the general proposition, that the word "heirs," in relation to personal estate, imports next of kin, especially if real estate be combined with it. Thus, in the case of *Gwynne* v. *Muddock*, 14 Ves. 488, where a testator gave all his real and personal estate to A. for life, adding, after her death his "nearest *heir-at-law* to enjoy the same," Sir *W. Grant* held, that the heir-at-law took the real and personal estate, and not the realty only, the testator having blended both in the gift. See also *Tetlow* v. *Ashton*, 15 Jur. 213; *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524; *Henderson* v. *Green*, 28 Beav. 1. And even where the entire subject of gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense; nor will the construction be varied by the accident that the description applies to a plurality of persons, since any number of co-heirs make but one "heir." See 2 Lord Raym. 829. Thus, the words, "to my *heir* 4,000*l.*," were recently held to entitle three co-heiresses of the testator jointly; Sir *J. Leach*, M. R., neatly observing, "where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir:'" *Mounsey* v. *Blamire*, 4 Russ. 384.

In *Ware* v. *Rowland*, 12 Jur. 165, Lord *Cottenham* held, that, by the words "to and among my heirs-

Gifts to Heir.

at-law," a sum of stock passed to the heir-at-law of the testator at the time of his death; but as the same person in that case filled the character both of heir and next of kin, the question did not arise as to whether she took the fund in one character or the other. It is, however, clear that (except in the case of gifts by way of substitution) gifts of personalty only, to the "heirs" of a person will, in the absence of a different intention indicated by the context, receive their strict legal construction: see *Pleydell* v. *Pleydell*, 1 P. Wms. 748; *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524; *Hamilton* v. *Mills*, 29 Beav. 123; *Smith* v. *Butcher*, 10 Ch. D. 113. In *Re Thompson's Trusts*, 9 Ch. D. 607, a bequest of personalty to the "heirs *or* next of kin" of A., was construed as a gift to the statutory next of kin of A.

Various meanings given to the word "heir" on the context.

In some cases upon the context the word "heirs" has been construed to mean children, as regards personal estate: *Loveday* v. *Hopkins*, Amb. 273; *Bull* v. *Comberbatch*, 25 Beav. 540; *Roberts* v. *Edwards*, 33 Beav. 259; and even as regards real estate: *Milroy* v. *Milroy*, 14 Sim. 48; *Micklethwait* v. *Micklethwait*, 4 C. B. (N. S.) 790; cf. *Spence* v. *Handford*, 4 Jur. (N. S.) 987. In *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276, a gift of personalty to A. for life, with remainder to the heirs of the body of A., was held on the construction of the will to mean such of the statutory next of kin of A. as were descended from her.

See further on this subject, Jarm. Wills, Vol. II., pp. 79 *et seq.*

### 6. General Remarks on Gifts to Classes.

Suggestions as to gifts to the children, next of kin, &c., of *several* persons.

It may be useful to close the present section with a brief statement of some points respecting gifts to the children, heirs, next of kin, or relations of a plurality of persons, in order that the draftsman may prevent, by explicit declaration, the occurrence of any question. In framing such gifts care is requisite, in order to avoid various questions; such as—

General Remarks.

Distribution *per capita*, or *per stirpes*.

1st. Whether the children, next of kin, &c., of the several persons named, are to take *per capita* or *per stirpes*, especially if the latter is intended; since otherwise the distribution would be *per capita*, not only where the gift is thus—to the children of A. and of B.: *Malim* v. *Keighley*, 2 Ves. jun. 333, 529; see *Lady Lincoln* v. *Pelham*, 10 Ves. 176; but also where it is to the children of A. and to the children of B.: *Malcolm* v. *Martin*, 3 Br. C. C. 50; and if there should be children of one only, they will take the whole, Ib.; and even if there should be only one child of one of the persons named, and the terms of the bequest might seem exclusively adapted to a plurality of objects, the entirety will vest in such only child; see *Wicker* v. *Mitford*, 3 Br. P. C. Toml. ed. 442:—a construction which accords with that given to the general Statute of Distributions, as to which see *post*, pp. 714 *et seq.*

Heirs of several persons respectively, or collectively.

2nd. Whether it is intended that the gift shall apply to the heirs, next of kin, &c., of the several persons *respectively*, or to persons who shall answer to the character of children, heirs, &c., of *both or all* (*b*). A limitation to the right heirs of persons who are actually husband and wife, and who are not related in blood, is held to mean heirs, *i.e.*, children, of both. Thus, where a testator devised to H., daughter of A., in tail, with remainder to such child or children as the wife of the said A. was then enceinte with, in tail, with remainder *to the right heirs of A. and M. his wife for ever*, it was contended, that the limitation to the right heirs of A. and M. was intended to give an estate in moieties to the heirs of each; but the Court held, that, in order to entitle any person, it was necessary that he or she should *answer the description of heir of both*, which could

(*b*) With respect to *children*, of course this question could not arise in regard to more than two, or even then, if the individuals named were of the same sex, or, being of different sexes, were not husband and wife *de facto*, or capable of becoming such *de jure*. It has never been decided whether a gift to the children of A. and B. (a man and woman not related in blood) means children proceeding from them both or respectively.

General Remarks.

only apply (they being strangers in blood) to a child of both, the husband and wife being, in contemplation of law, one person only: *Roe* v. *Quartley*, 1 T. R. 630. In one case, a question was raised, whether a devise in favour of the next of kin of the testatrix's late father and mother, his or her heirs and assigns for ever, and if more than one, as tenants in common, applied to the next of kin of these persons (who were not related) *respectively*, or persons answering to the description of next of kin of *both*. The testatrix was a spinster of very advanced age. Lord *Lyndhurst*, C., decided in favour of the latter construction, remarking, that the testatrix contemplated that the next of kin might be *one* individual or more, which was inconsistent with the supposition that she meant next of kin of the father and next of kin of the mother, as they were not related: *Pycroft* v. *Gregory*, 4 Russ. 526. But it would seem that she might have contemplated the possibility of the failure of the next of kin of one.

Next of kin of testatrix' late father and mother.

Clear indication whether children of *all* are to take.

3rd. It should also be distinctly shewn, that the children, &c., of *all* are intended, and not children in one instance and parents in the others, which is often the grammatical construction of words which are meant to have a different effect; for instance, a gift to "my brother and sister's children" will be read as applying to the brother and the children of the sister, and not to the children of both, as no doubt is intended: *Doe* v. *Joinville*, 3 East, 172; *Lugar* v. *Harman*, 1 Cox, 250; and (what is still worse) the brother would take only a share equal to that of one of the sister's children: *Blackler* v. *Webb*, 2 P. Wms. 383. The expression should have been, to my brother's and sister's children, or to the children of my brother and of my sister.

Introduction of qualifying contingency.

4th. If a contingency is to be introduced into the qualification of the objects, such as that of their being in existence at a given period, it should be made clearly apparent that it applies to the objects themselves, and not to the parents' ancestors, &c., though such, it appears, would be in general the adjudged construction; since a gift "to the children of my brothers and sisters, who shall be living at

General Remarks.

the time of my decease," has been held to import children who shall be living, and not the children of brothers and sisters who shall be living; as the latter reading re-models the sentence, making it children of *such* of my brothers, &c.: *Barker* v. *Lea*, 3 Ves. & B. 113.

## CHAPTER XIX.

### JOINT TENANCY, AND TENANCY IN COMMON.

**Joint Tenancy, and Tenancy in Common.**

Joint tenancy, when created.

A GIFT to several persons simply, will, generally speaking, make them joint tenants, whether the subject be real or personal estate: *Cray* v. *Willis*, 2 P. Wms. 529; *Barnes* v. *Allen*, 1 Br. C. C. 181; *Stuart* v. *Bruce*, 3 Ves. 632; *Whitmore* v. *Trelawny*, 6 Ves. 129; *Crooke* v. *De Vandes*, 9 Ves. 197; *Atcheson* v. *Atcheson*, 11 Beav. 485; *Moffat* v. *Burnie*, 18 Beav. 211. In creating a tenancy in common, it is not unusual to express affirmatively and negatively that the co-devisees or co-legatees shall be tenants in common, and not joint tenants; but such explicitness of declaration is not necessary. The words, "equally to be divided," and "share and share alike," will produce the same effect: *Doe* v. *Vaughan*, 1 D. & R. 52; *Clayton* v. *Lowe*, 5 B. & Al. 636; having been adjudged, indeed, adequate to sever the tenancy, even in the instance of a deed: *Rigden* v. *Vallier*, 2 Ves. sen. 252. In a will much slighter expressions will suffice. Thus, devisees or legatees have been held to be tenants in common under a gift to several persons *equally*: *Warner* v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10; or even to them *respectively*: *Heathe* v. *Heathe*, 2 Atk. 121; see also *Torret* v. *Frampton*, Sty. 434; *Marryat* v. *Townly*, 1 Ves. sen. 102; or "each of their respective heirs:" *Gordon* v. *Atkinson*, 1 De G. & S. 478; or where the limitation was to the heirs of the devisees as they should "severally" die: *Sheppard* v. *Gibbons*, 2 Atk. 441; also, where the gift was expressed to be to A. & B. "*between them:*" *Lashbrook* v. *Cock*, 2 Mer. 70, 118; *Perkins* v. *Baynton*, 1 Br. C. C. 118; *Att.-Gen.* v. *Fletcher*, L. R. 13 Eq. 128; or to be enjoyed "*alike:*" *Loveacres* v. *Blight*, Cowp. 352; see also *Thorowgood* v. *Collins*, Cro. Car. 75. And a direction

Expressions which create a tenancy in common.

Joint Tenancy, and Tenancy in Common.

introduced into a bequest of leaseholds, that the legatees should bear an annual charge *in moieties: Kew* v. *Rouse*, 1 Vern. 253 ; and words referring to the "shares" of co-residuary legatees : *Dodson* v. *Day*, 3 Br. C. C. 405 ; see *Ive* v. *King*, 16 Beav. 46 ; *Robertson* v. *Fraser*, L. R. 6 Ch. 696 ; have respectively been held to make them tenants in common.

Effect of a qualified gift to survivors.

The great characteristic of a joint tenancy is survivorship ; which, however, is liable to be defeated by a severance of the tenancy ; and, consequently, a qualified gift to the survivor of several co-devisees or co-legatees, in the event of the death of either, under certain circumstances, being exempt from such hazard, is consistent with, and therefore does not necessarily negative the construction of, a joint tenancy : *Barnes* v. *Allen*, 1 Br. C. C. 181.

But where a testator gave real and personal property to his brother and sister, their heirs, executors, &c., and proceeded, "But in case my said brother should die in the lifetime of my sister, without leaving any issue, then I give and devise his share and interest hereinbefore devised" to the sister absolutely : it was held to be clear that the sister was not to take as being the surviving joint tenant, but only in the event of the death of the brother without issue during her lifetime, which showed an intention to create a tenancy in common : *Ryves* v. *Ryves*, L. R. 11 Eq. 539 ; see also *Paterson* v. *Rolland*, 28 Beav. 347.

Contradictory expressions.

Sometimes a gift contains expressions respectively pointing at a joint tenancy and a tenancy in common. In such case one must yield, and the former, it is probable, would generally be selected, on account of the well-known bias in favour of a tenancy in common. See *Perkins* v. *Baynton*, 1 Br. C. C. 118 (where the expression was, "jointly and between them"). In some instances, the seeming discrepancy has been avoided by holding the co-legatees to be joint tenants of a particular interest (as for life), and tenants in common of the ulterior interest ; *Gardiner* v. *But*, 3 Mad. 425 ; *vide* also, as to devisees in tail, *post*, p. 683. But a legacy to two, to be equally divided when they should arrive at twenty-one, has been held to make the legatees tenants in common,

**Joint Tenancy, and Tenancy in Common.**

immediately, so that, on the decease of one under age, her share went to her representatives, and not to the survivor; *Jolliffe* v. *East*, 3 Br. C. C. 25.

Gifts to classes.

The rule which construes a gift to two or more simply as creating a joint tenancy, applies indiscriminately to gifts to individuals and classes, including, it should seem, gifts to children, in disregard of Lord *Hardwicke's* objection, in *Rigden* v. *Vallier*, 2 Ves. sen. 258, to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship.

Different periods of vesting held to be inconsistent with a joint tenancy.

However, a gift by will, under which all the members of the class are not necessarily entitled at the same instant of time, but which vests the property in the existing objects, with a liability to be divested *pro tanto* in favour of after-born objects, was recently decided, by reason of the different periods of vesting, to create a tenancy in common: *Woodgate* v. *Unwin*, 4 Sim. 129.

It is observable, that, in the case of *Stratton* v. *Best*, 2 Br. C. C. 233, a contrary rule was applied to the limitations of a deed.

Trusts arising by implication.

Where a trust is raised by implication from a power of *distribution* among a class of defined objects (*vide ante*, p. 553), they take as tenants in common: *Reade* v. *Reade*, 5 Ves. 744; *Casterton* v. *Sutherland*, 9 Ves. 445; *Kennedy* v. *Kingston*, 2 J. & W. 431; overruling *Maddison* v. *Andrews*, 1 Ves. sen. 157; and the same rule apparently applies to the objects of a gift implied from a power of selection: *Re White's Trusts*, John. 656.

Effect of death of member of class in lifetime of donee of power.

And here, it may be observed, that the decease, in the lifetime of the donee, of any member of a class to whom a testamentary power of selection or distribution extends, defeats the power *pro tanto*, but the entirety may be appointed to the survivors: *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299. See also *Butcher* v. *Butcher*, 9 Ves. 382; 1 V. & B. 79. Lord *St. Leonards*, however, was of opinion, that this doctrine is confined to cases in which the entire property vests in the survivors; and that, if the objects of the gift, in default of appointment, take as tenants in common, among whom there is no sur-

vivorship, the power, by the decease of any one or more of the objects, is defeated *pro tanto:* (Sugd. Pow., 8th ed., 419); *Reade* v. *Reade*, 5 Ves. 774.

Joint Tenancy, and Tenancy in Common.

Estates tail are the subject of some peculiar distinctions in regard to the nature of the tenancy subsisting between the co-devisees. If they are persons who may have common heirs of their bodies, being husband and wife, or a man and woman who may then lawfully marry, they are tenants in tail by entireties, or jointly, as the case may be. Where, however, the devise is to persons who are not husband and wife, or who cannot lawfully marry (as in the instance of a devise to the children of A. in tail), so that they cannot have or be presumed to have common heirs of their bodies, the devisees are tenants in common in tail: Co. Litt. 184, a.; *Huntley's Case*, Dy. 326, a.; *Cooke* v. *Cooke*, 2 Vern. 645; *Perry* v. *White*, Cowp. 777; *Forrest* v. *Whiteway*, 3 Exch. 367; *De Windt* v. *De Windt*, L. R. 1 H. L. 87. But even then the joint tenancy takes effect so far as it can, the construction of the devise being, that the devisees are *joint tenants for life, with several inheritances in tail: Wilkinson* v. *Spearman*, in Dom. Proc. cit. 2 Vern. 545; 2 P. Wms. 530. See also Co. Litt. 182, a.

Devisees in tail, when tenants in common.

The notice of these points has somewhat anticipated the observation, that where real estate is limited by deed or will for an estate of inheritance or freehold concurrently to two persons who are husband and wife, they take by entireties and not as joint tenants, and the lands thus limited devolve to the survivor, unaffected by the separate alienation of either husband or wife, whose incapacity singly to exercise the *jus disponendi* over any part of the property is the consequence of their unity of person, which makes their concurrence essential to any such act: Co. Lit. 187, a.; *Doe* v. *Parratt*, 5 T. R. 652.

Tenants by entireties.

Another consequence of this unity of person (and one which it is often important for the draftsman to bear in mind), is, that where property is given to a husband and wife jointly with any other person or persons, they are computed as and take the share of

Husband and wife regarded as one person.

Joint Tenancy, and Tenancy in Common.

one only : *Lewin* v. *Cox,* Moore, 558, pl. 752 ; *Anon.*, Skinn. 182 ; Co. Litt. 187, a. And the same rule applies where the gift creates a tenancy in common : *Warrington* v. *Warrington,* 2 Hare, 54. The rule is not altered by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) : *Re Marsh,* 27 Ch. D. 166 ; *Re Jupp,* W. N. 1888, p. 147.

## CHAPTER XX.

### LIMITATIONS TO SURVIVORS.

**Limitations to Survivors.**

"Survivor" generally construed strictly.

ALTHOUGH it is now a settled rule of construction that the word "survivor" is to be read in its strict and natural sense, without regard to the presumable intention of the testator, unless the context of the will itself puts a different construction on it, yet in some instances the Courts have appeared willing, even in the absence of any ground afforded by the context, to read the word "survivor" as synonymous with "other."

Exceptional decision in *Barlow* v. *Salter*.

An instance in which this liberal construction of the word "survivors" occurs, is *Barlow* v. *Salter*, 17 Ves. 479, where a testator, in a certain event, directed all his real and personal estate to be divided between his four nephews and nieces, N., W., C., and E.; C.'s part only for life, *and her part to be divided between the survivors*—Sir *W. Grant*, M.R., treated it as clear that C.'s share, at her death, would go to the other three legatees, whether then living or not, observing that "survivors," as here used, had the same sense as "others," as had been frequently decided.

This case was certainly destitute of grounds arising in the context, for changing the words "survivors" into "others;" but it is to be remarked, that the point was only incidentally adverted to by the Master of the Rolls, whose opinion on it formed no part of, though it may have influenced, his adjudication. His Honour's dictum, however, seems to have given rise to the notion which obtained extensively in the profession, that "survivor" might even, without any explanatory context, be read as importing *other*—a notion that now stands corrected by numerous decisions, which show that this word, like all others, must, when unexplained by other parts

Limitations to Survivors.

of the will, be construed according to its natural and proper signification.

Thus, in *Davidson* v. *Dallas*, 14 Ves. 576, where a testator bequeathed to the children of his brother, R. D., 3000*l.*, to be equally divided among them, and if either of them should die before the age of twenty-one years, their share to go to the *survivors;* —Lord *Eldon*, after referring to the rule for construing "survivors" as importing *others*, observed that there was nothing in the will indicating a general intention, upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

So, in *Crowder* v. *Stone*, 3 Russ. 217, where a testator bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor, to be divided equally between his nephew and four nieces, and in case of the death of his said nephew, or of any or either of his said nieces without issue before their respective parts or shares should become due and payable to them, then the part or share of him, her, or them so dying without issue as aforesaid should go to and be equally divided between and amongst the *survivor and survivors* of them, share and share alike. At the decease of the testator's wife, one niece only survived; some of the deceased nieces had and others had not left issue. Lord *Lyndhurst* held, that the survivor was entitled to the whole. See also *Ranelagh* v. *Ranelagh*, 2 My. & K. 441; *Cromek* v. *Lumb*, 3 Y. & C. 565; *Cursham* v. *Newland*, 2 Beav. 145; *Willatts* v. *Willatts*, 12 Jur. 670; *Leeming* v. *Sharratt*, 2 Hare, 14.

General conclusion from the cases.

These decisions agree with and are fully supported by the earlier cases of *Ferguson* v. *Dunbar*, 3 Br. C. C. 469, n.; and *Milsom* v. *Awdry*, 5 Ves. 465: the whole constituting a chain of authority sufficiently strong to preclude the slightest hope of maintaining the enlarged construction of the word "survivor," without an explanatory context. See also *Beckwith* v. *Beckwith*, 25 W. R. 282; *Re Horner's Estate, Pomfret* v. *Graham*, 19 Ch. D. 186; *Re Bean*,

Limitations to Survivors.

29 Ch. D. 839. And the circumstance, that there occurs in the same will, in reference to another subject or other objects, an instance of the words "survivor" and "other" being used conjunctively, is not considered to imply an intention to give to the word "survivor," standing alone, their united force or signification.

Thus, in *Winterton* v. *Crawfurd*, 1 Russ. & My. 407, where a testator devised the residue of his real estate to trustees, upon trust as to one-third to pay the rents to the separate use of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the survivors or survivor and others or other of them; and after giving the other two-thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare, that in case one or more of his said daughters should die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughters, in trust for the child or children *of the survivors or survivor* of his said daughters *per stirpes*, and the heirs of the bodies of such child and children; and in case any one or more of such children should die without issue, then as to the shares of him, her, or them so dying, in trust for the *survivors or survivor, others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny

Limitations to Survivors.

died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, Lady Winterton, the only surviving daughter, to the exclusion of the children of Fanny—Sir *J. Leach*, M.R., said: "In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivor' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true, that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters; and this intention would be defeated, if, upon the death of Lady Winterton without issue, which is stated to be a probable event, the children of the deceased sister were excluded."

Remarks upon *Winterton* v. *Crawfurd*.

The reasoning of the Master of the Rolls, in regard to the inconsistency between the devise *for life* to the survivors, and the notion that the children of the deceased devisees were to stand in their place, is inconclusive, because, though the devise for life could not take effect in regard to any deceased child, the devise in remainder to the issue of such child might. Indeed, if his Honour was right in the opinion expressed by him, that, after the death of the last surviving daughter, the property would go over to the children of the deceased daughter, and not to the ulterior devisees, there would seem to be great difficulty in upholding his decision, as it would involve the absurdity of reading the same words in two different senses. The case, too, would then be in direct opposition to *Doe* v. *Wainwright*, 5 T. R. 427, where, *even in a deed*, the limitation of cross

Limitations to Survivors.

remainders in tail to *surviving* children was held to take effect in favour of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate devise, that the estate was not to go over, unless the issue of *all* the children failed.

Effect where gift over is combined with a collateral event

"In *Aiton* v. *Brooks* (7 Sim. 204), however," observes Mr. Jarman, "it was considered, that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event,* the rule of construction adopted in the preceding cases did not apply, but that the word 'survivor' might be construed *other,* on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees." See Jarm. Wills, Vol. II., p. 694. In this case the gift was "to the survivor of them, *her executors or administrators.*" The decision is apparently contrary to the current of authority on this question, and cannot safely be relied on: see the cases cited *ante,* p. 686; see also *Lee* v. *Stone,* 1 Exch. 674. It must, however, be admitted that the Courts have in several recent cases, where there was a gift over, shown a strong inclination to give effect to the words by construing "survivors" as "others": see *Badger* v. *Gregory,* L. R. 8 Eq. 78; *Waite* v. *Littlewood,* L. R. 8 Ch. 70; *Wake* v. *Varah,* 2 Ch. D. 348; and in *Re Arnold's Trusts,* L. R. 10 Eq. 252, the same construction was adopted by *Malins,* V.-C., though there was no gift over. Where, however, there is a gift over in an event which may happen to all the legatees, as if all should die under twenty-one years of age or without issue, "survivors" will be construed "others."

Effect of gift over on event happening to all the legatees.

Thus in *Wilmot* v. *Wilmot,* 8 Ves. 10, where a testator bequeathed to his son A. and to each of his daughters, B. & C., one-third of what he might die possessed of, to be put out at interest, but they were not to be put in possession until a prescribed age; and in case of the death of either of the above-

Limitations to Survivors.

named children before they attained the before-mentioned ages, his or her share be equally divided between the *two surviving children*, and, in the event of the death of two of the above-mentioned children before they attained the said respective ages, then the whole of what he might die possessed of should devolve to the *surviving child;* but should all his children die before they attained their said respective ages, then over. B. attained the age, and died; A. afterwards died under the age. Lord *Eldon* held, that the administrator of B., the deceased child, was entitled to participate, his Lordship being of opinion, that the word "surviving" here meant the same as "other," or "living at the age aforesaid." He remarked, that, in the clause in which the gift over is made, it was never intended that any portion should be taken: it was to be either the whole or none.

In this case the context evidently favoured the construction adopted by the Court; for it was apparent, from the tenor of the clause, that an entire share was not to accrue to a single survivor, unless and until *two* of the legatees had died under the prescribed ages.

Practical suggestion.

Mr. Jarman thus states the general conclusion from the cases, with a practical suggestion: "The result then would seem to be, that the word 'survivor,' when unexplained by the context, must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators, and that the word is one peculiarly liable to misuse, has induced a readiness in the Courts to yield to the slightest indication in the context of an intention to use the word 'survivor' as synonymous with *other*. Some progress has been made in ascertaining when this may be done. But the present state of the authorities seems hardly to justify the hope that litigation has reached its limits on this often-occurring slip, and should teach to framers of wills the necessity of increased attention to its avoidance." Jarm. Wills, Vol. II., p. 709.

Clauses of

Unless the clause in express and unequivocal

**Limitations to Survivors.**

accruer shoul be extended to accruing shares.

terms embrace accruing as well as original shares, an intention to this effect cannot, consistently with the established construction, be implied: *Woodward* v. *Glasbrook*, 2 Vern. 388; *Ex parte West*, 1 Br. C. C. 575; *Crowder* v. *Stone*, 3 Russ. 217; *Rickett* v. *Guillemard*, 12 Sim. 88. As a matter of course, therefore, the shares, both original and accruing, of the several objects should be expressly subjected to the clause of accruer, as in the examples of this clause to be found in the Precedents of the present work. Slight expressions have been held to be sufficient for this purpose; thus, in *Milsom* v. *Awdry*, 5 Ves. 465, the words "in manner aforesaid," introduced into the gift of the accruing shares, were decided to have the effect of subjecting them to the operation of the clause of accruer. See also *Worlidge* v. *Churchill*, 3 Br. C. C. 465. See also *Eyre* v. *Marsden*, 4 My. & Cr. 231; *Leeming* v. *Sherrat*, 2 Hare, 14; *Sillick* v. *Booth*, 1 Y. & C. C. C. 121.

# CHAPTER XXI.

## INDEFINITE GIFTS OF REAL ESTATE AND LEASEHOLDS.


| | PAGE | | PAGE |
|---|---|---|---|
| *As to Beneficial Interests* ..... | 692 | *As to Estates of Trustees* ..... | 697 |


**Indefinite Devises Enlarged to a Fee.**

Indefinite devise formerly passed only an estate for life.

*As to Beneficial Interests.*]—A devise of freehold or copyhold messuages, lands, tenements, or hereditaments, either in general terms, or by a local or other particular description, not including the word "estate" or "property," or any equivalent expression, did not, in a will made before 1838, carry more than an estate for life, though the testator might have shewn, by expressions in the introductory part of the will, an intention to dispose of his whole estate: *Denn* v. *Gaskin*, Cowp. 657; Doug. 731; *Doe* v. *Wright*, 8 T. R. 64; *Doe* v. *Allen*, Id. 497; or have given a nominal legacy to his heir apparent or presumptive: *Roe* v. *Bolton*, 2 W. Bl. 1045; *Right* v. *Sidebotham*, Doug. 730; *Roe* v. *Daw*, 3 M. & S. 518; or have intimated an intention wholly to disinherit him: *Awse* v. *Melhuish*, 1 B. C. C. 519; *Right* v. *Compton*, 9 East, 267; or though the devise is to a class, including the heir, as to the testator's children: *Dickins* v. *Marshall*, Cro. El. 330; *Doe* v. *Tucker*, 3 B. & Ad. 473; or to one or more of a class of devisees to be nominated by another, as to such son or sons of A. as he should by will appoint: *Fairfax* v. *Heron*, Pre. Ch. 67; or though the devise contained words importing equality of division: *Goodwyn* v. *Goodwyn*, 1 Ves. sen. 227; or though there was in another part of the will or in the immediate context a devise *expressly for life*, affording the argument, therefore, that the testator meant something different by an *indefinite* devise: *Goodtitle* v. *Edmonds*, 7 T. R. 633; *Doe* v. *Clarke*, 2 B. & P.

N. R. 343; *Doe* d. *Viner* v. *Eve*, 5 A. & E. 317; *Silvey* v. *Howard*, 6 A. & E. 253; or though the testator, after describing the land, adds, "which I purchased for 600 guineas" (this being the price he paid for the inheritance): *Doe* v. *Parratt*, 3 B. & Ad. 469. Notwithstanding the occurrence of any, or probably of all, these circumstances, it is indisputably clear that an indefinite devise in a will made before 1838 conferred only an estate for life.

**Indefinite Devises Enlarged to a Fee.**

This rule of construction was entirely technical, being at variance with the popular notion, which regards the gift of the corpus of any subject, without discrimination between real and personal estate, as comprehending all the testator's interest therein. A conviction that the construction was hostile to the intention of testators, induced the Courts to lend a willing ear to grounds for departing from it, whenever a plausible pretext for their doing so could be offered. Hence have arisen the various classes of cases in which indefinite devises have been enlarged to a fee by construction or implication, which cannot here receive more than a very brief notice. The principal admitted grounds for such enlargement were—

Grounds for enlarging indefinite devise to a fee.

*First.* Where the word "estate," or "property," or some other equivalent expression was used in the body of the gift, which words carried the fee, though associated with words of locality, or other expressions pointing at the corpus of the land: *Bridgwater* v. *Bolton*, 1 Salk. 236; *Jackson* v. *Hogan*, 1 Cowp. 299; *Bailis* v. *Gale*, 2 Ves. sen. 48; *Sharp* v. *Sharp*, 6 Bing. 63; *Randall* v. *Tuchin*, 6 Taunt. 410; *Roe* d. *Allport* v. *Bacon*, 4 M. & S. 366. And see the cases referred to in Jarm. Wills, Vol. II., p. 275, note (*d*). But the words "estate," &c., if used in recitals or in the introductory part of the will did not pass the fee: *Doe* v. *Clarke*, 1 Cr. & M. 39; *Doe* v. *Guillim*, 3 N. & M. 247. So a devise of "all my moiety," or "all my share" in certain lands carried the fee: *Doe* d. *Atkinson* v. *Fawcett*, 3 C. B. 274. So also any informal expressions clearly and necessarily indicating an intention to pass the fee, would have that effect: *e.g.*, a gift to A. "in fee simple" or

Operation of the words "estate" and "property" to confer a fee.

**Indefinite Devises Enlarged to a Fee.**

"for ever," or "to him and his:" Co. Lit. 9 b; and see cases collected in notes to Jarm. Wills, Vol. II., pp. 274, 275.

Charge of a gross sum on the devisee.

*Secondly.* Where a devisee, whose estate was undefined, was directed to pay the testator's debts or legacies, or a specific sum in gross, he took an estate in fee, because he might otherwise have been damnified by the estate passing from him before he was reimbursed the sum expended; and the strong improbability of loss from the disparity in the amount of the sum charged relatively to the value of the land did not negative the implication: *Moone* v. *Heaseman*, Willes, 140; *Doe* v. *Holmes*, 8 T. R. 1; *Goodtitle* v. *Maddern*, 4 East, 496. Nor, for the same reason, did the futurity or contingent nature of the charge, though the contrary has been sometimes advanced: *Merson* v. *Blackmore*, 2 Atk. 341; *Doe* v. *Allen*, 8 T. R. 497.

No enlargement of *express* estates.

The rule under consideration, however, was confined to *indefinite* devises; for, where the direction to pay was imposed on a person taking an *express* estate for life; (*Goodtitle* v. *Edmonds*, 7 T. R. 635; see also *Willes* v. *Lucas*, 1 P. Wms. 474); or an estate tail, whether express or arising constructively by implication from words introducing the devise over; (*Denn* v. *Slater*, 5 T. R. 535; *Doe* v. *Owens*, 1 Barn. & Ad. 318); it was wholly inoperative to enlarge such estate.

Distinction where the charge is upon the land.

It is well settled, that the mere imposition of a burthen on the land (no mention being made of the person by whom it is to be borne) had not the effect of enlarging the estates of any of the devisees; as in the instance of a devise to A. after debts and legacies were paid, or subject to or charged with the payment of debts and legacies, which clearly conferred only an estate for life: *Denn* v. *Moor*, 1 B. & P. 247. See also *Fairfax* v. *Heron*, Pre. Ch. 67.

As to annual charges.

The same general doctrine applied to *annual* charges, which, if made payable by the devisee of an undefined estate, enlarged that estate to a fee, whether the will directed the annual sum to be paid by the devisee simply, or by the devisee *out of the*

Indefinite Devises Enlarged to a Fee.

*land: Spicer* v. *Spicer,* Cro. Jac. 527; *Baddeley* v. *Leapingwell,* 3 Burr. 1533; *Jenkins* v. *Jenkins,* Willes, 650; *Goodright* v. *Stocker,* 5 T. R. 93; *Right* v. *Compton,* 9 East, 265; *Willis* v. *Lucas,* 1 P. Wms. 474.

In consistency with the principle applicable to charges of gross sums, the imposition of an annuity on the lands, in terms which did not make the payment of it the personal duty of any devisee, left the estates created by the will wholly unenlarged and unaffected: see *Doe* v. *Clayton,* 8 East, 141.

Enlargement of a fee by the effect of a gift over.

*Thirdly.* Another ground for holding an implied fee to pass by an indefinite devise, was, its being succeeded by a gift over in the event of the devisee dying under the age of twenty-one years, or any other prescribed age; such devise over being considered to denote that the prior devisee was to take, or rather to retain, the fee in the alternative event of his attaining the age in question; since, in any other supposition, the contingency on which the ulterior devise was made dependent would be very absurd: *Doe* v. *Cundall,* 9 East, 600; *Marshall* v. *Hill,* 2 M. & S. 608; *Doe* v. *Coleman,* 6 Price, 179; overruling *Fowler* v. *Blackwell,* 1 Com. 353. The rule applies where the devise over confers an estate for life only: see *Frogmorton* v. *Holiday,* 3 Burr. 1618; *Doe* v. *Coleman,* 6 Price, 179. An indefinite devise would have been enlarged to a fee, by the effect of a devise over, to take effect on the prior devisee dying under age, *and without leaving lawful issue: Toovey* v. *Bassett,* 10 East, 460.

However this may be, authority forbids the extension of the doctrine to cases in which the devise over in fee arose on a collateral event, wholly unconnected with the decease of the prior devisee; for, where lands were devised to the testator's wife for life, with remainder to A. and B., as tenants in common; and the testator provided, that, in case C. should disturb his said wife in the enjoyment of the premises, the same should go to D. in fee; it was held, that A. and B. took estates for life only: *Roe* v. *Blackett,* Cowp. 235.

**Indefinite Devises Enlarged to a Fee.**

It is also clear, that where an indefinite devise was limited in defeazance of, or in substitution for, a previous devise in fee (being the converse of the cases just mentioned), no enlargement of estate takes place. Thus, if lands are devised to A. and his heirs, and, in the event of his dying under twenty-one and without issue, to B., B. will take an estate for life only: *Middleton* v. *Swain*, Skinn. 339; *Beviston* v. *Hussey*, Skinn. 385; *Fairfax* v. *Heron*, Pre. Ch. 67; *Doe* v. *Holmes*, 2 Wils. 80. But in *Doe* v. *Lawton*, 6 Sc. 303, where a house was excepted out of a devise to A. in fee, and given to B. and C. without words of limitation, it was held, that the fee passed to them.

Devise to trustees in fee in trust for A., without words of limitation, gives the fee to A., the *cestui que trust*.

It is now settled, that where lands were devised to trustees in fee in trust for a person, without any words of limitation of the estate to that person, the *cestui que trust* took the beneficial interest in fee: *Moore* v. *Cleghorn*, 12 Jur. 591; see also *Challenger* v. *Sheppard*, 8 T. R. 597, and *Knight* v. *Selby*, 3 Man. & G. 92; 3 Sc. N. R. 409.

Estates *pur autre vie*.

As to the question whether the whole interest in an estate *pur autre vie* passes without words of limitation, *vide ante*, Vol. I., p. 654. In *Doe* d. *Lewis* v. *Lewis*, 9 M. & W. 662, an estate *pur autre vie* limited to the testator, his heirs and assigns, was devised to W. J. L. and his assigns during the residue of the term; and it was held, that, on the devisee's death, it passed to his executors.

By the stat. 1 Vict. c. 26, a devise without words of limitation to pass the fee.

By the 28th section of the Wills Act (1 Vict. c. 26), a devise without any words of limitation is to be construed to pass the fee-simple, or other the whole estate or interest of the testator, "unless a contrary intention shall appear by the will." See this section set out, *post*, p. 733.

As formerly nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context; so now it will be observed that by this clause an estate in fee will pass by such a devise, *unless a contrary intention shall appear by the will.*

Operation of this section.

It has been decided that this enactment applies only to devises of real estate vested in the testator

Indefinite Devises Enlarged to a Fee.

at his death, and not to particular estates created for the first time by his will. Thus, a devise of a rentcharge without words of limitation gives to the devisee a rentcharge for his life only: *Nicholls* v. *Hawkes*, 10 Hare, 342. So also the devise of an easement, created *de novo* by the will, is only for the life of the devisee: *Reay* v. *Rawlinson*, 29 Beav. 88; unless *necessary* to the enjoyment of property devised to the same person: see *Pym* v. *Harrison*, 33 L. T. 796.

Contrary intention.

It has been held, that a contrary intention is not to be presumed, so as to prevent an indefinite devise from being enlarged to a fee, by the fact that the same will contain also other devises with formal words of limitation: *Wisden* v. *Wisden*, 2 Sm. & G. 396.

Nor is the gift of a special power of appointment to the object of an indefinite devise sufficient to include the operation of this enactment: *Brook* v. *Brook*, 3 Sm. & Gif. 280; see *Weale* v. *Olive*, 32 Beav. 421. But if there is a repugnancy in the will, the absence or presence of words of limitation may assist the construction of the will. So, where the same lands were in one part of the will devised to A. simpliciter, and in another part to B. and his heirs, it was held that A. took an estate for life with remainder to B. in fee: *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

*As to Estates of Trustees.*]—The remaining class of indefinite devises conferring a fee consists of those in which a trust was created requiring that the devisee should take the inheritance. The doctrine which assigned to devisees in trust an estate exactly commensurate with the exigencies of the trust had long been familiar, but was often perplexing in its application on account of the difficulty of pronouncing what is precisely the quantity or measure of estate which the purposes of the trust required: see *Morrant* v. *Gough*, 7 B. & C. 206. The notice of a few points, by way of example, is all that can be attempted. If the trustees were to convey, of course they took the fee: *Doe* v. *Field*, 2 B. & Ad. 564;

**Indefinite Devises Enlarged to a Fee.**

and a trust to sell vested in them an estate equally extensive: *Murthwaite* v. *Jenkinson,* 2 B. & C. 357; but a mere charge of debts and legacies did not constructively give them an estate: *Kenrick* v. *Lord Beauclerk,* 3 B. & P. 178. An unrestricted power of leasing afforded a strong argument for vesting the fee in the trustees: *Doe* v. *Walbank,* 2 B. & Ad. 554; and so, it seems, did the circumstance of leaseholds (the legal estate in which was given to and necessarily remained in the trustees) being combined with the freehold in the devise: *Houston* v. *Hughes,* 6 B. & C. 403.

Trust to *pay* rents, &c., how construed.

An established distinction was, that a direction to trustees to *pay* the rents to the person who was beneficially to receive them, vested in the trustees the legal ownership: *Robinson* v. *Grey,* 9 East, 1; but a trust *to permit and suffer* him to receive the rents had no such effect: *Right* v. *Smith,* 12 East, 455; *Gregory* v. *Henderson,* 4 Taunt. 772. Where both expressions were used, the latter prevailed; hence the words "to pay *or permit or suffer*" carried the estate to the beneficial devisee: *Doe* v. *Biggs,* 2 Taunt. 109. Where, in addition to the direction to permit and suffer the rents to be received, the testator expressed another purpose, requiring that the trustee should retain the estate, as the preservation of contingent remainders, the property remained in him as it would have done if such purpose had stood alone: *Biscoe* v. *Perkins,* 1 V. & B. 485.

Estate of trustees restricted to infancy or coverture.

It should seem, that, in general, where lands were devised to trustees, or even to them and their heirs, in trust to apply the rents for the benefit of a minor until his age of twenty-one years, and then in trust for him in fee; or where the devise was in trust for the separate use of a female for life, and, after her decease, in trust simply for the ulterior objects of the testator's bounty, the estate of the trustees was limited to and terminated with the minority or coverture (actual or possible), for the protection of which the trust estate was evidently created: *Nash* v. *Coates,* 3 B. & Ad. 839.

Limitation *to the use* of the trustees.

Of course, a testator might, if he thought proper, vest the estate in his trustees without assigning to

Indefinite Devises Enlarged to a Fee.

them any duty to perform, and such would unquestionably be the effect of a devise to the *use* of the trustees in trust for the beneficial objects: *Symson* v. *Turner*, 1 Eq. Ca. Ab. 303, pl. 1, n.; *Harris* v. *Pugh*, 12 Moo. 577; also *Doe* v. *Field*, 2 B. & Ad. 564. But even a limitation to the *use* of the trustees would, it seems, if the extent or quantity of their estate was not expressly defined, have admitted of being enlarged or restricted by the nature of the trust: *Venables* v. *Morris*, 7 T. R. 342, 437; *Curtis* v. *Price*, 12 Ves. 89; and see *Hawkins* v. *Luscombe*, 2 Swanst. 375. To the subject of the estates of trustees the 34th chapter of Mr. Jarman's Treatise on Wills is devoted (Jarm. Wills, Vol. II., p. 289 *et seq.*), where the reader will find the long series of decisions respecting the quality and extent of the estate conferred by devises in trust, stated and commented on.

Remarks of Mr. Jarman.

"Of all the adjudged points," observes Mr. Jarman, "connected with the subject, that which has been deemed the least satisfactory is the doctrine of those decisions which, in certain cases, gave to trustees, whose estate was undefined, a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute 1 Vict. c. 26:" Jarm. Wills, Vol. II., p. 320.

Estates of trustees under present law.

These enactments are contained in the 30th and 31st sections of the Act (set out, *post*, p. 733), and are to the effect that no devise to trustees or executors, except for a term or presentation to a benefice, are to pass a chattel interest; and that trustees under a devise without words of limitation are to take the fee, or other the whole estate of the testator.

Mr. Jarman's remarks upon stat. 1 Vict. c. 26, ss. 30, 31.

"These clauses," continues Mr. Jarman, "have been the subject of much criticism. It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those

Indefinite Devises Enlarged to a Fee.

sections such a construction as will preserve it from collision with the other. The design of the 30th section would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or, being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, an estate for years, or, as in *Doe* v. *Simpson*, an estate for life, with a superadded term for years, but) an estate in fee-simple. The result, in short, is, that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee. It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the 'surplus rents and profits being given to a person for life,' making no provision, therefore, for the case (a possible, though not a frequently occurring one,) of a trust of any other kind being created for a purpose coextensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held, that such a case is excluded from the 31st section by the exception in the 30th section, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this

(even if so far), it is presumed, the exceptive part of the 30th section could not be construed to qualify or control the operation of the 31st section; but decision alone can settle the point.

Indefinite Devises Enlarged to a Fee.

"The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate, or only a power; also, whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee-simple; and, consequently, there should be no relaxation in the anxious care of framers of wills to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of the 31st section, under *such* wills become a question, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

Points not excluded by the Act.

"The new doctrine would not, it is conceived, preclude the construction that trustees take an estate *pur autre vie*, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction: for where an estate is devised to trustees indefinitely, the authorities (with one solitary exception, see *Hawker* v. *Hawker*, 3 B. & Al. 537, in which there seems to have been an opposing context,) conduct to the conclusion, that whatever duty is subsequently imposed on them, must be in virtue of their estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will."

Absolute interest in leaseholds passes, when.

The doctrine which required words of limitation, or some corresponding or equivalent demonstration of intent, in order to vest in the devisee the testator's whole estate or interest, did not apply to leaseholds for years, which, however long, absolutely and entirely passed under a simple gift of messuages, or other such descriptive appellation. Thus, if a man, who is possessed of a term of 1000 years in White-

Indefinite Devises Enlarged to a Fee.

acre, devised, or rather bequeathed in these words: —"I give Whiteacre to A.," the entire term (the executors' assent being obtained) passed to the legatee, and positive intention must have been evinced in order to give to the bequest a more restricted operation. And this, of course, is now the rule with respect to wills made since 1837.

## CHAPTER XXII.

### WHAT PASSES UNDER THE WORDS "HOUSEHOLD FURNITURE," "GOODS AND CHATTELS," "HOUSEHOLD EFFECTS," &c.

"Household Furniture," &c.

As to bequests of household furniture, &c.

It is of no inconsiderable importance to choose the most appropriate words for describing those articles of personalty, which are often bequeathed separately from the general estate, such as household furniture, &c., since many questions arise on such bequests; though, as they relate to matters of small value, comparatively few of them become subjects of judicial consideration. To this probably we must ascribe the fact, that less attention has been paid to the framing of such gifts than to many other clauses of rarer occurrence.

Bequests of this kind are divisible into two classes, viz., those in which the articles in question are described with reference to locality, and those in which they are not so described. In the former class of cases, the utmost generality of description will commonly best answer the intention; for, where a testator bequeaths all his effects which shall be in and about his dwelling-house at the time of his decease, he usually means that everything found there at the prescribed period shall pass to the legatee. As to what words amount to a reference to locality, see *Norris* v. *Norris*, 2 Coll. 719.

In the case of *Willis* v. *Curtois*, 1 Beav. 189, a testator, having three establishments, at A., B., and C., bequeathed the one at A. to his nephew; and all his carriages, horses, implements, and his live and dead stock and chattels, in and about the premises at A., and also his household goods and furniture, pictures, plate, linen, china, liquors of all sorts, and brewing vessels, and likewise his watches and personal ornaments; and he also gave to his said

"Household Furniture," &c.

nephew all his books in his house at B.; he gave the premises at B. to trustees for sale. Lord *Langdale*, M.R., held, that the household goods, furniture, &c., at B. and C. passed by the bequest. In the same case, MS. notes of a physician, of his attendance on a patient, and which were bound up in volumes, were held to pass under a bequest of "all and every my books in and about my house" at A.

Suggestion where certain classes of articles are to be excepted.

And even where part is intended to be excepted, if such exception embraces only a single class or a few classes of articles, it is better to describe the subject of bequest by some general word, such as "effects" or "property," and introduce an exception descriptive of such articles, than to attempt an enumeration of the various classes of articles which the bequest is meant to comprise.

Whether money and securities for money will pass as goods and chattels in a house.

A testator seldom intends under the bequests in question, to include money and securities for money, which therefore should be expressly excluded, especially the former; as it should seem, according to the cases, that money (including in this denomination bank and other notes payable to bearer on demand) *will* (*a*), and securities for money *will not*, pass under a bequest of goods and chattels in and about a particular house, the latter being merely the evidence of title to things out of the house and not things in it: *Chapman* v. *Hart*, 1 Ves. sen. 271; *Popham* v. *Lord Aylesbury*, Amb. 68. As to which see 11 Ves. 662; *Green* v. *Symonds*, 1 Br. C. C. 129 n.; *Moore* v. *Moore*, 1 Br. C. C. 127; *Jones* v. *Sefton*, 4 Ves. 166; *Brooke* v. *Turner*, 7 Sim. 671; *Wrench* v. *Sutting*, 3 Beav. 521; *Hertford* v. *Lowther*, 7 Beav. 1; *Fleming* v. *Brook*, 1 Sch. & L. 318.

(*a*) The circumstance that the legatee has a money legacy has been considered to favour a more restrictive construction: *Roberts* v. *Kuffin*, 2 Atk. 112. As to the application of the rule "noscitur a sociis" to questions of this nature, see also *Cavendish* v. *Cavendish*, 1 Br. C. C. 467; *Michell* v. *Michell*, 5 Mad. 69; *Arnold* v. *Arnold*, 2 My. & K. 315; *Att.-Gen.* v. *Harley*, 5 Russ. 173; *Lamphier* v. *Despard*, 2 Dr. & W. 59; *Ferguson* v. *Ogilby*, 2 Dr. & W. 548; *Montresor* v. *Montresor*, 1 Coll. 693; *Parker* v. *Marchant*, 1 Y. & C. C. C. 290, 1 Phill. 356; *Moore* v. *Moore*, 29 Beav. 496; *Manton* v. *Tabois*, 30 Ch. D. 92.

"Household Furniture," &c.

Another point often raised in construing bequests of chattels in and about a house, relates to the period at which they must answer to the described locality. The rule seems to be to consider the death of the testator as such period, unless the contrary appears. And, therefore, where a testator devised his house in Jermyn Street, and all his goods and furniture therein, to his lady, for life, except the pictures, which he gave to J. and E.; Lord Keeper *Wright* held, that the exception (which was considered to comprise as well pictures in boxes as those hung up as furniture) extended to pictures brought into the house after the will was made: *Gayre* v. *Gayre*, 2 Vern. 538. So, where a testator gave to his wife all his personal estate at a place called W., it was held that the words passed whatever personalty the testator had there at the time of his death: *Sayer* v. *Sayer*, 2 Vern. 688. So, a bequest of "my library of books now in the custody of Mr. C.," was held to comprise all the books in the library at the testator's decease, the word "now" not restricting the bequest to the books of which the library was composed at the making of the will, but denoting merely where the library then was. It was compared to the bequest of a flock of sheep *now on such a hill*, which it was said would pass the sheep produced after the making of the will, *it being the case of a collective body: All Souls College* v. *Codrington*, 1 P. Wms. 597. But if the testator has introduced into his description restrictive expressions pointing at present or past time, it is clear that prospective acquisitions are excluded; and therefore where a testatrix bequeathed all the goods she *brought* into the house, it was held that no goods passed except what were in the house at the making of the will: *Dormer* v. *Bishop Burnet*, cit. Amb. 281. And if, from the nature of the case, it is evident that the testator refers to the locality, for the purpose of designating specific chattels then in his contemplation, and not with the view of requiring them to answer to the description at any future period, the construction will be made accordingly. As where the captain of a ship bequeaths all his

At what period effects must answer to a described locality.

Use of word "now."

"Household Furniture," &c.

goods and chattels on board a particular ship, it is obvious that he cannot mean goods answering to this description at his death, when he may have no interest in the ship, but that he intends to designate such goods as are then belonging to him, whatever may be their future local situation: *Chapman* v. *Hart*, 1 Ves. sen. 271.

Chattels in course of removal.

It seems that a legacy of goods in or about a particular house will not carry articles of furniture selected and packed for removal to the house by the testator's order, but not actually removed thither at the time of his decease (*Duke of Beaufort* v. *Lord Dundonald*, 2 Vern. 739 (*b*); or furniture purchased by him, but not sent home (*Grandison* v. *Pitt*, 2 Vern. 740 n., ed. by Raithby); nor will it comprise goods removed to another house in the testator's lifetime, if such change of locality continues up to the period of his decease: *Heseltine* v. *Heseltine*, 3 Mad. 276. See *Lord Brook* v. *Earl of Warwick*, 12 Jur. 912. To avoid this consequence and provide against the contingency of the testator's change of residence, bequests of this nature should be made to comprise the testator's effects which may be in or about *any* house or houses he may happen to occupy at his decease. It is also convenient to extend such a bequest to articles removed from the house for any temporary purpose.

In some of the cases, a distinction is hinted at between the effect of necessary and unnecessary removal; but it is unlikely that at the present day the Courts would embarrass themselves with attempting to apply so subtle a distinction; see *Earl of Shaftesbury* v. *Countess of Shaftesbury*, 2 Vern. 747, an authority against it; for a bequest by a testator of the goods that should be in his house at R. at his decease, was there held to be defeated by the removal (evidently a necessary one) of the goods from R., on the occasion of the steward, in the absence but with the privity of the testator, giving up the house to the landlord. It was said, that the case

(*b*) But, as to this case, see 3 Atk. 202.

"Household Furniture," &c.

would have been otherwise, if the removal had been made by fraud or on purpose to disappoint the legacy, or by a tortious act unknown to the testator.

As to bequests of chattels not restricted to a given locality.

In the second class of bequests before referred to, viz. those in which household furniture or other such articles are described without reference to locality, general terms of course are to be used with caution, as otherwise the bequest will extend to the whole personal estate (*c*) (see *Kendall* v. *Kendall*, 4 Russ. 360), and the claim of the legatee be brought into competition with that of the general residuary legatee, thereby creating one of those perplexing questions in which the Courts have to determine how far general words of description are restricted by the more limited terms with which they stand associated: 3 P. Wms. 112; 2 Atk. 103; 13 Ves. 311; 13 Ves. 39; 1 Russ. 146. And care should also be taken not to introduce into the bequest an exception of any articles which such bequest would not otherwise comprise, the effect of which necessarily is, to drive the expositor of the will to the alternative of supposing that the testator to have meant that the bequest shall receive such a construction as would have extended it to the excepted articles if they had not been expressly excluded, or to have made an unnecessary and incongruous exception. Thus, a bequest of plate, linen, household goods, and other effects (money excepted), has been held to carry stock in the funds, though it is clear that, without the exception, stock would not have passed under the bequest: *Hotham* v. *Sutton*, 15 Ves. 319. Where general words are followed by words descriptive of a particular species of property, the effect is to confine the general words to things of the nature specified. See *Timewell* v. *Perkins*, 2 Atk. 103; *Trafford* v. *Berrige*, 1 Eq. Ca. Ab. 201, pl. 14.

"Household furniture" and "house-

With respect to the extent of particular expressions, it may be observed, that the terms "household

(*c*) As to this see Jarm. Wills, Vol. I., pp. 751 *et seq.*

"Household Furniture," &c.

goods," or "household furniture" (which seem to be synonymous), will include household linen (5 Russ. 319); china (*Hele* v. *Gilbert*, 2 Ves. sen. 430), both useful and ornamental; pictures hung up in frames (*Cremorne* v. *Antrobus*, 5 Russ. 319); and, in ordinary cases, even plate (*Nicholls* v. *Osborn*, 2 P. Wms. 419 n.; *Kelley* v. *Powlet*, Amb. 607 (*d*); *Stapleton* v. *Conway*, 1 Ves. sen., Belt's Supplement, 187; *Cremorne* v. *Antrobus*, 5 Russ. 319); and fire-arms, where used for domestic defence (see 1 S. & St. 189); but not books (*Kelly* v. *Powlet*, Amb. 607; *Bridgman* v. *Dove*, 3 Atk. 201; see *Porter* v. *Tournay*, 3 Ves. 314; *Cornewall* v. *Cornewall*, 12 Sim. 298); or globes or mathematical instruments (*Kelly* v. *Powlet*, Pre. Ch. 207 n.; but see *Lord Brook* v. *Earl of Warwick*, 12 Jur. 912; or, it seems, victuals and housekeeping stores, such as meat, beer (*Slanning* v. *Style*, 3 P. Wms. 334; 2 Ves. sen. 280), wines (3 Ves. 314), and other articles whose use is in their consumption, of which therefore an additional mention is requisite, as a testator rarely intends things of this nature to fall into the residue, especially if it be made subject to a trust for sale. Such effects appear to be aptly described by the term "consumable stores," which will comprise some articles not included in the denomination of housekeeping provisions, such as hay, corn, &c. A gift of consumable stores for life is

"hold goods" how construed.

As to articles purchased in way of trade.

(*d*) An excepted instance, suggested by the Master of the Rolls in the cited case, is that of a tradesman buying a service of plate as a bargain, and not for his domestic use, which probably would have been deemed an extravagant supposition in those days of plainness and simplicity. His Honour, however, disclaimed being understood to mean that the plate must be in actual use (as suggested by Lord *Hardwicke* in *Snelson* v. *Corbet*, 3 Atk. 370). This exception, indeed, seems to belong to that class of cases in which the gifts under consideration are held not to comprise articles purchased for the purposes of trade; for, it is clear, that a bequest of household furniture by a broker, or of plate by a goldsmith or silversmith, would not pass his general stock, but would be confined to such furniture or plate as the testator had appropriated for domestic use: *Pratt* v. *Jackson*, 2 P. Wms. 302; *Le Farrant* v. *Spencer*, 1 Ves. sen. 97.

an absolute gift of the property: *Randall* v. *Russell*, 3 Mer. 190; *Andrew* v. *Andrew*, 1 Coll. 690. "Household Furniture," &c.

It has been held by *Jessel*, M.R., that tenant's fixtures will not generally pass by a gift of "furniture": *Finney* v. *Grice*, 10 Ch. D. 13; but see *contra*, *Paton* v. *Shepherd*, 10 Sim. 186, which decision was attributed by *Jessel*, M.R., to "special circumstances." Tenant's fixtures.

The term "household effects" is a more extensive, and therefore seems to be a better general term of description than "household goods" or "furniture." Thus, in the case of *Cole* v. *Fitzgerald*, 1 S. & St. 189, where a testator gave to E. C. his dwelling-house, garden, and premises at R. for her life, and also all and singular the household furniture *and other household effects of and belonging to him in the said dwelling-house and premises at the time of his decease*; the following articles were found in the dwelling-house and premises at the testator's death—four fowling-pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, about a hundred volumes of books in general circulation, an organ, a parrot and cage, a pony, a cow, a haystack, and a considerable stock of wines and liquors:—Sir *J. Leach*, V.-C.—"The words 'household furniture and other household effects' will comprise all property in the house and on the premises intended for use and consumption therein, or for the ornament thereof. E. C. is therefore entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot, books, and wine and liquors; but not to the pony, cow, or fowling-pieces, unless it is proved that they were kept for the defence of the house. If the haystack was only for use, it would pass; if for sale, it would not pass." On appeal (3 Russ. 301), Lord *Lyndhurst* concurred in his Honour's decision: his Lordship observing—"It is clear that this testator, by adding to 'household furniture' 'other household effects,' meant to carry his bequest further than merely to household furniture. The only question is, how far the word 'effects' is controlled by the word 'household;' and though some doubt may be "Household effects."

"Household Furniture," &c.

entertained with respect to the wines and liquors, the books, and the turning machinery, I do not see any sufficient reason for excluding any of them from the bequest to E. C." If the word "effects" had not been restrained by association with "household," the bequest in question would clearly have comprised the pony and domestic animals, which were held (contrary, no doubt, to the testator's real intention) not to pass—though it is always to be remembered, that words in themselves the most extensive are susceptible of restriction from, and are often narrowed by, their juxtaposition with less comprehensive terms, being considered to point to articles *ejusdem generis: Boon* v. *Cornforth*, 2 Ves. sen. 280. In the case of *Gower* v. *Gower*, 2 Eden, 201, Lord *Northington* held, that even running horses passed under a clause in Earl Gower's will as goods and chattels.

Heirlooms.

As to the proper mode of limiting personal property, intended to go with real estate devised in strict settlement, so as to avoid the operation of the rule, that words which create an estate tail in real estate confer the absolute interest in personalty, see Jarm. Wills, Vol. II., pp. 577 *et seq.* A full discussion of this question will also be found in Vol. VI. of this Work sub tit. SETTLEMENTS. See, as to bequests of chattels to be held as heirlooms, *Rowland* v. *Morgan*, 12 Jur. 348 (where the earlier cases on this subject will be found collected); *Re Johnson's Trusts*, L. R. 2 Eq. 716; *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382; *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *Countess of Harrington* v. *Earl of Harrington*, L. R. 5 H. L. 87; *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302; *Re Viscount Exmouth*, 23 Ch. D. 158; *Re Cresswell*, 24 Ch. D. 102; *Re Johnston, Cockerell* v. *Earl of Essex*, 26 Ch. D. 538; *Re Marquess of Bute*, 27 Ch. D. 196.

## CHAPTER XXIII.

### PRIORITY AND ORDER OF PAYMENT AND ABATEMENT OF LEGACIES.

**Priority of Payment of Legacies.**

Priority among legatees not conferred by certain expressions.

The ordinary expressions in a will, descriptive of the order of paying pecuniary legacies, are not considered to denote an intention to vary or disturb the equality which, by the general rule of equity, obtains among legatees of any given class. This was shown in some clear general propositions by Sir *J. Leach*, V.-C., in the case of *Beeston* v. *Booth*, 4 Mad. 161—"The expressions 'In the first place I give to A., then to B.,' are not evidence of such intent (*i.e.* an intent to depart from the general rule); for they mark only the order in which it occurred to the testator to name the objects of his bounty. A gift to A. payable at one month after my decease, to B. at six months, and to C. at twelve months, is not evidence of such intent; for, although to be paid at different times, the presumed intention remains, that they are all equally to be paid at those times. The expressions 'In the first place I direct that my executors shall pay to A., then to B., then to C.,' are not evidence of such intent; for they mark only the order in which it occurs to the testator to give the directions to his executors. The expressions 'I direct that my executors shall in the first place pay to A., in the next place to B., then to C.,' are not evidence of such intent, because they do not necessarily import more than the order of payment: that A. shall be paid by my executors in the first place, or out of the first moneys which they have applicable to the payment of legacies; B. in the next place, or next in order; and then, or next in order, C.; and these expressions are therefore consistent with the presumed intention, that all shall be equally paid in their order." See also *Vintner* v. *Pix*, 1 Ch.

Priority of Payment of Legacies.

Rep. 133; *Brown* v. *Allen*, 1 Vern. 31; *Lewis* v. *Lewis*, 2 Ves. sen. 417; *Blower* v. *Morret*, Id. 420; *Brown* v. *Brown*, 1 Keen, 275; *Thwaites* v. *Foreman*, 1 Coll. 409; *Johnson* v. *Child*, 4 Hare, 87. See *Ashburnham* v. *Ashburnham*, 12 Jur. 299, where Sir *L. Shadwell*, V.-C., held, that an annuity given by a testator to his brother towards his maintenance and support, was not charged on the real estate, and was not entitled to priority, but must abate *pari passu* with the other legacies.

Legacies to servants, &c.

It has been also decided, that legacies to servants, *Att.-Gen.* v. *Robins*, 2 P. Wms. 25; *Alton* v. *Medlicott*, cit. 2 Ves. sen. 417; to executors, though given for their care and trouble, *Heron* v. *Heron*, 2 Atk. 171; *Duncan* v. *Watts*, 16 Beav. 204; or to friends for the purchase of mourning rings, *Apreece* v. *Apreece*, 1 Ves. & B. 364 (all which a testator would commonly wish to exempt from deduction); to charities, *Tate* v. *Austen*, 1 P. Wms. 265; *Sturge* v. *Dimsdale*, 6 Beav. 462; are equally within the general rule, and subject to abatement proportionally with other legacies; and annuitants cannot claim precedence over legatees of gross sums: *Hume* v. *Edwards*, 3 Atk. 693; see *Innes* v. *Mitchell*, 1 Phill. 710; nor is the wife or child of the testator generally in a better situation than mere strangers in respect of priority: *Blower* v. *Morret*, 2 Ves. sen. 420. But where a testator bequeathed to his wife 500*l.* to be paid to her *immediately* after his decease, and his estate proved insufficient for payment in full of all the legacies, it was held that the legacy of 500*l.* had priority over all other pecuniary legacies: *Re Hardy*, *Walls* v. *Borwick*, 17 Ch. D. 798.

Legacies in consideration of legatee's relinquishing some benefit.

But where a legacy is something more than mere bounty (being founded on a valuable consideration moving from the legatee), as where it is given upon the condition of his renouncing some claim upon the testator's estate, the legatee is not liable to abate *pari passu* with those whose gifts flow only from the spontaneous bounty of the testator. On this principle, it has been often decided, that a widow, to whom a pecuniary legacy is bequeathed in lieu of dower, is entitled, on a deficiency of assets, to be

Priority of Payment of Legacies.

paid in preference to other legatees of the same class; *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Heath* v. *Dendy*, 1 Russ. 543; *Norcott* v. *Gordon*, 14 Sim. 258; and this advantage extends to the entire legacy, although it may exceed, and however largely it may exceed, the value of the dower: *Davenhill* v. *Fletcher*, Amb. 244. But it is not given where the testator leaves no real estate subject to dower: *Acey* v. *Simpson*, 5 Beav. 35; *Roper* v. *Roper*, 3 Ch. D. 714. The Dower Act, 3 & 4 Will. 4, c. 105, has an express saving of this rule of equity (s. 12). So a legacy given in discharge of a debt has priority; but the legatee must have a valid legal claim subsisting at the death; and accordingly, where a testator bequeathed to certain creditors, who had accepted from him a composition of ten shillings in the pound, sums equal to the residue of their debts, it was held that the sense of moral obligation, which had induced this act, did not confer on the legatees any superiority of claim over other voluntary claimants under the same will: *Coppin* v. *Coppin*, 2 P. Wms. 292. See, however, *Williamson* v. *Naylor*, 3 Y. & C. 208, where the circumstance, that the testator might have relied on the Statute of Limitation as a defence against the creditors' claims, was held not to bring them within the rule in *Coppin* v. *Coppin*.

# CHAPTER XXIV.

## DEVOLUTION OF THE PERSONAL (*a*) ESTATE OF PERSONS DYING INTESTATE.

**Intestacy.**

Stat. 22 & 23 Car. 2, c. 10. Distribution of personal estate.

THE distribution of the personal estate of intestates is, with some local exceptions presently noticed, regulated by the stat. 22 & 23 Car. 2, c. 10, which disposes of the surplus, after paying debts and funeral expenses, as follows: viz., one-third to the wife and two-thirds to the children, equally, or, such children being dead, to such persons as legally represent (*b*) them, "other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allowed to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an

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(*a*) The law of descent of real estate is discussed, *ante*, Vol. I., pp. 131 *et seq.*, sub tit. ABSTRACTS.

(*b*) In the Statute of Distributions the term "legal representatives" means descendants; consequently the widow of a deceased son takes nothing: *Price* v. *Strange*, 6 Mad. 161.

Intestacy.

equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate." And in case there shall be no child nor any legal representatives of any child, then one moiety (*c*) to the wife, and the residue equally to the next of kindred (*d*) in equal degree, and those who legally represent them; but no representations to be admitted among collaterals after brothers' and sisters' children. If no wife, then all the estate equally amongst the children; and if no child, then to the next of kindred in equal degree, and their legal representatives as aforesaid. The statute also provides, that no distribution shall be made till the expiration of a year, and that persons to whom it shall be made shall give bond with sufficient sureties to refund, if any debts owing by the intestate should thereafter be recovered. The act not to prejudice the customs of London and York.

Claim of surviving husband.

This statute, it will be observed, does not recognise the title of a surviving husband, on whom,

(*c*) It has been held, that where an intestate leaves a widow but no next of kin, one moiety belongs to the widow, and the other to the Crown: *Cave* v. *Roberts*, 8 Sim. 214.

(*d*) "The Statute of Distributions," said Lord *Cottenham* in *Withy* v. *Mangles*, 10 Cl. & Fin. 248, "accurately preserves the distinction between 'next of kin,' and those to whom it directs the distribution of personalty. If there be no children, it directs the distribution of the estate equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them; and then confines the representation within brothers' or sisters' children; not treating the rights of those who take by representation as belonging to them as next of kin, but as derived from others, who, if they had lived, would have been next of kin. If the familiar expression, 'next of kin under the statute,' be considered as having reference to this provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether 'next of kin under the statute' has not been inaccurately used as describing those who are entitled under the statute, but whether the term 'next of kin,' without any reference to the statute, has received any such judicial construction. A short examination of the cases will show that the contrary was established by a very great preponderance of authority." See also as to the effect of the statute in Wms. Exors. 1498; and the observations of *Lush*, L.J., in *Re Goodman's Trusts*, 17 Ch. D. at p. 277.

Intestacy.

therefore, it might seem to impose the obligation of distributing the personal estate of his deceased wife, not reduced into possession during her lifetime, amongst her next of kin. This led to the passing of the Act of 29 Car. 2, c. 3, sect. 35, which enacted that the previous statute should not extend to the estates of *feme coverts* dying intestate, but that the husband might have administration as before.

Mother may claim with brothers and sisters.

Doubt seems also to have existed in regard to the relative claims of brothers and sisters, and the mother, being a widow ; to remove which, the stat. 1 Jac. 2, c. 17, provided, that if, after the death of the father, any of the children died intestate, without wife or children, in the lifetime of the mother, every brother and sister, and their representatives, should have an equal share with her. This statute is obviously defective in expression, there being no provision for the case of both a wife and mother surviving ; but the defect has been supplied by decision : for, where an intestate left a wife and mother, and several nephews and nieces, the children of a deceased brother, his personalty was held to be divisible into fourths, of which two belonged to the widow, one to the mother, and one to the nephews and nieces : *Stanley* v. *Stanley*, 1 Atk. 455 ; *Keylway* v. *Keylway*, 2 P. Wms. 344. The word "representatives" in this statute (*i.e.* stat. 1 Jac. 2, c. 17) receives the same construction as the word occurring in the previous general Act, which restricts representation among collaterals (but among them *only*) to the children of brothers and sisters : *Pett's Case*, 1 P. Wms. 26 ; and hence a surviving mother is entitled in exclusion of the *grandchild* of a deceased brother. See *Stanley* v. *Stanley*, 1 Atk. 457 ; *Withy* v. *Mangles*, 10 Cl. & F. 215.

Mother-in-law.

Of course, a mother-*in-law* is not entitled to the maternal share ; she is to all intents and purposes a stranger : see *Duke of Rutland* v. *Duchess of Rutland*, 2 P. Wms. 216.

Posthumous children not excluded.

Distributive shares, under the Act of 22 & 23 Car. 2, c. 10, vest immediately on the intestate's decease, but not so as to exclude an infant *en ventre*

*sa mère: Edwards* v. *Freeman*, 2 P. Wms. 440; *Wallis* v. *Hodson*, 2 Atk. 113. Intestacy.

The restriction of the right of representation among *collaterals* to brothers' and sisters' children, of course, has the effect of entitling the child of a deceased brother in exclusion of the grandchild of another deceased brother; or, in other words, a living nephew is preferred to the child of a deceased nephew: *Pett's Case*, 1 P. Wms. 26; and, upon similar grounds, the child of a deceased uncle is denied participation with a living uncle: *Maw* v. *Harding*, Pre. Ch. 28. Right of representation.

Wherever any person claims under the representative clause in the statute, the distribution is necessarily *per stirpes*. Thus, if the intestate, a widower, happen to have left a child and two grandchildren, the children of a deceased child, his personal property becomes divisible into moieties, of which one goes to the surviving child, and the other to the two grandchildren. But if all the claimants are of equal degree, whatever that degree be, the distribution is *per capita;* for instance, if the only descendants are three grandchildren, the issue of two deceased children, or if the next of kin consists of three nephews, the children of a deceased brother and sister, the distribution will not be (as before) in moieties, but each grandchild or each nephew (as the case may be) will take one-third: *Davers* v. *Dewes*, 3 P. Wms. 41; *Lloyd* v. *Tench*, 2 Ves. sen. 213. Distribution when made *per stirpes*. When *per capita*.

The statute has been decided to include indifferently the relations of the whole and those of the half-blood: *Smith* v. *Tracy*, 2 Vent. 317; *Burnet* v. *Mann*, 1 Ves. sen. 156; *Jessop* v. *Watson*, 1 My. & K. 665. Relations of half-blood.

At the present day, very few questions arise concerning relative proximity of kindred, the computation of its degrees being regulated by principles which have been long settled, though this certainty was not arrived at until many adjudications had taken place on disputed points.

In the case of *Mentney* v. *Petty*, Pre. Ch. 593, the Master of the Rolls observed, that "the rule was taken from the civil law, and not from the canon law, between which there was a wide difference in Mode of computing degrees of consanguinity.

Intestacy.

the computation of the degrees of proximity; for the *canon law*, prohibiting marriage between relations till after the fourth degree, that they might exclude as many as possible from the liberty of marriage within those degrees without a dispensation, reckon all in the direct ascending or descending line, and those in the collateral line corresponding to them, to be but one degree; as, for instance, father or mother, uncle or aunt, make but one degree; so, grandfather or grandmother, great uncle or great aunt, make but two degrees; but, by the *civil law*, the father or mother make one degree, the grandfather or grandmother two degrees, and the uncle and aunt three degrees; so that the grandfather or grandmother, in the distribution of an intestate's estate, shall be preferred before the uncle or aunt, as being nearer of kin, within the rules of computation or the law of proximity, by the civil law; and so it was decreed by my Lord Chancellor *Cowper*, in the case of *Duppa*, for the grandmother against the uncle or aunt. But, if you go one degree further, and reckon to the great grandfather or grandmother, they are in equal degree with the uncle or aunt, as they are in the third degree in direct lines with the uncle or aunt, who are in the third degree in the collateral line; for you must reckon through the grandfather or grandmother to come to the uncle or aunt, and then they are in just the same degree of remove from the nephew or niece in the collateral line, as the great grandfather or great grandmother are in the direct ascending line, and consequently, being in equal degree of kindred by the rules of computation of the civil law, are equally entitled to the distributive shares with the uncle or aunt." See also *Woodroff* v. *Wickworth*, Pre. Ch. 527; *Blackborough* v. *Davis*, 1 P. Wms. 41; *Withy* v. *Mangles*, 10 Cl. & F. 215.

Points decided respecting consanguinity.

Applying the principle just stated, it will be obvious that uncles and aunts are on an equal footing with nephews and nieces: *Durant* v. *Prestwood*, 1 Atk. 454; *Lloyd* v. *Tench*, 2 Ves. sen. 213. The like equality, of course, prevails among their respective children, *i.e.* first cousins and great

Intestacy.

nephews and nieces: *Thomas* v. *Ketteriche*, 1 Ves. sen. 333; who consequently are postponed to uncles and aunts, nephews and nieces: *Maw* v. *Harding*, Pre. Ch. 28; *Bowers* v. *Littlewood*, 1 P. Wms. 594. Some difficulty was felt in adjusting the relative claims of the grandfather or grandmother, and of the brother or sister: the former clearly was in the second degree; and it was contended with some plausibility, that, as the latter could only be reached through the father and mother, he was at an equal distance, in point of consanguinity, from the intestate. It was decided, however, that, having regard to the doctrine of the civil law, and the rules in force before the statute, the brothers and sisters were entitled in preference to the grandfather and grandmother: *Evelyn* v. *Evelyn*, Amb. 191; 3 Atk. 762.

Inconvenience of intestacy (*e*).

But though there is now little room for dispute, in regard to the proximity of relationship, yet the disposition of property which the statute makes, however fair and equitable in the main, is too simple to satisfy the various exigencies of family provisions, and would seldom be deliberately adopted. For instance, a man having a wife and children rarely intends to (as the statute would) give to the wife a distributive share in the capital, but more commonly means to restrict her to a life interest; and the shares of children who are minors, or who are or may become married women, require modifications adapted to infancy and coverture. And even where it is not intended materially to vary the destination of the property, testacy is generally to be preferred to intestacy. Some of the grounds of this preference are, that a testator is enabled to place the legal control over the property in the hands of his own nominee, with regulated powers, instead of its being entrusted to the person or persons who may happen to obtain administration, and whose authority

(*e*) The stat. 44 Vict. c. 12, sect. 27, has done away with the difference which formerly existed as regards the amount of duty payable in respect of probate and letters of administration respectively (see *ante*, p. 172); but by the stat. 51 Vict. c. 8, additional duties have been imposed on "successions": see *ante*, p. 250.

Intestacy.

is for many purposes inconveniently narrow; besides which, when the next of kin are numerous, their equal right to administer sometimes occasions disputes. A will also prevents (or at least ought to prevent) questions among children respecting advancements (presently noticed). And, moreover, the intention in favour of presumed next of kin is less exposed to hazard by making an express gift to them, than by confiding their interests to the law of succession. For example: suppose a man to have an only brother, whom he presumes to be his next of kin, and that, intending his brother to succeed to his property, he dies intestate; the claim of such brother might have to compete with the adverse pretensions of another relation of the same degree, whom the deceased had never known or recognised as such, or who was supposed to be dead; or it might even turn out, that, in consequence of an irregularity in the marriage of the parents of the deceased, and of his reputed brother, no legal relationship subsisted between them; in which case the title of the latter would be wholly supplanted by that of the Crown. In such cases administration is granted to the patentee of the Crown: *Jones* v. *Goodchild*, 3 P. Wms. 33.

Hotchpot clause in stat. 22 & 23 Car. 2, c. 10.

The hotchpot clause in the statute of 22 & 23 Car. 2, c. 10, has given rise to many questions. It has been held not to apply to the case of an advancement by a widow, its language being exclusively applicable to the male parent: *Holt* v. *Frederick*, 2 P. Wms. 356.

Points decided respecting advancements, under the stat. 22 & 23 Car. 2, c. 10.

The advancement clause is considered to have been inserted for the mere purpose of producing equality among the children and their representatives, and consequently cannot be made to augment the distributive share of the widow: *Ward* v. *Lant*, Pre. Ch. 182; *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51; *Stewart* v. *Stewart*, 15 Ch. D. 539.

The children of a deceased child, who was advanced by the intestate in his lifetime, are clearly bound to bring into hotchpot what their parent received, in like manner as such parent, if living, must have done: *Proud* v. *Turner*, 2 P. Wms. 560.

Intestacy.

In order to constitute an advancement, the gift must be by way of portion or preferment to set the child up with: *Head* v. *Head*, 1 Ves. sen. 17. Hence, a mere allowance by way of maintenance is not sufficient: see *Edwards* v. *Freeman*, 2 P. Wms. at p. 449 (unless, perhaps, where extended to a daughter after marriage, 3 Atk. 528); nor will small presents of money for wedding clothes, travelling expenses, or other such purposes, be so considered; 3 P. Wms. 317, 3 Atk. 528; nor even the payment of an apprentice fee, being in the nature of a consideration for maintenance. *Secus*, as to the purchase of any office or promotion, civil or military. See 3 P. Wms. 317, n.; *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

Mere alimony not an advancement.

An annuity settled on a child is an advancement, though given expressly for maintenance; *Hern* v. *Barber*, cit. 1 Ves. sen. 17; and it is to be estimated at its value when granted, unless the annuity should happen to have ceased, in which case it seems the child would have an option to bring in the sum actually received: *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51. Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement, and it is not the child's estate for life only that ought to be brought in: *per* Lord *Hardwicke*, 2 Atk. 635.

Annuity deemed an advancement.

It is not essential to a statutory advancement, that it be gratuitous or voluntary; for a portion secured by a marriage settlement has been decided to be such; nor need it be payable or even vested before the intestate's decease; it is sufficient that the child has *in event* become entitled under a settlement made in the intestate's lifetime: *Edwards* v. *Freeman*, 2 P. Wms. 435.

Provision need not be voluntary.

A legacy, not being a provision "in the lifetime," need not be brought into hotchpot by a child claiming "a share" in the undisposed-of residue: *Edwards* v. *Freeman*, 2 P. Wms. at p. 440. Indeed, the doctrine is confined to cases of intestacy; for if, by the will, an executor is appointed, which is at law

Rule where intestacy is partial.

Intestacy.

(though not at law only (*f*)), a disposition of the entire personal estate, it seems that the hotchpot clause of the statute would be excluded. And, therefore, where A. made a will, appointing an executor, and bequeathing certain legacies, but not the residue, which was held to be distributable under the statute, a daughter of the deceased, who had received a marriage portion, was held to be entitled to her full share of such residue: *Vachell* v. *Jeffereys*, Pre. Ch. 170; see also *Cowper* v. *Scott*, 3 P. Wms. 125. The mere appointment of an executor would produce the same excluding effect, even though *no* part of the personalty were *beneficially* disposed of: *Walton* v. *Walton*, 14 Ves. 324. Lord *Hardwicke* appears to have ruled, that an advanced child might claim a share in that portion of the personal estate which, by the customs of London and York, is distributable according to the Statute of Distributions, without bringing the advancement into hotchpot: *Hearn* v. *Barber*, 3 Atk. 214.

Advancement where intestacy is partial.

What provision for the heir deemed an advancement.

Real estate descending to the eldest son is, by the express terms of the statute, not to be deemed part of his distributive share; and this has been held to extend to any other child whom custom makes heir: *Lutwyche* v. *Lutwyche*, Forr. 276. Moneys expended by the father in the improvement or repair of houses which he afterwards suffers to descend, are of course undistinguishable from any other descended realty: *Smith* v. *Smith*, 5 Ves. 721.

It is conceived that a settlement of *real estate* on the eldest son *by deed*, would not be an advancement within the meaning of the statute, of which the terms are "by descent or *otherwise*." See 5 Ves. 723. However, *personalty* settled on the heir clearly must be brought into hotchpot by him; *Phiney* v. *Phiney*, 2 Vern. 638; see 8 Ves. 55; but money which is absolutely to be laid out in land would be regarded, it seems, as a settlement of land. *See Hume* v. *Edwards*, 3 Atk. 453.

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(*f*) *Vide* stat. 11 Geo. 4 & 1 Will. 4, c. 40, stated *ante*, p. 474; *Mapp* v. *Elcock*, 15 Sim. 563.

Intestacy.

Customs of London and York.

The Statute of Distributions (sect. 4) expressly saved the customs of the city of London and the province of York. These customs have, however, been abolished by the stat. 19 & 20 Vict. c. 94, as regards the estates of persons dying on or after the 1st of January, 1857, and accordingly they do not seem to call for consideration in this place. For information on the subject, reference may be made to the 3rd Edition of this Work, Vol. XI., pp. 414 *et seq.*, also to Mr. Justice Williams' Treatise on Executors, Vol. II., pp. 1533 *et seq.*

Rights of Crown to *bona vacantia*.

As to the right of the Crown to the personal estate of an intestate who leaves no relations, see *Middleton* v. *Spicer*, 1 Br. C. C. 202; *Taylor* v. *Hoggarth*, 14 Sim. 8; *Jones* v. *Goodchild*, 3 P. Wms. 32; *Carr* v. *Roberts*, 8 Sim. 214; *Dyke* v. *Walford*, 12 Jur. 839; *Cradock* v. *Owen*, 2 Sm. & Gif. 241; *Powell* v. *Merritt*, ib. 381; *Read* v. *Steadman*, 26 Beav. 495.

If after the Crown has taken possession of *bona vacantia* the next of kin establish their claim, the Crown is not liable for the income received during its possession: *Re Goodman*, 17 Ch. D. 771.

# APPENDIX.

## PART I.

### THE STATUTE 1 VICT. CAP. 26.

AN ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS.

*Explanation of Terms.*

Stat. 1 Vict. c. 26.

(*Royal Assent, July 3rd, 1837*).

Meaning of certain words in this Act.

"Will."

12 Car. 2, c. 24.

14 & 15 Car. 2 (I.).

"Real estate."

"Personal estate."

Sect. 1. Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say), the word "*will*" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures *in capite* and by Knight's Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof;" or by virtue of an Act passed in the Parliament of Ireland, in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures *in capite* and by Knight's Service," and to any other testamentary disposition; and the words "*real estate*" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "*personal estate*" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or

interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Stat. 1 Vict. c. 26.

Number.

Gender.

*Repeal Clause.*

Sect. 2. And be it further enacted, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his land;" and also an Act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an Act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an Act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an Act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an Act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an Act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie;* and also an Act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an Act passed in the Parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;" and also an Act passed in the fifty-fifth year of the reign of King

Repeal of the Statutes of Wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1, Sess. 2, c. 2 (I.).

Sects. 5, 6, 12, 19, 20, 21, and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.).

Sect. 9 of 14 Geo. 2, c. 20.

25 Geo. 2, c. 6, (except as to colonies).

25 Geo. 2, c. 11 (I.).

55 Geo. 3, c. 192.

Stat. 1 Vict. c. 26.

George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this Act does not extend.

*General Enabling Clause.*

All property may be disposed of by will,

Sect. 3. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant-right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof, by deed or will; and also to all rights of entry for conditions broken, and other rights of entry, and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

comprising customary freeholds and copyholds, without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie;*

contingent interests;

rights of entry, and property acquired after execution of the will.

*Fees on Copyholds.*

As to the fees and fines pay-

Sect. 4. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant-right,

or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or inrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or inrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

able by devisees of customary and copyhold estates.

*Copyholds.*

Sect. 5. And be it further enacted, That when any real estate of the nature of customary freehold or tenant-right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls.

And the lord to be entitled to the same fine, &c., when such estates are not now devisable, as he would have been from the heir in case of descent.

Stat. 1 Vict. c. 26.

*Estates pur autre Vie.*

Estates *pur autre vie.*

Sect. 6. And be it further enacted, That if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie* whether freehold or customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

*Age of Testator.*

No will of a person under age valid.

Sect. 7. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

*Married Women.*

Nor of a *feme covert*, except such as might now be made.

Sect. 8. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this Act.

*Execution of Wills.*

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

Sect. 9. And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

*Execution of Testamentary Appointments.*

Appointments by will to be executed like other wills, and to be

Sect. 10. And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects

the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity. Stat. 1 Vict. c. 26. valid, although other required solemnities are not observed.

*Wills of Soldiers and Seamen.*

Sect. 11. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act. Soldiers' and mariners' wills excepted.

*Petty Officers and Seamen in the Navy and Marines.*

Sect. 12. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth, and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy. Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and mariners.

*Publication.*

Sect. 13. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof. Publication not to be requisite.

*Attesting Witness's Competency.*

Sect. 14. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. Will not to be void on account of incompetency of attesting witness.

*Gifts to Attesting Witnesses.*

Sect. 15. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or Gifts to an attesting witness to be void.

Stat. 1 Vict. c. 26.

debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

*Creditor Attesting Witness.*

Creditor attesting to be admitted a witness.

Sect. 16. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

*Executor Attesting Witness.*

Executor to be admitted a witness.

Sect. 17. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

*Revocation by Marriage.*

Will to be revoked by marriage, except, &c.

Sect. 18. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

*Revocation by Presumption.*

No will to be revoked by presumption.

Sect. 19. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

*Revocation by Subsequent Will or Codicil, or Destruction of Instrument.*

No will to be revoked but by another

Sect. 20. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or

by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Stat. 1 Vict. c. 26.

will or codicil, or by a writing executed like a will, or by destruction.

*Obliterations and Interlineations.*

Sect. 21. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.

No alteration in a will shall have any effect, unless executed as a will.

*Revival of Revoked Will.*

Sect. 22. And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

*Revocation—Subsequent Conveyance.*

Sect. 23. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

A devise not to be rendered inoperative by any subsequent conveyance or act.

*Will speaks, from what Period.*

Sect. 24. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate

A will shall be construed

Stat. 1 Vict. c. 26.

to speak from the death of the testator.

comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

*Lapsed and void Devises.*

A residuary devise shall include estates comprised in lapsed and void devises.

Sect. 25. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

*General Devise—Copyholds, Leaseholds.*

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

Sect. 26. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

*General Devise—Appointment.*

A general gift shall include estates over which the testator has a general power of appointment.

Sect. 27. And be it further enacted, That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Stat. 1 Vict. c. 26.

*Fee-simple without Words of Limitation.*

A devise without any words of limitation shall be construed to pass the fee.

Sect. 28. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

*Words importing Failure of Issue.*

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

Exceptions.

Sect. 29. And be it further enacted, That, in any devise or bequest of real or personal estate, the words "*die without issue*," or "*die without leaving issue*," or "*have no issue*," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

*Estate of Trustees.*

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

Sect. 30. And be it further enacted, That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

Sect. 31. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Stat. 1 Vict. c. 26.

*Lapse of Estate Tail.*

Devises of estates tail shall not lapse.

Sect. 32. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

*Lapse—Children or Issue dying in Testator's Lifetime.*

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

Sect. 33. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

*When Act operates.*

Act not to extend to wills made before 1838, nor to estates *pur autre vie* of persons who die before 1838.

Sect. 34. And be it further enacted, That this Act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

*Scotland.*

Act not to extend to Scotland.

Sect. 35. And be it further enacted, That this Act shall not extend to Scotland.

Act may be altered this session.

Sect. 36. And be it enacted, That this Act may be amended, altered, or repealed by any Act or Acts to be passed in this present session of Parliament.

# PART II.

## SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR AND PREPARING WILLS (*a*).

**Suggestions as to Preparation of Wills.**

When your client intends that his estate shall devolve in the way in which it would do if he died intestate, he should be made aware, that by means of a will he may invest the executors with more ample powers in winding up the affairs than an administrator would possess (*vide ante*, p. 719), and, if there is real estate which would descend to an infant, may provide for the proper management of it, by appointing trustees for that purpose, *post*, pp. 849, 917.

As to intestacy.

Inquire what is the nature of the testator's property. If it comprises freehold, copyhold, or leasehold estates, are any of such estates in mortgage; and, if so, are the devisees or legatees to take *cum onere;* if not, out of what fund is the estate to be disencumbered, *ante*, p. 851.

Nature of testator's property.

Where real estates are to be specifically devised, the title-deeds, or a recent abstract of the title, should if possible be seen. The neglect of such investigation often occasions the omission of small parcels, or even more serious misdescriptions, misstatements of tenure, omission of special provisions adapted to the state of the title, &c. See p. 848.

Investigation of title.

And if the testator has made a marriage or other settlement, or is entitled to any interest in settled property, the settlement or will should be inspected, in order to ascertain the nature and extent of his interest and powers. Under his marriage settlement he may have a power of jointuring and charging portions, and would probably possess a general power of appointment in default of issue. The result of such inspection may sometimes be to shew, that the property which the testator supposes to be at his own disposal is tied up by his settlement.

Is any contract for the sale or purchase of real estate pending, or likely to be pending at the testator's death? If so, the destination of the purchase-money or of the estate should be provided for, *post*, p. 850; and if it is to be devised in settlement or on trust, power should be given to the trustees to deal with the contract. See *post*, p. 926. In the case of a contract for purchase, provision should be made for any question which may arise between the devisee and the residuary legatee, in case the contract should not be strictly enforceable, and for compensating the devisee if the contract fails.

Contract for sale or purchase.

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(*a*) To many practitioners some of the Suggestions in the text will appear, and in fact will be, superfluous; but they will not the less readily assent to the propriety of the insertion of such matter for the use of their less experienced brethren.

**Suggestions as to Preparation of Wills.**

Partnership.

Is the testator in partnership, either in his general business or in any particular adventure? If so, how is his interest to be dealt with? The articles of partnership should be examined, in order to see if they contain any power to be exercised by will. See pp. 749, 770, 778, 780, 790, 986, 1019.

Wife's leaseholds and choses in action.

Testators frequently consider themselves to be absolutely entitled to leaseholds and legal and equitable choses in action belonging to their wives, and suppose that they can dispose of such property by will, see *ante*, Vol. I. pp. 212, *et seq.* Sometimes even the wife's separate property is so regarded. Attention should be directed to the wife's title by survivorship. Although the widow would be put to her election by a specific gift of such property to another, no case of election could be made against her by a mere residuary legatee.

Testator holding money belonging to his children.

Testators sometimes receive monies belonging to their children, for which the latter hold no security or acknowledgment. Inquiry should in all cases be made as to the existence, or the probability of the future existence, of any unsettled accounts or claims between the testator and his children.

Legacies to debtors and creditors.

Advancements.

Are any of the legatees, or husbands of legatees, indebted to the testator; and if so, are the debts to be brought into account? Are advancements by the testator to be accounted for? Are legacies to creditors of the testator to go in satisfaction of their claims? See pp. 774 *et seq.*, 795, 985 *et seq.*, 989, 1015.

Emblements.

The emblements on a devised estate are often of great value; and though if the estate descends they would go to the executor and not to the heir, yet when it is devised, they go to the devisee in the absence of a provision to the contrary, thus giving him a great advantage over a pecuniary legatee, or a general legatee for life, who is not entitled to interest during the first year. The testator's intention on this head should be ascertained.

Specific gifts.

Property should not be specifically given without a special reason, because such gifts are liable to ademption. On the other hand, they are favoured in the administration of the assets.

Fund for debts and legacies.

Is any specific fund to be appropriated for payment of debts, funeral and testamentary expenses, and legacies, in exoneration, either of all the other property of the testator, or of particular portions of it? or is the real estate to be charged concurrently with the personalty? See pp. 757, 758.

Leaseholds.

Are leaseholds to follow the destination of the freeholds, or to be converted with the personal estate?

Conversion.

Is the general residuary real or personal estate to be subject to a trust for conversion, or to remain *in statu quo*, and with any and what exceptions (*e. g.*, household domestic effects, and especially articles of consumption)? And are the trustees to have any and what discretionary power to delay or suspend the conversion? See pp. 869 *et seq.*

Income from leaseholds and precarious investments.

Is the actual income arising from investments or property of a precarious or perishable nature to be enjoyed as income during any suspension of conversion? And what discretion is to be vested in the trustees as to such property, and also as to reversionary and other property not immediately saleable with advantage? See pp. 871, 872.

**Suggestions as to Preparation of Wills.**

What investments are to be authorised? See pp. 873 *et seq.* Whether, where a son or other near object of the testator's regard is in business, the trustees are to lend any trust money to him, and to what amount and on what security? See pp. 787, 882. Whether any securities which the testator may possess at his death are to be retained? See p. 870. Whether any indulgence is to be shewn to any particular debtors? See pp. 870, 985, 989.

Reversions

As to investments.

Loan to son, &c.

What (if any) discretion is to be vested in trustees to pay unproved demands—waive doubtful rights of the testator—give indulgences to debtors—refer disputes to arbitration—and invest trust monies in the purchase of real estates. See pp. 882, 978. Some of these powers are now implied by statute, but others should be inserted as a matter of course, without express instructions. Such are, powers to vary securities—to apply a definite portion of the principal of the shares of minors not otherwise provided for (especially of the testator's children) for their advancement. Pp. 877, 914.

Retaining testator's investments, &c.

Discretionary powers of trustees.

Are trustees for sale, &c., to be empowered to appoint agents, bailiffs, &c., to cut timber, repair, insure, lease, open and work mines, &c.? Pp. 919 *et seq.*

Power to manage.

May trustees purchase trust property? P. 868. May trustees, being solicitors, auctioneers, or surveyors, transact and charge for business? P. 975.

Privileges to trustees.

A person who takes only a partial interest under the will should seldom be appointed sole executor or trustee.

Sole executor.

Is the wife or other head of the family to have a legacy for immediate use? P. 792. Such a gift is generally proper.

Immediate legacy to wife.

Who is to take the consumable household stores? P. 761. It is seldom intended that they should be sold.

Consumable stores.

If the testator has no children, but there is a possibility of his having any by his present wife, provision should invariably be made for such a contingency. See pp. 746, 884 *et seq.* The same precaution should be observed where existing children are provided for by name.

Provision for possibility of issue.

If you have not certain knowledge on the point, endeavour to learn whether there is any doubt as the legitimacy of any of the testator's children, or the legality or fact of his marriage with his reputed wife; and suggest the consequences of an insufficient description of such objects by their reputed character only. See pp. 645 *et seq.*

Legitimacy of legatees.

If provision is made for illegitimate persons, inquire what is to become of the property in case of their death under age or without having effectually (see p. 850) disposed of it by will or otherwise. A mere annuity or life interest will often be the best provision; but if an interest in the capital is to be given, the best course, in order to exclude the title of the Crown in all events, is to confer on such objects a power of appointing the corpus by deed or will, and to insert a gift over in default of appointment.

Gifts to illegitimate persons.

If the testator himself is illegitimate, or has no near relations, more than ordinary care should be taken to prevent intestacy.

Illegitimacy of testator.

Legacies to illegitimate children or to a reputed wife (especially

Legacy duty:

**Suggestions as to Preparation of Wills.**

annuities) should be expressly given clear of legacy duty, or succession duty.

reputed wife and children.

Where children are to be maintained by the widow, it should be made clear whether any enforceable trust is to be imposed on her, and whether she is to have a discretion as to the proportion, and whether their right to maintenance is to cease on their attaining twenty-one or marrying (see pp. 810, 831, 884, 887); and, if it is then to cease, some provision for them should be made, to take effect in possession in that event. See *Pride* v. *Fooks*, 2 Beav. 430; *Conolly* v. *Farrell*, 8 Beav. 347; *Re Camac's Trust*, 12 Jur. 470; *Longmore* v. *Elcum*, 2 Y. & C. 363. See also Lewin on Trusts, pp. 137 *et seq.*

Income to widow for maintenance of children.

Power to apportion maintenance funds.

The statutory provisions for maintenance confine each object to the benefit of the income from his own expectant or vested share. It may sometimes be better to make a common fund of the shares of all the minors for the time being, to be applied in such proportions as the trustees think fit. See p. 912.

Infant.

Lunacy, improvidence, insolvency, &c.

If the legatee or annuitant is a minor, is the legacy to be paid at majority? or how otherwise? P. 796. If the legatee is lunatic, or mentally imbecile, or of weak character, deaf and dumb, improvident, insolvent, or an uncertificated bankrupt, what (for there should be some) extraordinary powers are to be given to the trustees to apply the legacy for the benefit of the legatee? A gift in trust for the wife and family of a legatee so situated, or of a legatee in trade, according to circumstances, may be expedient. (See p. 802.) Sometimes the situation or character of the legatee may be such as to render a simple gift over on alienation proper and sufficient. Pp. 893 *et seq.*

Power to settle shares of infant legatees.

Are the trustees to have power to settle the legacies or shares of legatees or devisees marrying in infancy, or (which is better) are such legacies to be absolutely settled in such event? See pp. 810, 889, 931.

Authority to pay small legacies to parents of infant legatees.

It is often both convenient to the trustees and useful to the objects to authorise the payment or delivery of pecuniary or specific legacies, of small amount or value, to the parents of infant legatees, with a direction that their receipts shall discharge the trustees. See p. 797.

Power to appoint life interest to wife or husband.

Is any legatee or devisee for life to have a power to appoint a life interest or annuity to a surviving wife or husband? In the case of a female legatee, it should be ascertained whether the power is to be made exerciseable by deed or will, or by will only. See p. 931.

General power in default of issue.

Is a female legatee or devisee for life to have a general power of appointment (confined in case of coverture to will) in default of issue? and how is the property to go in default of issue, in case such power is not exercised, or not given? See pp. 838, 849, 888.

Payment of legacies, interest, &c.

At what time are pecuniary legacies (if any) to be paid? are such legacies to carry interest, and if so, from what time, and at what rate, and whether to be paid free from legacy duty, and how to abate in case of deficiency of assets? See p. 819.

Annuities.

How are annuities to be raised and secured, whether by the charge or appropriation of a particular fund or estate, or by the executors purchasing a government annuity or otherwise, when to

Suggestions as to Preparation of Wills.

commence, and at what intervals to be payable, and if intended to be free from legacy duty? See pp. 824 *et seq.*

Annuities (including rentcharges) and life interests should be given clear of legacy duty or succession duty. Where a life interest is given in a specific fund or in the residuary personalty or any share of the residue, the tenant for life has income or interest from the testator's death; but in the case of a general legacy of money or stock, the tenant for life will have no income in respect of the first year, unless it is expressly given to him. See pp. 792, 796.

Deferred income of legatee for life.

If property is given on a contingency (whether that of the devisee or legatee attaining a specified age or any other event), what is to become of it, in the alternative event of the devisee or legatee dying under the vesting age, &c.?

Contingent gifts.

What (if any) provision is to be made for the event of any legatee or devisee dying in the testator's lifetime or before the vesting of his interest, by substituting the children of the deceased, &c.? See pp. 797, 799, 901, 987 *et seq.*

Lapse.

Where the share or legacy of one of several devisees or legatees is to be given over on his death under contingent circumstances, or in any given event, ascertain and express with precision whether the gift over is to be for the benefit of the survivors, or of the *others*,—whether it is to include accrued shares or not,—whether the accrued shares are in all respects (or, so far as the rule against perpetuities will permit) to be subject to the same conditions as the original shares. And in all limitations to *survivors*, express the time at which the class of survivors is to be ascertained.

Gifts over; survivorship, &c.

If there is a gift which may not take effect immediately, what is to become of the intermediate income?

Deferred gift.

In framing deferred gifts to children, or to any other class of objects capable of future augmentation, if there is no prior life interest, or one which may determine while the class is still capable of augmentation, expressly extend the gift, if that is the intention, to all members of the class coming into existence as well after as before the time when the fund or estate would otherwise be divisible. See p. 894.

Deferred gifts to classes.

In limitations in tail, are the testator's own daughters to take before the daughters of his sons or grandsons? If so, the order of the limitations will be, to the first and other sons and their sons successively in tail male, remainder to the testator's daughters either as tenants in common or successively for life, and to their sons in tail male, remainder to the sons (or sons' sons) in tail general, remainder to the daughters in tail general. If not, the limitation to the sons (or sons' sons) in tail general will precede the limitation to the daughters.

Strict settlement.

Where an inalienable provision for a married woman is charged upon land, it should be confined to a specific estate, or be accompanied with apt provisions for shifting the security.

Charges on land for inalienable use of married women.

If an estate in mortgage is devised in settlement power may be given to the trustees to invest the surplus proceeds of any sale to be made by the mortgagee in securities other than those authorised by the Settled Land Act. See p. 958.

Estates in mortgage.

Where an estate held under one title is devised in parcels, provision should be made for the custody of the title-deeds (p. 982);

Splitting of estates held under one title.

**Suggestions as to Preparation of Wills.**

and, in the case of contiguous properties, for any rights of way or other easements that may be required for the full enjoyment of any parcel. See pp. 842, 848, 933. And if property included in one mortgage is devised in parcels to different persons *cum onere*, the manner in which the charge is to be borne should be stated. See p. 851.

Provision for easements.

Splitting of estates in mortgage devised *cum onere*.

In disposing of copyholds, vest a power of appointment either in trustees or in the beneficial devisee. Where the power is given to trustees, it should be made to accompany the office. Where it is given to a beneficial taker, it should be made exerciseable by will; so that in case of his death before admittance, his testamentary appointee will not have to pay a double set of fees and fines. The existence of a power of appointment over copyholds may often be the means of considerable saving to the estate. If the legal estate is not vested in the trustees, they should be empowered to manage the property and receive the rents for the maintenance of minors: see pp. 917, 955.

Power of appointment over copyholds.

Witnesses.

As the last, and not the least important precaution, the testator's solicitor should select as attesting witnesses persons of respectability and intelligence, not being devisees or legatees, or the husbands of devisees or legatees. See sect. 15 of the Wills Act (1 Vict. c. 26), and *Townsend* v. *Townsend*, 34 Ch. D. 357.

Memoranda of usual provisions.

The following memoranda of some of the most usual provisions in wills may be useful by way of suggestion, when a will is to be prepared in haste :—

*Provisions for Wife.*—Consumable stores, furniture (pp. 761 *et seq.*), immediate legacy, further legacy to be paid at the usual time (p. 792). Income for life or during widowhood (pp. 884, 886, 887, 889), or annuity for life or during widowhood, or reducible on marriage (pp. 828, 831), or, substitution of annuity for life interest in case of marriage (p. 885 n.). Income, charged with maintenance of children, either during infancy or not, or, as to daughters, during their discoverture (pp. 810, 831, 887). House for residence, on condition of repairing and insuring, with power on default for trustees to repair, &c., and recover expenses (pp. 843, 855, 857). Wife to share the capital with the children, or to take residue after legacy to child (pp. 995, 1023). Whether or not to have actual income of unconverted property (pp. 869, 872).

*Provisions for Children.*—Power of selection given to parent as to all or part of the fund, exercisable by deed or will or by will only; Power to appoint to issue of *living* children (see p. 885). Appointments not to vest in unmarried infants. In default of appointment, to children and issue of deceased children, *per stirpes*, sons at twenty-one, daughters at twenty-one or marriage, or sons and daughters at twenty one or marriage, or sons and daughters attaining twenty-one or leaving issue (pp. 886 *et seq.*); or to vest at twenty-five (p. 889), or on marriage with consent of guardians (p. 889), or (as to grandchildren, &c., of whom testator cannot appoint guardians) with consent of trustees (p. 889). If vesting not dependent on marriage or leaving issue, substitute issue in

Suggestions as to Preparation of Wills.

case of death before vesting (pp. 899, 901). Vesting should not generally be made to depend on survivorship (see pp. 685 *et seq.*). Advancement (p. 914). Shares of daughters, marrying under twenty-one, to be held in trust for them for separate and inalienable use for life, and then to their children, with power of selection during coverture by will and during discoverture by deed or will; hotchpot; power to appoint life interests to husbands; advancement; general power of appointment during coverture by will only; in default of issue, ultimate limitation to persons who would be entitled under Statutes of Distributions in case of death without having been married (see pp. 840, 888).

Immediate gift to children during wife's life (p. 889).

Daughter's share for her inalienable use during coverture, with testamentary power of appointment (p. 801).

Life interest to cease on alienation—children of living persons, who do not take absolute life interests, to be entitled whenever born (pp. 893 *et seq.*).

*Children, Infants, &c.*]—Investment of legacies and shares (*b*); Power to vary investments (pp. 874 *et seq.*). Maintenance out of income or capital, and advancement (pp. 912, 914). Power to pay small legacies to father or guardian (p. 797). Maintenance by wife, and, if so intended, direction as to amount which each child may claim (pp. 831, 887).

*Children—Classes—Tenants in Common.*]—Substitution of issue of objects dying before testator, or before vesting; Cross limitations of shares of those dying without issue; accrued shares to pass by clause of accruer, and to be on same trusts as original shares (pp. 793, 799, 813, 815, 890, 901, 903, 908).

*Legacies.*]—When to be paid; Interest, priorities, and abatement; Legacy duty. See pp. 818, 819. Provision against lapse (pp. 793 *et seq.*, 987 *et seq.*). Charge on realty, with power to sell and mortgage (pp. 757, 873). Power to postpone raising, and to raise interest for maintenance (pp. 817 *et seq.*). Investment of infants' legacies; Maintenance out of income or capital, advancement (pp. 912, 914); Substitution of children (pp. 793, 799, 806 *et seq.*).

*Annuities and Rent-Charges.*]—From when to commence; When to be first paid; At what times payable; Apportionment; Free of legacy duty; Power to set apart fund for, and to pay out of capital

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(*b*) Executors should be authorised to invest legacies belonging to minors, instead of paying them into Court under the stat. 36 Geo. 3, c. 52, s. 32. In a modern case a decree was made against executors, with costs, for payment of a legacy of 50*l.*, with 4 per cent. interest, which they had invested in the Consols instead of paying into Court, although by so doing the expense of getting the fund out of Court was saved: *Rimell* v. *Simpson*, 18 L. J., Ch. 55, and see as to this case Lewin on Trusts, p. 360, note (*b*).

Suggestions as to Preparation of Wills.

of fund, if income deficient; Power to purchase, annuitant not to take purchase-money; For inalienable use of female annuitant; To cease on alienation (pp. 824 *et seq.*).

Whether annuity is to be charged on land exclusively, or only in aid of the personalty (p. 834). Power to apportion on sales (pp. 925 *et seq.*).

*Life Interest in Residue or Share of Residue, or in general Legacy of Money or Stock.*]—Whether income of residue to be enjoyed in specie; Free of legacy duty; Income of residue to be accumulated until sale or conversion, in which case an immediate annuity is given in lieu of income during the first year. See p. 872.

*Real Estate.*]—Appointment of trustees of the settlement created by the will for the purposes of sect. 42 of the Conveyancing, &c., Act, 1881, and of the Settled Land Acts (pp. 849, 955). Charge of debts and legacies, and power to trustees to raise by sale or mortgage (pp. 757 *et seq.*). Power for tenant for life to jointure and charge portions (pp. 946 *et seq.*). Special powers, if required, to tenants for life or trustees to grant leases, to invest purchase-monies, and vary investments; and to manage, cut timber for repairs or for sale, work, and open mines; to sell mansion-house, &c., without consent, &c.; Provisoes as to notices, mining rents and royalties, &c. (pp. 956 *et seq.*).

If the legal estate is to be limited to the members of a class who attain a certain age, or marry, &c., it should not be limited by way of contingent remainder, under which those only can take who answer the description at the death of the tenant for life; but the estate should be limited to vest immediately in all the members of the class, with cross executory limitations in case of death before attaining the required age, or marrying, &c. (p. 853). Another course is to devise to the objects as tenants in common in tail, with cross remainders in tail, wholly omitting the condition of attaining twenty-one (p. 941.)

*Conversion.*]—Absolute or discretionary trust to sell, &c.; To appoint copyholds; To pay debts and legacies; To invest and vary investments; Before sale, to lease, manage, repair, insure, &c. (pp. 866 *et seq.* and pp. 910 *et seq.*). Power to postpone conversion; Declaration as to income in the meantime (pp. 869 *et seq.*).

*Charges and Incumbrances on Realty.*]—Whether to be charged on the land exclusively, or only in aid of personalty (p. 757 *et seq.*). Whether devisee is to take *cum onere* (p. 851).

*Devisee in Fee.*]—Provision for ademption; Substitution of issue in case of death (p. 853).

*Devise to Tenants in Common.*]—Substitution of issue; Cross limitations (p. 853); Power to trustees to partition (p. 926).

Suggestions as to Preparation of Wills.

*Infant Devisees.*]—Appointment of trustees to manage, receive rents for maintenance, &c. (pp. 849, 955).

*Life Estate.*]—Devisee to repair, ensure, &c.; In default, trustees to do so, and recover expenses (pp. 855 *et seq.*); Power to appoint gross sum in default of issue (p. 949); Power to jointure and charge portions (pp. 947 *et seq.*).

*Estate contracted for.*]—Power to accept title, waive requisitions, &c. (p. 926); Legacy if purchase goes off (p. 850).

*Copyholds.*]—Power to devisee or trustees to appoint uses, subject to which the legal estate is devised directly to the persons intended to take beneficially (pp. 848, 855).

*Renewable Leaseholds.*]—Provision for renewal (pp. 845, 964); Power to lease.

*Bequest of Specific Debt or Security.*]—Whether legatee is to have arrears of interest? (pp. 773 *et seq.*); Proviso for ademption (p. 773).

*Property and Investments Abroad.*]—Power to appoint special trustees and agents (p. 968).

*General Provisions.*]—Power to determine questions (p. 977); To convert, delay conversion, invest, change investments (pp. 866 *et seq.*); To retain particular investments (p. 870). Advancement of minors (p. 914). Trustees, being solicitors or land agents, &c., may make professional charges (p. 973). Who is to have power to appoint new trustee? (pp. 967 *et seq.*)

# PART III.

## GENERAL SCHEME OF WILL.

### Where the Residue is to be Converted into Money.

Appendix to Dissertation.

*Scheme of Will.*

Commencement, see p. 745.

Appointment of executors, see pp. 747 *et seq.*

Appointment of guardians, see pp. 751 *et seq.*

Appointment of special executors of particular property, and bequest of such property, *e.g.*, business, mortgage debt, &c., see pp. 748 *et seq.*

Specific bequests, see pp. 759 *et seq.*

Bequests of business and ancillary clauses (unless inserted previously after appointment of special executors), see pp. 777 *et seq.*

Demonstrative and absolute pecuniary bequests, see pp. 792 *et seq.*

Annuities, see pp. 824 *et seq.*

Settled pecuniary bequests, see pp. 835 *et seq.*

Specific bequests of leaseholds, see pp. 841 *et seq.*

Specific devises, see pp. 848 *et seq.*

Gift of residue and trusts for conversion, see pp. 861 *et seq.*

Investment clause, see pp. 874 *et seq.*

Trusts of residue, see pp. 877 *et seq.*, and pp. 884 *et seq.*

Advancement clause, see pp. 914 *et seq.*

Powers of trustees and directions and provisions relating thereto, see pp. 910 *et seq.*

Power to appoint new trustees, see pp. 967 *et seq.*

Trustee clauses, see pp. 972 *et seq.*

# COMMON FORMS IN WILLS.

## COMMENCEMENTS, &c. (*a*).

Commencements, &c.

1. I, [*testator*], late of, &c. (*b*), and now of, &c., HEREBY REVOKE (*c*) all wills, codicils, and testamentary dispositions heretofore made by me, AND DECLARE this to be my last will.

Commencement of will.

2. THIS IS THE LAST AND ONLY (*d*) WILL of me, [*testator*], of [*town residence*], and also of [*country residence*].

Revocation of former wills.

Another form.

3. THIS is a [second] codicil to the will of me, [*testator*], of, &c., which bears date the —— day of ——, 18—.

Commencement of codicil.

4. I, [*testator*], of, &c., HEREBY DECLARE this to be a [second] codicil to my will, which bears date, &c.

Another form.

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(*a*) Although all the clauses to be found in ordinary wills may be classified and reduced to a moderate number of Common Forms, yet their combinations in practice create such variety, that scarcely any two wills are alike, and a complete will is therefore seldom available as a precedent, beyond furnishing a few of the forms which the draughtsman must gather from many sources and put together, with more or less of alteration in a new order. For this reason precedents of complete wills are far less useful than precedents of conveyances, leases, mortgages, settlements, and other instruments, of which, their scope being both narrower and better defined than that of wills, the conveyancing elements are fewer and recur more often in the same combinations.

Plan of the Forms and Precedents in this volume.

(*b*) The mention of a past as well as present address may often be useful as evidence of a testator's identity, when he may have been registered by a former address in the books of the Bank of England, or of a company, as the holder of any stock or shares.

(*c*) It is better expressly to revoke all former wills than to leave open the inquiry, whether they are wholly superseded by the new one. As to revocation of wills, &c., see *ante*, pp. 396 *et seq.*

Revoking clause.

(*d*) Here the word "only" amounts to a revocation of former wills.

Commencements, &c.

Will conditional on not leaving issue.

5. But I direct that this will shall not take effect if I leave any issue surviving me (*e*).

Commencement of will.

6. This is the last will of me [*testator*], of, &c., intended to operate on, and dispose of all my real and personal property in the United Kingdom; I revoke all wills, codicils, and testamentary dispositions heretofore made by me; But I declare that this will shall take effect concurrently with, but independently of another will of even date herewith, relating to property not intended to be affected by this will, situate at ——, in the Kingdom of [Italy].

Recital of appointment of executors in India, and bequest of property there to them in trust, as to house for A. B. for life;

7. Whereas, by will or instrument in writing, dated the —— day of ——, I have appointed [*Indian executors*], my executors as to such part of my personal estate as, at the time of my death, shall be in India; And I have likewise devised and bequeathed unto the said [*Indian executors*], their heirs, executors, administrators, and assigns respectively, All my real and personal estate in India, In trust as to my house situate in ——, in Calcutta, for [*name*], and her

to convert residue;

assigns, during her life; And as to all the residue of my said real and personal estate, and as to the said house, from and after the death of the said [*name*], Upon trust, absolutely to sell all my said real estate, and collect and get in all my personal estate, and out of the moneys which shall so come to

to set apart fund for annuity for A. B. for life;

their or his hands, to invest upon such security in India or elsewhere, as they or he shall think fit, a sum, the interest whereof will produce the sum of —— rupees per annum; With power to alter and vary the said securities as they or he shall think fit, and to pay the said annual sums to the said [*name*], during her life, for her separate use, and without

to transmit residue to English executors;

power of anticipation; And to hold the residue of the said moneys (and on the death of the said [*name*], the moneys so invested), Upon such trusts and subject to such directions as shall be transmitted to them by any trustees or trustee for the time being of that part of my estate which is situated in

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Possibility of issue should be provided for.

(*e*) This clause is applicable where a married testator, being childless, makes no provision for children by his will, if the birth of issue by his present wife is even remotely probable. But it is generally much better, under such circumstances (unless in a case of emergency, where brevity is essential) to insert express provisions for children.

Commencements, &c.

Europe, and, in default of any such direction, upon the trusts declared or to be declared by my will of that part of my estate which is situated in Europe. And in the instrument now in recital is contained a proviso, that in case either or both of them the said [*Indian executors*] should have died, or have ceased to reside in India, at the time of my death, then the senior partner or the two senior partners for the time being in the house or firm of [*firm*], in Calcutta, shall be substituted as my executor or executors and devisee or devisees, trustee or trustees, in his or their place or places (as the case may be). Now I do hereby confirm the said instrument and every part thereof, and I do hereby revoke all other wills, codicils, and other testamentary writings made by me at any time or times heretofore. (*Appointment of executors and trustees of property in England, &c.*)

confirmation of Indian will.

8. I confirm the settlement [*or*, several settlements] made on my marriage with [*name*] my present wife, and I declare that the provisions hereby made for my said wife and children shall be construed as supplemental to, and not in satisfaction of, any of the provisions made or covenanted to be made in and by the same settlement [*or*, settlements respectively].

## APPOINTMENT OF EXECUTORS, &c.

Appointment of executors.

1. I appoint [*executor*], of, &c., [*or*, my son [*name*]] sole executor of my will.

2. I appoint my wife, [*name*], sole executrix of my will.

3. I appoint [*executor*], of, &c., and [*executor*], of, &c., executors [and trustees] of my will [except as regards the property hereinafter mentioned (*f*)].

(*f*) See *post*, p. 748, forms 7, *et seq.* These words in brackets will be inserted where the appointment of general executors is followed by an appointment of special executors.

**Appointment of Executors, &c.**

4. I APPOINT my wife, [*name*], during her widowhood, and my son, [*name*], and [*name*], of, &c., to be executrix and executors (*g*) and trustees of this my will; but if my wife should marry again, she shall thereupon cease to be an executor and trustee of my will, and in such case all property hereby devised and bequeathed in trust shall, as soon as may be, be transferred to, and vested in the trustee or trustees for the time being of this my will.

Wife and son executors.

Wife a trustee only during widowhood.

Substitutive appointment of executors and trustees.

5. I APPOINT [*executor*], of, &c., and [*executor*], of, &c., executors and trustees of my will, and in case either or both of them shall die in my lifetime, or renounce probate, then I appoint [*substituted executor*], of, &c., executor in his or their place. And in case either or both of the said [*executors*] shall die in my lifetime or decline to act as trustees or trustee, then I appoint the said [*substituted executor*] to be trustee in his or their place; And in such case, I declare that this my will, and all the devises, bequests, powers, and provisions hereinafter contained, shall be read and construed in the same manner, and shall have the same operation and effect in all respects as if the name of the said [*substituted trustee*] had been inserted therein instead of the name of the trustee or trustees so dying or refusing as aforesaid (*h*).

Appointment of son at twenty-one as executor with others.

6. I ALSO APPOINT my son, [*name*], if and when he shall attain the age of twenty-one years, executor and trustee of my will; And I direct that upon his attaining that age, the trust property shall be transferred to, and vested in him jointly with the other trustees or trustee for the time being of this my will.

Special executorship of life policies.

7. I APPOINT the said [*legatee*] my sole executor, so far only as concerns the several policies of insurance, and the monies, bonuses, and additions secured by or to be received in respect of the same, hereinafter bequeathed to him; And I direct that the expense of the limited probate to be taken out by the said legatee shall be borne by him [*or*, paid out of my general personal estate] (*i*).

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(*g*) The use of the word "executors" with reference to several persons, one of whom is a female, is however quite warrantable.

(*h*) As to the appointment of substitutive executors, see Wms. Exors. p. 249.

Expense of limited probate.

(*i*) It is advisable to disclose on whom the expense of a limited probate is to fall, as the point may otherwise occasion dispute.

Appointment of Executors, &c.

8. I APPOINT my three sons, [*names*], my executors so far only as concerns my share and interest in the partnership business of ——, carried on at ——, in the County of ——, under the style or firm of [A. & Co.], and in the partnership property, monies, debts, and arrears of profits hereinafter respectively bequeathed to them. And I direct, &c.

Special executorship of partnership share (*k*);

9. I APPOINT the said [*legatee*] my sole executor (*l*), so far only as concerns my business of a —— heretofore carried on by me at ——, in the County of ——, and the stock-in-trade, fixtures, machinery, plant, utensils, and effects, goodwill, [term and interest,] policies of insurance, [book and other debts,] and premises hereinafter bequeathed to him. And I direct, &c.

of stock in trade and business.

10. I APPOINT the said [*legatee*] to be my sole executor, so far only as concerns the mortgage debt and interest hereinafter bequeathed to him, and the benefit of all securities for the same (*m*); And I direct, &c.

Special executorship of mortgage debt and securities.

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(*k*) For form of bequest of share in business, and ancillary clauses, see *post*, p. 778, form 2. Where a testator's business is bequeathed to one or more, as trustees, who are appointed special executors, an express power to compromise, &c., should be inserted in the will: see *post*, p. 976, form 27.

(*l*) The utility of giving to a legatee of such things as trade debts, a legal title to sue for and recover them, and of exonerating the general executors from the trouble and responsibility of doing so, is obvious. But if there is any reason to fear that the general estate of the testator, exclusive of the trade credits, will not be sufficient for payment of his debts, it may be proper to associate the general executors with the legatees in the office, as in the following form:

As to appointment of special executor.

"I APPOINT the said [*legatee*] and [*general executors*] jointly to be my executors, so far only as concerns the said stock-in-trade, fixtures, machinery, plant, utensils, and effects, goodwill, [term and interest,] policies of insurance, [book and other debts,] and premises so bequeathed to the said [*legatee*]."

Appointment of legatee to be executor as to legacy jointly with the other executors.

(*m*) Sect. 30 of the Conveyancing Act, 1881, does not purport to affect the devolution of the mortgage debt, so that it would seem that a special executor may be appointed for this purpose, but it seems doubtful whether any advantage would be gained by so doing, as the legal estate in the mortgaged property would apparently devolve on the general executors or executor either alone, or jointly with the special executor (a point which is not quite free

**Appointment of Executors, &c.**

Appointment of executors as to a specific debt, and appointment of the debtor and the other executors, executors of residue.

11. I APPOINT [A.B.], of, &c., and [C.D.], of, &c., my executors in respect of such debt or debts (if any) as are or may be owing to me from my said brother [E.F.] (*n*); And I appoint my said brother and the said [A. B.] and [C. D.] to be my executors as to the residue of my personal estate and trustees of this my will; And I direct, &c.

Bequest of leaseholds (*o*).

Legatee of leaseholds to be limited executor.

12. I GIVE AND BEQUEATH to, [*name*], of, &c., my leasehold messuage at ——, with the appurtenances, in my occupation at the date of this my will, and all the term and interest I shall have therein at my decease. AND I APPOINT the said [*name*], executor of this my will, so far as relates to the said leasehold messuage and premises, but not in respect of any other part of my personal property and effects (*p*). AND I DIRECT, that the expense attending the limited probate to be taken out by the said [*name*] shall be paid out of my residuary personal estate [*or*, "by him"].

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from doubt) as being the "personal representatives" of the testator within the meaning of the section: see Hood and Challis, Conv. Acts, 2nd edit., 1884, p. 172.

Limited executorship in respect of debts.

(*n*) It may still, sometimes, be convenient to appoint special executors as to the debt owing from one of the general executors. This was formerly necessary in order that the remedy for the debt at law might be kept alive; but the debt was always enforceable in equity, and now in the case of variance between the rules of equity and the rules of law, the former are to prevail: see sect. 25 (11) of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

(*o*) This form furnishes an alternative mode of arrangement where a bequest of specific property is made, and the legatee is appointed special executor thereof. It may be convenient where the bequest is not accompanied by elaborate provisions to dispose of the property in the earlier part of the will, and then to proceed to deal with the remainder of the estate.

Convenience attending the creation of a limited executorship of leaseholds, &c.

(*p*) Where a leasehold estate or a legal chose in action is bequeathed specifically, it is convenient to constitute the legatee executor, quoad the subject of gift, for the purpose of clothing him with the rights, and of exempting the general executors from the risks incident to the representative character in regard to the property in question: otherwise the legatee of a chose in action must be entrusted by the executors with an authority to sue in their names; and with respect to leaseholds, the executors become liable to the rent and covenants; and, as such liability continues even after the property has been legally vested in the legatee by assent (supposing the testator to have been bound by express covenant, and not merely in virtue of his ownership of the term), and after the executor has parted with the assets among the

Appointment of Executors, &c.

And I appoint [*executor*], of, &c., and [*executor*], of, &c., executors and trustees of my will, except as to the leasehold messuage and premises hereinbefore bequeathed to the said [*name*].

Appointment of general executors.

Literary executor.

13. I appoint [*literary executor*], of, &c., my executor in respect only of all my letters, manuscripts, and documents, and all copyrights and other rights and privileges relating thereto hereinafter bequeathed to him.

Executor as to letters, &c.

14. I bequeath to [*legatee*], of, &c., all my letters, letter-books, and papers (other than vouchers, accounts, account-books, and the manuscripts of any treatises or works which I may be preparing for publication), and I appoint him executor in respect only of the same; and I direct him to examine the same, and to destroy all such papers as he shall think ought not to be preserved, and particularly, &c.; and I declare that it shall be at his absolute discretion (except as regards, &c.) to show the same, or any of them, or to disclose their contents to any other person.

Appointment of special executor for property in a colony.

15. I appoint [*name*], of, &c., to be executor of this my will in respect of my property in ——; And I devise and bequeath to him all such property real and personal upon trust, to sell, get in, and convert the same into money, and to remit the proceeds to my general executors hereinbefore appointed.

Appointment of guardians.

16. I appoint my wife, [*name*] (*q*), and also [*trustees*], to

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legatees, this is one of the most formidable responsibilities attendant on an executorship, and is a source of much perplexity and dispute between legatees and executors in regard to the indemnity which the latter are entitled to require. (Vide *ante*, Vol. III., p. 239.) In proportion as the rent approaches to the annual value of the property, and the covenants in the lease are onerous, of course the proposed scheme of exemption the more forcibly recommends itself. Too much regard cannot be paid by will-makers to every expedient calculated to facilitate the administration of the trust affairs, and to remove the objections which often deter cautious and capable men from undertaking these important and responsible duties.

(*q*) The appointment of the wife is superfluous; for by the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), sect. 2, it is enacted that, "On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if sur-

**Appointment of Executors, &c.**

be executrix, and executors, and trustees of this my will, and guardians of such of my children as shall be under the age of twenty-one years and unmarried at the time of my death.

Wife guardian during widowhood,—then trustees or trustee.

Trustee for the time being to be guardians.

17. I APPOINT my wife, [*name*], sole guardian of the persons and estates of my children during her widowhood; and after the death or marriage of my wife, I appoint the said [*executors*] and the survivors and survivor of them, or other the trustees or trustee for the time being of my will, guardians or guardian of my children during their respective minorities, and in case of my wife's marriage, jointly with her during the remainder of her life.

Appointment of guardians.

Proviso for cesser of guardianship.

18. I APPOINT jointly with my wife [*name*] the said [*executors*], and the survivors and survivor of them, to be guardians and guardian of my children during their respective minorities; But such guardianship shall cease as to each of the said guardians who shall go to reside abroad, refuse or become incapable to act in the said guardianship, or become bankrupt or insolvent.

Guardian with power to appoint successor.

19. I APPOINT [*guardian*], of, &c., during his life, and after his death such person or persons as he shall by will appoint or nominate to be guardian or guardians of my children during their respective minorities.

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viving, shall be the guardian of such infant, either alone, where no guardian has been appointed by the father, or jointly with any guardian appointed by the father. Where no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time, appoint a guardian or guardians to act jointly with the mother." It will be observed that there is no provision for the cesser of the mother's guardianship on marriage.

By sect. 4, every guardian under this Act is to have all the powers of guardians appointed under the Acts 12 Car. 2, c. 24, and 15 Car. 2, c. 19 (Ireland). By sect 6, the Court has power to remove guardians "appointed or acting by virtue of this Act," and appoint another guardian in his or her place.

This Act does not affect the rule that the child is to be brought up according to the religious faith of its father, and the mother as statutory guardian is bound to observe this rule: *Re Scanlan*, W. N. 1888, p. 140.

Appointment of Executors, &c.

20. I APPOINT [*guardian*], of, &c., and [*guardian*], of, &c. [*or*, the said [*trustees*] and the survivors and survivor of them], to be the guardians of my son, [*name*], during his minority; and in case of the death of either of them the said [*guardians*] during such minority, then I authorise and empower the survivor of them to appoint such person as he shall think fit to be a guardian jointly with himself of the said [*son*] in the place of the guardian so dying.

Guardian with power to substitute.

Guardians for sons, with special directions.

21. I APPOINT my said wife, [*name*], and the said [*trustees*], and the survivors and survivor of them, guardians and guardian (*r*) of my son, [*name*], and of any son or sons I may hereafter have, during their respective minorities. AND I

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As to appointments of guardians.

(*r*) Another, and perhaps a preferable mode, is to constitute the trustees for the time being guardians, as in form 17, supra; but it is sometimes doubted whether the office of guardian can properly be vested in such a fluctuating body. This opinion seems to be ill-founded; for the stat. 12 Car. 2, c. 24, s. 8, authorises the father, by deed or will, "in such manner, and from time to time, as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons, in possession or remainder, other than Popish recusants." These words seem not to restrict the father to an appointment by name, but to leave it open to him to prescribe any mode of ascertaining the persons who are to be guardians. But the appointment, if void as to the person, will be effectual as to the property bequeathed (if the guardianship is expressly extended to that), and even as to the person will generally be confirmed by the Court.

The 9th section of the act explains that the authority of the guardian is to extend to the custody of the profits of the real estate, and the custody, tuition, and management of the personal estate, of the ward. As in an executorship, so where there are several guardians, each one appears to have an independent authority; on the death of one of several guardians, the office survives: *Eyre* v. *Shaftesbury*, 2 P. Wms. 106.

A guardian cannot, without express authority from the father, delegate his office: *Villareal* v. *Mellish*, 2 Swanst. 536; see *Re Parnell*, L. R. 2 P. & D. 379.

The statute of Car. 2 gave the mother no power to appoint a guardian to her children, and such appointment was void: *Re Kaye*, L. R. 1 Ch. 389; but now by the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), sect. 3 (1), "The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried); and

Appointment of Executors, &c.

DIRECT that my said sons shall be under the personal care of my said wife until they shall respectively attain —— years of age. AND as and when my said sons shall respectively attain the said age of —— years, or in the event of the death of my said wife before they shall have respectively attained that age, I DIRECT that my said sons shall from thenceforth, until they shall respectively be placed out in some profession or business, be sent to —— or some other public or grammar school, or reside with and be under the care of a private tutor until they shall respectively attain the age of —— years, or be sooner placed out as aforesaid, and thereafter, unless then so placed out, be sent to a college in one of the Universities of Oxford or Cambridge, such school, tutor, and college respectively to be selected by their guardians or guardian for the time being.

Appointment of guardians for daughters, with substitution of other guardians in case of their death.

AND I APPOINT my said wife, [*name*], and [A.B.], wife of [*name and description*], and the said [*one of the trustees*], and the survivors and survivor of them, to be guardians and guardian of my daughter, [*name*], and any daughter or daughters I may hereafter have, during their respective minorities, or until their respective marriages; And in the case of the deaths of both my said wife and the said [A.B.] during the minority and before the marriage of any of my said daughters, then and in such case I APPOINT [C.D.], the wife of [*name and description*], to be a guardian of my said daughters in the place of my said wife and the said [A.B.]. AND I FURTHER DIRECT, that my said daughters shall reside with and be under the personal care of my said wife during their respective minorities, and until their respective marriages, if my said wife should so long live; But, in the event of the death of my said wife during the minority and before the marriage of any of my said daughters, then and in such case I DIRECT, that such of my said daughters as shall not then have attained the age of twenty-one years or been married, shall reside with and be under the personal care of

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where guardians are appointed by both parents they shall act jointly."

A will not properly executed and attested under the present law, cannot operate as an appointment of guardians, unless it is sealed and may take effect as a deed. See sects. 1 and 9 of the Wills Act, *ante*, pp. 724, 728.

See further as to appointment of guardians, *ante*, Vol. I., pp. 797 *et seq.*

Appointment of Executors, &c.

the said [A.B.], until they shall respectively attain the age of twenty-one years or marry, provided the said [A.B.] shall so long live and shall be willing to accept such charge; But in case the said [A.B.] should die during the minority and before the marriage of any of my said daughters, or shall decline accepting such charge as aforesaid, then I DIRECT that such of my said daughters as shall not then have attained the age of twenty-one years or been married, shall reside with and be under the personal care of the said [C.D.], until they shall respectively attain the age of twenty-one years or marry.

Guardians of children, including an illegitimate child.

22 *a*. I APPOINT my sister, [*name*], and the trustees or trustee for the time being of this my will, guardians and guardian of each son of mine during his minority, and of [*illegitimate daughter*] (*t*), and every other daughter of mine during minority and until marriage:

Sister to have the care of daughters, with an annuity for each.

22 *b*. AND I REQUEST my said sister to continue the care and education and maintenance of my daughters by my late wife. AND until they shall respectively attain the age of twenty-one years or marry, I DIRECT the trustees or trustee for the time being of my will to pay to my said sister, [*name*], during such time as she shall live and attend to the education and maintenance of my said daughters respectively, or either of them, the annual sum of £——, for and in respect of each such daughter, by four equal quarterly payments in every year, clear of legacy duty, the first quarterly payment to be made immediately upon or after my death, and to be considered as a payment in respect of the quarter of a year ending with the day of my death, and each such annuity to be continued, and, if necessary, apportioned up to the time when my said sister shall die or cease to attend to the education and maintenance of the daughter in respect of whom such annuity shall be paid, and to be in addition to the

As to appointment of guardians of illegitimate children.

(*t*) With respect to the illegitimate child, this appointment of guardians will be invalid, as the testator does not stand in a recognised parental relation to her: *Sleeman* v. *Wilson*, L. R. 13 Eq. 36. The nomination, however, is not without use, as the Court will generally appoint to the guardianship persons nominated by a putative father: *Ward* v. *St. Paul*, 2 B. C. C. 583; *Peckham* v. *Peckham*, 2 Cox, 46; *Chatteris* v. *Young*, 1 J. & W. 106.

**Appointment of Executors, &c.**

maintenance already provided for my said daughters by the settlement executed on my marriage with their mother.

Devise to executors of trust and mortgage estates in copyhold and customary lands (*u*).

23. I DEVISE all hereditaments of copyhold or customary tenure which at my death shall be vested in me as tenant on the court rolls of any manor upon any trusts or by way of mortgage, and of which I shall at the date of my death have power to dispose by will unto the said [*executors*] and their heirs, upon the trusts and subject to the equity of redemption which shall at my death be therein subsisting or capable of taking effect respectively: And I declare that all moneys secured on any such mortgage shall be considered as and form part of my general personal estate; [PROVIDED ALWAYS and I hereby further declare that it shall be lawful for any one [or two or three] of the said [*executors*] to disclaim the devise lastly hereinbefore contained, and, in such case, the copyhold and customary hereditaments hereinbefore devised shall vest in such one [or more] of them the said [*executors*] who shall not disclaim such devise, to the exclusion of such of them as shall disclaim the same; PROVIDED ALWAYS that no such dis-

Power for executors to disclaim the devise (*w*).

Proviso that

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(*u*) As regards freehold estates or interests of inheritance or limited to the heir as special occupant, devises of trust and mortgage estates are now simply inoperative: see sect. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). But by the Copyhold Act, 1887 (50 & 51 Vict. c. 73), sect. 45, it is enacted that, "The 30th section of the Conveyancing and Law of Property Act, 1881, shall not apply to land of copyhold or customary tenure vested in the tenant on the court rolls of any manor upon any trust or by way of mortgage." It is therefore advisable still to insert in wills, devises of trust and mortgage estates, as regards copyholds and customary lands, so that in case the testator dies having any such estates vested in him as sole trustee or mortgagee, any copyholds comprised in a settlement or mortgage may by virtue of the devise vest in the executors, who are the persons on whom the freeholds so comprised will devolve by the operation of the statute. It may be observed that the devise will often be nugatory as regards *mortgage* estates in copyholds, &c., inasmuch as the admittance of mortgagees as tenants on the court rolls is not usual: see *ante*, sub tit. "MORTGAGES," Vol. III., p. 763.

As to the general law, prior to the recent enactments, with regard to the devises of trust and mortgage estates, see the third edition of this work, Vol. XI. pp. 782 *et seq.*

(*w*) This power may be inserted if it is desired to avoid the expense as regards fees, &c., of the admission of several persons as tenants on the court rolls: see as to this, *ante*, sub tit. "PURCHASE DEEDS," Vol. V., pp. 327, 339.

claimer shall be deemed to be a renunciation of the office of executor of this my will or any codicil thereto, or to be a disclaimer of any estates, interests, trusts, powers or authorities thereby vested or reposed in, or conferred on the said [*executors*] or any of them, as executors and trustees of this my will, or in anywise to affect any such estates, interests, powers, or authorities, save as regards the right to admittance as tenant [or tenants] on the court rolls of any manor of which any such copyhold or customary hereditaments are holden].

**Appointment of Executors, &c.**

such disclaimer shall not affect other powers, &c., of executors disclaiming.

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## DIRECTIONS AS TO FUNERAL, PAYMENT OF DEBTS, ETC.

1. I DESIRE that I may be buried in as simple and inexpensive a manner as possible in my family vault at —— [*or*, in some cemetery or churchyard near the place of my death].

Direction respecting funeral.

2. I DIRECT that the expense of my funeral shall not exceed £——.

The same.

3. I CHARGE my freehold and copyhold estates [at ——, in the county of ——] with the payment of my funeral and testamentary expenses, debts (including debts secured by mortgage) and legacies hereinafter bequeathed in exoneration of my personal estate (*x*).

Charge of debts, &c., on real estate, in exoneration of personalty.

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(*x*) The effect of a charge of all the testator's debts on his real estate was to take the real estate out of the operation of the statute 3 & 4 Will. 4, c. 104, which rendered real estate liable to the testator's simple contract debts, and to subject it, as *equitable* assets, to the payment of all debts of whatever degree *pari passu*, so as to destroy the priority to which specialty debts would otherwise be entitled under those statutes. But now, in the administration of the estates of persons dying after the 31st of December, 1869, specialty debts have no priority: 32 & 33 Vict. c. 46. A charge of debts empowers the devisees in trust of the lands charged, or, if there be no such devisee, then the executors to raise the amount required by sale or mortgage of the lands: see 22 & 23 Vict. c. 35, sects. 14—18. But this power does not extend to an administrator: *Re Clay and Tetley*, 16 Ch. D. 3.

Effect of charge of debts.

**Directions as to Funeral Debts, &c.**

4. I CHARGE all my real estates not hereinafter specifically devised, equally and *pari passu* in the first instance with my personal estate, with the payment of my debts (*y*).

Charge of debts.

Direction for payment of

5. I DIRECT that the debt of £—— owing by me to [*mortgagee*], of, &c., on the security of a mortgage, dated, &c., and

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The following express power of sale may, however, be here added, if desired :

Power to raise money for debts, &c., by sale or mortgage.

"And for that purpose, I AUTHORISE my executors or administrators [*or*, my trustees or trustee for the time being] whether the deficiency of my personal estate shall have been ascertained or not, to mortgage, either in fee simple or for any term of years, or subject or not to powers of sale and other usual powers, to sell all or any part of my real estates [*or*, my said real estate at ——]; and to execute and do all such assurances and things as may be necessary or expedient for effectuating any such mortgage or sale; AND I DECLARE that on any such mortgage or sale no mortgagee or purchaser shall be bound or concerned to ascertain or inquire as to any deficiency in my personal estate, or as to whether any moneys raised under this power are actually wanted, or to see to the application thereof, or generally as to the propriety or expediency of any such mortgage or sale."

A charge of debts and legacies extends to lands specifically devised : *Mannox* v. *Greener*, L. R. 14 Eq. 456 ; but a charge of legacies only is confined to residuary realty : *Conron* v. *Conron*, 7 H. L. C. 168.

Necessity of explicitness as to personalty being exempt from debts and legacies.

(*y*) Among the testamentary obscurities which have from time to time created litigation, the neglect explicitly to declare whether a charge of debts and legacies on real estate is intended to exonerate the personalty, or to provide merely an auxiliary fund, holds a conspicuous place ; and too much stress cannot be laid on the importance of explicitness on the point. It is superfluous to charge realty generally with the payment of debts *in aid of* the personalty, in case of the latter proving insufficient for the purpose. For personalty is by law the primary fund for payment of a testator's debts, unless it is exonerated either by express words or necessary implication : see *Trott* v. *Buchanan*, 28 Ch. D. at p. 453. Where, however, it is claimed to exonerate the personalty, either altogether or in part, from its primary liability, it is necessary to do so by an express charge of the property intended to form the fund for payment of debts, &c.

A direction to pay debts is unnecessary, as such a direction merely amounts to a general charge of debts on the real and personal estate, in the order in which such property is chargeable by law, independently of any direction.

made, &c., on my farm and lands at ——, in the county of ——, and all interest due thereon up to the time of payment of the same sum, shall be paid out of my residuary personal estate, in exoneration of the mortgaged premises.

**Directions as to Funeral Debts, &c.**

mortgage debt out of personalty (*z*).

6. I CHARGE all the legacies hereinafter [*or*, hereinbefore] bequeathed on my real estate situate at ——, hereinafter devised to [*devisee*] in aid of my personal estate in case the same should prove to be deficient; AND for that purpose, &c., [*continue* as in p. 757, note (*x*)].

Charge of legacies on specific real estates.

## SPECIFIC BEQUESTS.

1. I BEQUEATH my wearing apparel to my servant, [*name*], if he shall be in my service at the time of my death.

Wearing apparel to servant.

2. I DIRECT that my wearing apparel be distributed among such of my servants, and in such manner as my executors shall, in their uncontrolled discretion, think proper.

Wearing apparel among servants.

3. I BEQUEATH all my wearing apparel, watches, jewelry, trinkets, dressing-cases, and articles of personal decoration or ornament, to [*legatee*], for her own absolute use and benefit.

Wearing apparel, trinkets, &c.

4. I BEQUEATH to my wife all my letters, copies of letters, correspondence, papers, memoranda, manuscripts, and writings, except documents of title, securities for money, vouchers, and accounts, relating to the property or rights of my heirs, executors, trustees, devisees, or legatees, or any of them.

Letters, &c., to wife (*a*).

5. I BEQUEATH to my wife all my published works, and all the manuscripts of my unpublished works, together with all

Manuscripts, copyright, &c., to wife.

(*z*) See Locke King's Act (17 & 18 Vict. c. 113), and the observations thereon, *ante*, Vol. III., pp. 873 *et seq.*, sub tit. "MORTGAGES."

(*a*) For form of bequest of letters, &c., to special executor, with directions for their destruction, see *ante*, p. 751, form 14.

Specific Bequests.

my copyright and all other rights and privileges in my published works, and full right to publish or complete the publication of my unpublished works (*b*).

Watch, &c.

6. I BEQUEATH to my elder son, [*name*], my gold watch, chain and appendages, and jewelry and personal ornaments.

Horses and carriages, &c.

7. I BEQUEATH to my younger son, [*name*], all my horses and carriages, with the harness, saddlery, trappings, and other accoutrements belonging thereto. [*Or*, any one of my carriages, and any one pair of my horses, together with one set of double harness, and one set of single harness for the same, to be selected by him respectively.]

Wine.

8. I BEQUEATH to each of my friends, [*legatees*], —— dozen of my best wine, to be selected by them in the order in which they are herein named.

Coins, &c., to British Museum.

9. I BEQUEATH all my coins, ancient sculptures, original inscriptions, and copies of inscriptions, manuscripts, and other antiquities, and such of my printed books as they may consider useful, to the Trustees of the British Museum, to be deposited and kept in the department of antiquities or the public library there, as the case may be.

Minerals, books, &c., with a request as to their disposition.

10. I BEQUEATH to my son, [*name*], my collection of minerals and fossils, with the cabinets in which they are placed, requesting, but not insisting, that he will, unless he see reason to the contrary, leave them at his death to his brother, [*name*].

Picture to elder son, with recommendation.

Recommendation not to be deemed a trust.

11. I BEQUEATH to my elder son, [*name*], my valuable picture of ——, by Rubens, and recommend, that, at his death, he will give the same to my grandson, [*name*]; But I expressly declare that this recommendation shall not be construed to create a trust in favour of such grandchild, or in any manner to abridge or restrict the absolute property of my said son in the said picture.

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(*b*) Copyright being personal property may be the subject of bequest, see *ante*, Vol. IV., p. 704.

Specific Bequests.

Books, &c., part to wife, remainder to son at twenty-one.

12. I BEQUEATH to my wife, [*name*], all my music-books, and music, printed or in manuscript, and also such of my printed and other books, not exceeding in the whole 100 volumes, as she shall select. AND I BEQUEATH the remainder of my books, whether printed or manuscript, except books of account, unto such son of mine living at my death as shall first attain the age of twenty-one years.

Books on payment of two-thirds of the value.

13. I GIVE to my son, [*name*], my library of books, including all additions thereto (*c*), or such part thereof as he shall select, on condition that he pay to my executors two-thirds of the value thereof, or of such part thereof as he shall select, such value to be ascertained by valuers, one to be appointed by my executors and one by my said son, or by any other means which shall be agreed on between my said son and my said executors.

Consumable stores to wife.

14. I BEQUEATH the specific legacies following: namely, To my wife, [*name*] (*d*), all the wines, liquors, fuel, housekeeping provisions, and other consumable stores, which shall, at my death, be in or about my dwelling-house at ——, aforesaid, [*or*, in or about any house or houses which I shall occupy or reside in at the time of my death].

Household effects, &c., to wife.

15. I BEQUEATH to my wife, [*name*], all my household furniture, pictures of every description in frames, plate, plated articles (*e*), linen, china, glass, musical instruments, books, watches, jewelry and trinkets, horses and carriages, and the equipage and furniture belonging thereto, cows, poultry, and other live stock, greenhouse and other plants in pots, gardening and husbandry implements, domestic animals, fuel, wines,

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(*c*) The gift of "my library" will carry books bought after the date of the will: *All Souls Coll.* v. *Codrington*, 1 P. Wms. 597.

As to naming the testator's wife.

(*d*) It is proper to mention the wife's name, although the will would necessarily be revoked by a second marriage; because it may happen that the parties have never been lawfully married, in which case the name will assist in identifying the person intended.

Misdescription of character of legatee.

The misdescription as wife of the testator of a named person to whom he was not lawfully married will not avoid the legacy: *Schloss* v. *Stiebel*, 6 Sim. 1; *Re Pitt's Will*, 27 Beav. 576.

(*e*) Plated articles are not included in the word plate: *Holden* v. *Ramsbottom*, 4 Giff. 205.

Specific Bequests.

liquors, and consumable stores, and other the household effects not hereinbefore bequeathed, and which shall be in or about the house in which I shall be residing at the time of my death, or in the stables, coach-houses, or out-buildings thereof. And I declare that the last-mentioned bequest shall comprise all effects, though not strictly household, which are applicable to personal or domestic use, ornament, occupation, or diversion, and are not hereinbefore otherwise specifically bequeathed (*f*).

The same, to son. Short form.

16. I bequeath to my eldest son, [*name*], all articles and effects of household, domestic, or personal use, ornament, occupation, or diversion belonging to me, and not hereinbefore otherwise specifically bequeathed.

Plate [or household effects] to children.

17. I bequeath all my plate [*or* all articles, &c., *as in last form*] unto my children, [*names*], to be divided among them or such of them as shall be living at my death, in equal shares; And in case any dispute should arise respecting the distribution of the said plate, I empower my executors to select and determine the specific articles to be taken by each legatee under the said bequest.

Articles to be selected by wife.

18. I give to my wife [the use, during her widowhood, of] such articles (not exceeding in the whole the value of £——), as she shall within the first three months after my death select from my household furniture and household effects, such value to be determined by my trustees or trustee for the time being.

Furniture, &c., to son, on condition of quitting messuage.

19. I give all my wines and consumable stores, household furniture, household linen, plate, china, books, and other

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As to bequests of household furniture, &c.

(*f*) It is of no inconsiderable importance to choose the most appropriate words for describing those articles of personalty which are often bequeathed separately from the general estate, such as household furniture, &c., since many questions arise on such bequests; though, as they relate to matters of small value, comparatively few of them become subjects of judicial consideration. To this probably we must ascribe the fact, that less attention has been paid to the framing of such gifts than to many other clauses of rarer occurrence. As to what passes under the words "household furniture," "household effects," &c., see *ante*, pp. 703 *et seq.*

Specific Bequests.

effects (except money, securities for money (*g*), and documents of title), which shall be in or about my house at —— at my death, unto my son [*name*], provided he and his family should, within three calendar months after my death, quit and deliver up possession of the same house, with the appurtenances, unto my trustees or trustee for the time being; AND, if my said son and his family should not so quit and deliver up possession of my said house, I DIRECT that the said wines (*h*) and other effects shall form part of my residuary estate.

Furniture in certain rooms.

20. I GIVE to my daughter, [*name*], all the household furniture and effects which at the time of my death shall be ordinarily used by her in the bed-chambers, nursery, and sitting-room then occupied by her and her children and her attendant, in my house.

Specific articles by reference to schedule (*i*).

21. I BEQUEATH the several articles mentioned in the schedule hereunder written to the several persons whose names are set opposite to such articles respectively in the second column of the same schedule.

Request to executors to distribute effects by reference to separate paper (*j*).

22. I REQUEST the executors of this my will to distribute all articles and effects which may be specified in any list or

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Securities for money.

(*g*) "Securities for money" include Government stock, but not Bank Stock, or other stock on which the dividends are variable: *Bescoby* v. *Pack*, 1 S. & St. 500; *Ogle* v. *Knipe*, L. R. 8 Eq. 434; nor, it has been held, an I.O.U., which is merely an acknowledgment of a debt: *Barry* v. *Harding*, 1 J. & L. 475. And "property invested in British or foreign funds, bonds, or *securities* of any description," does not include canal or railway shares: *Hudlestone* v. *Gouldsbury*, 11 Jur. 464; 10 Beav. 547; *Turner* v. *Turner*, 20 L. T. 30.

(*h*) The effect of this condition is not to suspend the legatee's right to consume the wines, but to make him liable to refund the value of such as he has consumed, if he do not perform the condition.

(*i*) The signature of the testator and attestation must of course be placed at the foot or end of this schedule: see 1 Vict. c. 26, sect. 9.

(*j*) This request is of no legal value, as a separate document cannot be incorporated in a will unless it is in existence at the date of the will: see *ante*, p. 537. It must also be borne in mind that executors acting in accordance with this request, without obtaining the consent of the residuary legatee, run some risk of being called to account as to their disposal of the articles.

Specific Bequests.

memorandum signed by me, and deposited with this my will, or which may be left by me at my death, in accordance with any directions therein contained; but I declare that any such list or memorandum shall not be deemed to have any testamentary character or effect by way of creating any trust, or otherwise howsoever.

Direction as to delivery of articles bequeathed.

23. I DIRECT that the specific legacy of my wines, &c. (see Form 14, *supra*), hereinbefore bequeathed to my said wife, shall be delivered to her immediately after my death; and that the several other specific legacies hereinbefore bequeathed shall be delivered within one calendar month after my death.

Leasehold house and use of furniture to wife for life.

24. I BEQUEATH to my wife the use of such leasehold house as I shall reside in at my death, and of my household furniture, household linen, plate, plated articles, china, glass, books, pictures, prints, musical instruments, and other effects of a like nature which shall at my death be in or about such house, during her widowhood, if she shall so long, at her own cost, keep the same house and articles in good repair and condition, (reasonable wear and tear only excepted), [and insured in the names or name of my trustees or trustee for the time being to their full value from damage by fire], and pay the rent and perform the covenants to which the lessee of the said house may be liable. I DIRECT that an inventory of the said articles whereof my wife is to have the use shall be taken, at the expense of my estate, as soon as convenient after my death, of which my wife shall keep one copy, and my trustees or trustee the other (*k*); which trustees or trustee are or is to determine [the amount of insurance to be made by my wife, and also], in case of dispute, what articles are included in either of the aforesaid gifts to her or for her use.

Inventory to be taken.

Wife to have the use of household furniture, &c.

25. I BEQUEATH to my wife, [*name*], the use, in her house of residence for the time being in England, so long as she shall continue my widow and shall reside in England, of all

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Specific legatee for life to sign inventory.

(*k*) In the absence of any special direction, a legatee for life of personal chattels will be ordered to sign and deliver an inventory, to be kept by the person next in succession, but not to give security: *Bill* v. *Kinaston*, 2 Atk. 81; *Slanning* v. *Style*, 3 P. Wms. 335; *Conduitt* v. *Soane*, 1 Coll. 285; 4 Jur. (N. S.) 502; *Foley* v. *Burnell*, 1 Br. C. C. 279.

Specific Bequests.

my household furniture, plate, plated articles, linen, china, glass, books, pictures, prints, musical instruments, and other effects of the like nature, which shall, at my death, be in or about my then dwelling-house. [*Delivery of inventory, and power to determine questions, ante, Form* 24.] And I exonerate my said trustees and trustee from all duty and responsibility in respect of the custody of the effects included in the same bequest, after delivery to my said wife of the said furniture and effects, until they or he shall receive actual notice that my said wife is dead or has married again, or is resident out of England. And after her death, or if and when she shall marry again or cease to reside in England, I BEQUEATH the same effects to my said son, [*name*], absolutely, if he should be living at the death of my said wife; But if he should be then dead, I GIVE the said effects unto my other child or children who shall be living at such death, equally to be divided between or among them, if more than one, the division thereof among such children to be made by the trustees or trustee for the time being of my will, in such manner as they or he in their or his discretion shall think proper.

Trustees' responsibility.

Bequest of furniture, &c., to son;

if dead, to other children equally.

26. AND I DIRECT that the said trustees or trustee, shall from time to time, during the life of my said wife, or until she shall marry again, or cease to reside in England, apply a sufficient part of the income payable to my said wife under the trusts hereinafter declared, in insuring and keeping insured the said household furniture and effects from damage by fire, to the full value thereof; and also in repairing or replacing such parts of the said household furniture and household effects as shall from time to time be damaged, worn out, destroyed, or lost.

Trustees to insure from fire;

to repair, &c.

27. I DIRECT that my wife shall during her life, or until, &c., keep the said articles in good repair and condition (reasonable wear only excepted), and insured against fire to the full value thereof (such value to be assessed by my trustees or trustee), in some respectable office, in the names or name of my trustees or trustee, and deliver the receipts for each premium of insurance to my trustees or trustee, within one week after the same shall become payable; in default whereof, it shall be lawful for my trustees or trustee, to repair or replace such of the said articles as shall be damaged, destroyed, or lost, or

Wife to repair and insure;

in default, trustees may repair and insure.

Specific Bequests.

(as the case may be) to effect or keep on foot such insurance, and retain or recover the costs of such repairs, purchases, or insurance respectively, out of or by sale of any income, capital, or property given to my wife by my will.

Declaration dispensing with inventory.

28. I DECLARE that it shall not be necessary to take any inventory of the said furniture and effects, and that my said trustees or trustee shall not be concerned to see to the insurance thereof, or be liable for any loss or damage thereof from any cause whatever.

Power of sale.

29. I DECLARE that it shall be lawful for my said wife at any time with the consent of the trustees or trustee for the time being of my will to dispose of such part of the said furniture and effects, and out of the proceeds of such sale to replace such of the said articles as shall be sold, damaged or destroyed, with others of the like kind.

Effects to be sold after death of tenant for life.

30. AND after the death of my said wife, UPON TRUST that my said trustees or trustee for the time being shall sell the furniture and effects aforesaid, in such manner as they or he shall think proper, and shall stand possessed of the monies to arise by such sale or sales, upon the trusts hereinafter declared of and concerning the monies to arise from the residue of my personal estate and effects hereinafter bequeathed. (*Add direction as to inventory, and authority to determine what articles are included in the bequest, form* 24.)

Power for tenant for life to purchase.

31. I AUTHORISE AND EMPOWER any person or persons for the time being entitled to the possession of the said articles of furniture and household effects to purchase the same from my trustees or trustee for the time being, at a valuation to be made by a valuer to be appointed by my said trustees or trustee [*or*, at the sum of £——], And I direct that the purchase-money for the same may be paid at such times, in such manner and with or without interest at such rate as my trustees or trustee shall think fit, and when so paid shall be added to my residuary personal estate.

Household effects for daughters while un-

32. I DIRECT my said trustees or trustee to permit my two daughters, [*names*], so long as they shall both continue unmarried and shall live together, and after the marriage or

Specific Bequests.

death of either of them, the other of them, so long as she shall continue unmarried, to have the use of all my household furniture and household effects not hereinbefore specifically and effectually disposed of, and the consumption, so long as they shall last, of my consumable household stores; And in case my said daughters, while both are unmarried, should cease to live together, or in case both of them should marry or die, THEN I DIRECT the said household furniture and household effects to be sold, and the produce thereof to be divided equally between my said daughters, their executors, administrators, or assigns; And in case either of my said daughters should die before me, and leave no child surviving me, then I GIVE the whole of the said furniture and effects or the produce of the sale thereof to my other daughter, her executors, administrators, and assigns.

married and living together;

afterwards to be sold and divided.

33. I BEQUEATH all the gold and silver plate, books, book-cases, manuscripts, maps, bronzes, medals, statuary, framed and unframed pictures, paintings, drawings, prints, and engravings, antiquities, jewels, minerals, fossils, specimens of natural history, Sèvres, Dresden, and ornamental china, and other articles of curiosity or vertu not otherwise specifically disposed of and of which I shall die possessed, to the said [*trustees*], their executors, administrators, and assigns, as heirlooms, [Upon trust during the life of my said wife to permit the same to be used and enjoyed by her, And from and after her death,] In trust for my eldest son, [*name*], during his life, with remainder in trust for his first and other sons successively, according to priority of birth, who shall be living at his death, and shall have attained or shall attain the age of

Plate, &c., as heirlooms, in strict settlement, where there is no realty (*l*).

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(*l*) Forms of bequests of heirlooms by reference to limitations of realty in strict settlement will be found at the end of the Common Forms of "DEVISES IN STRICT SETTLEMENT," *post*, pp. 933 *et seq.*

The forms given here in the text are intended to carry on the settlement of heirlooms apart from real estate so far as may safely be done. It will be seen that the trusts extend in certain events to great grandchildren of the testator, but such issue, in order to take, are expressly required to be *in esse* at the death of a son of the testator, who must necessarily be a life in being at the time of the testator's death. Of course, this form may be adapted so as to create successive trusts in favour of female issue. As to the rule against perpetuities, see *ante*, pp. 420 *et seq.*

Specific Bequests.

twenty-one years, or who shall die in the lifetime of my said son, [*name*], leaving a son or sons living at the death of my said son, [*name*], And in such last case in trust for such grandson of my said son, [*name*], as shall first attain the age of twenty-one years, absolutely; And in default of such issue, in trust for my second son, [*name*], for his life, with a like remainder in favour of his first and other sons and grandsons; And in default of such issue, In trust successively for every and any other son or sons, who may hereafter be born, for their respective lives, with like remainders over in favour of their respective first and other sons and grandsons, with the like priorities, and in the like events respectively; And in default of such issue, In trust for all my daughters or any my daughter who shall be living at my death, and the issue of any my daughters or daughter who shall have died during my life leaving issue living at my death, absolutely, and if more than one in equal shares, but the issue of any daughter or daughters who shall have died during my lifetime, to take only the share to which their mother would have been entitled, if she had survived me; with remainder on failure of all the trusts or limitations hereinbefore contained of the said heir-

Inventory.

looms, In trust for [*ultimate legatee*], of, &c., absolutely. And I DIRECT an inventory to be made of the articles hereinbefore mentioned and specifically bequeathed as heirlooms, and that there shall be two copies of such inventory, both of which shall be signed by each tenant for life of the said trust-premises upon receiving possession of the said trust-premises, and one of which shall be kept by such tenant for life for the time being, and the other by my said trustees or trustee for the time being.

Heirlooms, another form.

34. I BEQUEATH all my pictures, statuary, and other works of art in my leasehold house, No. 100 in —— Square, London, a list whereof headed, &c. [*state heading*], is deposited with this my will (*m*), to my said wife for her life, and after her death, Then unto my son, [*name*], for his life, and at his death then unto the eldest or only child of my said son, who being a male shall survive him, and attain the age of twenty-one years, absolutely, or if there shall be no such child, Then unto

(*m*) As to incorporation of documents in wills, see *ante*, p. 537.

Specific Bequests.

the eldest or only grandchild *ex parte paterna* of my said son, who being a male shall survive him and attain twenty-one, absolutely, or if there shall be none such, Then unto the eldest or only grandchild *ex parte paterna* of my said son, who being a female shall survive him and attain twenty-one, absolutely, or if there shall be none such, Then unto the eldest or only child of my said son, who being a female shall survive him and attain the age of twenty-one years, absolutely, or if there shall be none such, Then unto the eldest or only grandchild *ex parte materna* of my said son, who being a male shall survive him and attain twenty-one, absolutely, or if there shall be none such, Then unto the eldest or only grandchild *ex parte materna* of my said son, who being a female shall survive him and attain twenty-one, absolutely. But if there shall be none such, then unto my daughter, [*name*], for her life, and at her death, Then unto such child or grandchild of my daughter surviving her and attaining twenty-one, as is before designated in the gift to a child or grandchild of my said son surviving him and attaining twenty-one, so that the elder shall be preferred to the younger, and the male to the female, and the grandchild *ex parte paterna* to the child being a female, and to the grandchild *ex parte materna*. But should no lineal descendant of mine acquire the said pictures, statuary, and other works of art under the bequest aforesaid, Then upon failure of all my lineal descendants capable of taking under the said bequest, I direct that the same shall fall into my residuary estate. [*Inventory, as in Form* 33.]

Bequest of ready money to wife.

35. I BEQUEATH unto my wife, [*name*], absolutely, all my ready money (*n*), including money [to an amount not exceeding £——] in the hands of my banker, or any agent.

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Ready money, &c.

(*n*) "Ready money" will generally include money at the testator's bankers, but not money in the hands of an agent: *Parker* v. *Marchant*, 1 Phil. 356; *Montresor* v. *Montresor*, 1 Coll. 693. "Money in hand which I may have for current expenses," has been held to pass dividends due on stock in the funds and money in the hands of an agent: *Vaisey* v. *Reynolds*, 5 Russ. 12; *Fryer* v. *Rankin*, 11 Sim. 55. See *Glendening* v. *Glendening*, 9 Beav. 324.

"Property" at bank.

Where a testator, having at his bank a cash balance and certain share certificates, some inscribed, and the remainder transferable by delivery, bequeathed to A. a moiety of his "property" at the bank, it was held by *Chitty*, J. (36 Ch. D. 473) that a moiety of

**Specific Bequests.**

Share of law books, office furniture, papers, &c., to testator's son (with whom he was in partnership).

36. I GIVE to my son, [*name*], (with whom I have been for many years in partnership in the profession or business of solicitor), for his absolute use and benefit, all my share and interest in the law books, stationery, office furniture, and books of account, and also in the deeds, documents, papers, and writings, belonging to or in the custody of the said firm at the time of my death. I ALSO GIVE to my said son, for his absolute use and benefit, all the deeds, documents, papers, and writings collected by me in the course of my professional practice, or which shall be in my custody or possession on my sole and separate account at the time of my death, subject nevertheless to the paramount right or claim (if any) of any other person or persons otherwise to regulate and dispose of the custody thereof.

Farming stock to devisee of farm.

37. I BEQUEATH all my farming stock, both live and dead, [growing and other crops (*o*),] and all household and farming effects, and consumable stores and provisions whatsoever, which shall be in or about any freehold, copyhold, or leasehold house and farm, to which at the time of my death I shall be entitled, and which shall then be occupied by me or any of my sons, or by any bailiff, servant, or other person, for my use, To the person who, at the time of my death, shall first become entitled under the limitations of this my will to the house and farm in or about which the same shall be.

Farming stock, &c., at a particular farm.

38. I BEQUEATH unto [*legatee*], his executors, administrators, and assigns, for his and their absolute use and benefit, all the term, estate, and interest to which I shall be entitled at the time of my death in the farm and premises, and all the farming stock, both live and dead, growing and other crops, and household and farming furniture, utensils and effects, and consumable stores and provisions, which at the time of my death shall be in, upon, or about the farm and premises at ——, now held by me under lease from ——, Esq.

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the cash balance only passed; but this decision was reversed on appeal, and it was held that the bequest included half the certificates: *Re Prater*, 37 Ch. D. 481.

"Farming stock."

(*o*) Growing crops will pass under the description of "farming stock": *Re Roose, Evans* v. *Williamson*, 17 Ch. D. 697; overruling on this point *Vaizey* v. *Reynolds*, 5 Russ. 12. See also *Blake* v. *Gibbs*, 5 Russ. 13 n.; *Rudge* v. *Winnal*, 12 Beav. 357.

Specific Bequests.

39. I BEQUEATH to [*legatee*], of, &c., all stock in the public funds and other Government securities of Great Britain, of which I shall die possessed.

General bequest of Government and real securities (*p*).

40. I BEQUEATH unto the said [*trustees*], their executors, administrators, and assigns, upon the trusts and with and subject to the powers and provisions hereinafter declared of and concerning the same, the sum of £—— Bank Stock, of which I am now (*q*) on this —— day of ——, 18— (*r*), possessed; and also the sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock (*s*), [part of a larger sum of like stock,] this day standing in my name.

Bank Stock and New Stock, to trustees.

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(*p*) In bequeathing stock legacies it should be distinctly shown whether they are intended to be specific or general, or, in other words, whether the subject of gift is stock then belonging to the testator, or any stock that can be procured. The bequest in the text is evidently of the latter description; and, in general, the intention is best expressed by framing the legacy in this manner; because the making it specific subjects the testator to the necessity of altering his will at every change of his securities, or of adding a proviso for ademption as in Form 41. Explicitness on the point is important to prevent litigation. If the legacy is to be specific it should be expressed as in Form 40.

Suggestion as to stock legacies.

(*q*) As to the force of the word "now," see *Doe* d. *York* v. *Walker*, 12 Mee. & W. 591; *Anther* v. *Anther*, 13 Sim. 422; *Cole* v. *Scott*, 12 Jur. 591; *Hutchinson* v. *Barron*, 6 H. & N. 583; *Wagstaff* v. *Wagstaff*, 8 Eq. 229; *Everett* v. *Everett*, 7 Ch. D. 428; *Dickinson* v. *Dickinson*, 12 Ch. D. 22, and *Re Portal and Lamb*, 30 Ch. D. 50, which decides that s. 24 of the Wills Act, 1837, still leaves open, as a matter of construction, the question whether the testator intended to pass property under the specific or residuary gift in his will.

(*r*) The mention of the date will prevent any question from arising as to whether the word "now" means the date of the execution of the will or the date of the testator's death, from which the will speaks; see *ante*, pp. 350, 731. This question will not arise if there is an ademption clause, which should always be inserted in the case of a specific legacy of this nature, in the absence of instructions to the contrary. Stock in the funds is not money; and legacies of stock, whether specific or general, are not properly within the description of "pecuniary legacies." Thus where a testator directed that the duty on the pecuniary legacies given by his will should be paid out of his general estate, the direction was held not to apply to a general bequest of Consols: *Douglas* v. *Congreve*, 1 Keen, 41. See *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

Legacies of stock are not pecuniary.

(*s*) By the National Debt Conversion Act, 1888, 51 Vict. c. 2, provision is made for the conversion of the New Three per Cent. Stock, the Reduced Three per Cent. Stock, and the Three per

**Specific Bequests.**

Proviso in case of ademption.

41. PROVIDED ALWAYS that if I should not be possessed of the whole or part of the said stock at the time of my death, then in lieu of the whole or so much thereof as shall be deficient I bequeath to the said [*legatee*] [*or*, to the said trustees], the sum of £—— for every 100*l.* such stock, and so in proportion for any less amount than 100*l.*, [to be held by them upon the trusts aforesaid,] such sum to be payable in priority of any general pecuniary legacy bequeathed by this my will.

Shares in a company.

Provision in case of ademption.

42. I BEQUEATH to [*legatee*], absolutely, five of my shares in the —— Company; And if I should not be possessed of so many shares at the time of my death, I BEQUEATH to him, in lieu of each deficient share, the sum of £—— sterling.

Income of specific funds to widow for life.

Proviso in case of ademption.

43. I GIVE to my wife, during her life, the income arising from the sum of £——, $2\frac{3}{4}$ per cent. Consolidated Stock, now standing in my name; AND I DIRECT that the said stock shall be kept in the joint names of my said wife (*t*) and my trustees or trustee for the time being. PROVIDED ALWAYS, that if I should not possess the said several funds at my death, my trustees or trustee shall set apart and invest upon the public stocks or funds, or on real securities in England or Wales (but not in Ireland), and not upon or in any other security or investment, so much of the proceeds of my residuary real and personal estate as will produce the annual sum of £——; Such funds or securities to be kept in the joint names of my wife and my trustees or trustee, and the income therefrom to be received by or paid to my wife during her life. And in such case, and until such investment shall be made, I DIRECT that my said wife shall receive the said annual sum, or a proportional part thereof, out of my personal estate.

Policies of life insurance, &c. (*u*).

44. I BEQUEATH unto [*legatee*], his executors, adminis-

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Cent. Consolidated Stock into a new stock. By sect. 2, sub-s. (4) of the same Act, it is provided that the new stock shall be called Two and Three-Quarters per Cent. Consolidated Stock until the 5th April, 1903, and after that date shall be called Two and a Half per Cent. Consolidated Stock.

(*t*) The effect of inserting the name of the legatee for life in the books at the Bank is to entitle her directly to receive the dividends, without the intervention of the trustees.

(*u*) It may be advisable to appoint the legatee of the policies to be special executor in regard to them: see *ante*, p. 748.

trators, and assigns, absolutely, all policies of insurance on my own life [or any other life or lives] to which I shall be entitled at the time of my death, and all moneys, bonuses, and additions secured by or to be received in respect of the same policies respectively. [AND I DECLARE, that any moneys which shall become payable in respect of any of the said policies in my lifetime, and shall not be actually received by me, shall be included with them in this bequest.] Specific Bequests.

45. I BEQUEATH to [*legatee*] all the principal and interest moneys which shall be owing to me at my death on the bond of [*obligor*], and also the said bond and the full benefit thereof (*x*). [AND in case there should not be owing on the said bond at my death for principal, or principal and interest, the full sum of £——, I DIRECT that the deficiency shall be made up to the said [*legatee*] out of my personal estate.] Bond debt. Provision in case of payment.

46. I BEQUEATH to [*legatee*], absolutely, all the principal and interest moneys which at the time of my death shall be Mortgage debt (*y*).

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(*x*) A gift of a bond, or of the money owing on a bond, will, unless restrained by the context, carry arrears of interest due at the testator's death: *Harcourt* v. *Morgan*, 2 Keen, 274; *Kent* v. *Tapley*, 11 Jur. 940. And a bequest of a mortgage seems to admit of the same construction. But a bequest of the "sum of 200*l.*" secured by a mortgage, or of "300*l.* due upon a bond," will not pass arrears of interest: *Roberts* v. *Kuffin*, 2 Atk. 112; *Hawley* v. *Cutts*, 2 Freem. 24. It may be advisable to appoint the legatee of the bond special executor in respect thereof: see *ante*, p. 750. Arrears of interest on debt.

(*y*) The legatee of the mortgage debt may, if desired, be made special executor in respect thereof: *ante*, p. 749. It is obviously desirable that the legal estate in mortgaged property should be vested in the person entitled to the mortgage money. It would, however, seem impossible to frame any form of testamentary disposition which can be safely relied upon to avoid the necessity for the legatee of a mortgage debt to obtain a conveyance of the legal estate in mortgaged freeholds from the executors, on whom, by sect. 30 of the Conveyancing and Law of Property Act, 1881, the testator's mortgaged estates are made to devolve. Some conveyancers add to the bequest of a mortgage debt a devise of the mortgaged property as in the text, considering that the executor might pass the fee simple therein to the devisee by mere assent without conveyance: see Key & Elph. Conv. Prec. Vol. II., p. 657, n. But this expedient seems of doubtful efficacy; it does not *necessarily* follow that because, by virtue of the section, the legal estate in

Specific Bequests.

owing or accruing due to me on a mortgage for the sum of £——, [and further advances,] of [copyhold and leasehold] hereditaments [and property], [*mortgagor*], of, &c., situate at ——. AND in case the said mortgage debt of £——, or any part thereof, should be paid off in my lifetime, then, in lieu thereof, I GIVE to the said [*legatee*] the sum of £——, or such smaller sum as shall be equal to the amount so paid off, to be paid to him out of my general personal estate. [AND I hereby devise [and bequeath] All the hereditaments [and property of whatever nature or tenure] comprised in the said mortgage, unto and to the use of [*legatee*], his heirs, [executors, administrators,] and assigns, [according to the nature and tenure thereof respectively,] subject to the equity of redemption therein subsisting.]

Substitution of a pecuniary legacy in case of the mortgage being paid off in the testator's lifetime.

Devise of mortgaged estate to legatee of mortgage debt.

Legacy.

47. I BEQUEATH to [*legatee*] the sum of £——, AND I DECLARE that the sum of £—— lent by me to him, on his bond, or so much thereof as shall remain unpaid at my death, shall be released to him in part satisfaction of this legacy, but that

Bond debt to go in satisfaction of it.

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mortgaged freeholds devolves on and becomes vested in the testator's personal representatives as if it were a chattel real, and belongs to them from time to time "with all the like incidents" as if it were a chattel real, therefore the personal representatives can divest themselves of a fee simple estate, and transfer the same to another person except by deed, and by the words appropriate to the conveyance of such an interest. It is not improbable that on a future sale of the property, serious objection might be taken to a title founded on an alleged transfer of a testator's mortgage estate in freeholds by means of a devise and assent of the personal representatives: see Wolst. & Turn. Conv. Acts, pp. 81, 82, in notes.

The form of devise given in the text may, however, be here inserted *quantum valeat*, where the mortgaged property is of freehold tenure, if the draftsman places greater reliance on the words of the section than the present Editor is able to do, in the absence of express authority. It will, at the worst, be simply inoperative; and the intended operation may possibly be supported by judicial decision.

It is conceived that, if the security is a term of years, it will pass to the legatee thereof by assent of the executors without assignment. And legal estates by way of mortgage in copyholds are now excluded from the operation of the 30th section of the Act of 1881, so that a devise of a mortgage estate therein is valid, *provided that the mortgagee has been admitted*, but not otherwise: see the Copyhold Act, 1887 (50 & 51 Vict. c. 73), sect. 45. See also *ante*, p. 756, note (*u*).

Specific Bequests.

he shall not be accountable for any arrear of interest due at my death, nor shall any such arrear go in reduction of his said legacy; AND I DIRECT that the said bond shall be delivered up to be cancelled (*z*); And in case he die before me, I release his estate from the amount that shall be due on the said bond.

Release of debt.

48. I RELEASE the debt of £—— and interest owing to me by [*debtor*] on his bond, whether he survive me or not (*a*); AND I DIRECT that the said bond shall be delivered up to be cancelled.

Bequest of amount of mortgage debt to debtor.

49. I BEQUEATH to [*debtor*] the amount of the principal and interest moneys which, at my death, shall be owing from him to me, on the mortgage security now held by me; AND I DIRECT that the hereditaments comprised in the said mortgage shall be released and reconveyed accordingly freed and discharged from all principal and interest moneys secured

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Lapse in case of forgiveness of a debt.

(*z*) Where the testator released and forgave to A. B. the sum of 500*l.* owing on his bond, and directed the bond to be delivered up to him to be cancelled, it was held that the will did not import a general release; and that the benefit of the release lapsed by the death of the legatee before the testator: *Izon* v. *Butler*, 2 Price, 34. See also *ante*, p. 459, note (*c*).

(*a*) A testamentary release of a debt in general terms (see *Izon* v. *Butler*, 2 Price, 34; *South* v. *Williams*, 12 Sim. 566) will apparently operate, although the debtor should not survive the testator, except, it seems, in the case of one of two or more joint debtors, when it is construed as a legacy to that one, and will lapse by his death: *Izon* v. *Butler*, 2 Price, 34; *Maitland* v. *Adair*, 3 Ves. 231. But a mere gift of the amount of the debt to the debtor, without words of release, and perhaps even a release, if only to the debtor by name, is subject to lapse: *Sibthorp* v. *Moxam*, 3 Atk. 579; *Elliott* v. *Davenport*, 1 P. Wms. 83; *Toplis* v. *Baker*, 1 P. Wms. 86. A testamentary release of a debt is subject to the claims of the testator's creditors. It is advisable, where such a course is consistent with the testator's policy, to release the debt by an instrument taking effect in his lifetime, which release will be effectual at law, and will exempt the amount of the debt from probate and legacy duty.

As to abatement where debt is released.

Where a testator gives to his debtor the amount of the debt, that is a pecuniary legacy, liable to abatement if the assets are deficient. But a release of the debt in express terms is not, it is conceived, subject to abatement, except as a specific gift.

Specific Bequests.

thereby, and from all claims and demands in respect of the same; And in case he die, &c. [*ut ante*, Form 47].

Release of all debts.

50. I RELEASE to [*legatee*], whether he survives me or not, all principal and [illegible]neys whatsoever which may be owing to me fro[illegible]the time of my death; AND I DIRECT that all or any bonds, bills, notes, or other securities for any such moneys, shall be released and delivered up to the said legatee, or to his representatives, as the case may be.

Release of arrears of interest, and direction for payment of debt by instalments.

51. I RELEASE to [*legatee*], whether he survives me or not, all interest and arrears of interest which may be owing to me by him at the time of my death on the principal sum of £—— owing to me by him on his bond [*or*, on any principal moneys whatsoever which may then be owing to me by him]; AND I DIRECT that my said executors shall accept payment of the said principal sum [*or* sums] by yearly instalments, not exceeding £—— each, the first of such instalments to be paid on or before the expiration of twelve calendar months after my death.

Debt to be deducted from legacy.

52. WHEREAS my son [*name*] now owes me the sum of £——; Now I hereby bequeath to my said son the sum of £——, but so that any money he may owe me at my death shall be deducted therefrom; PROVIDED ALWAYS that if at the time of my death my son is an undischarged bankrupt, my executors shall retain so much of the said legacy as shall be equal to the full amount proveable as a debt in the bankruptcy, and the part so retained shall fall into and form part of my residuary estate (*b*).

Proviso as to legatee's bankruptcy.

Bequest of testator's share of

53*a*. AND WHEREAS, under or by virtue of the will of [*wife's father*], late of ——, deceased, I am entitled to one-fourth part

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(*b*) In an ordinary case the earlier part of this form is merely declaratory of the right of an executor to retain from the legacy payable an amount equal to the debt owing by the legatee; but if the debtor legatee should be bankrupt at the death of the testator an executor would have no such right, apart from express provision: *Cherry* v. *Boultbee*, 4 My. & Cr. 442; 2 Keen, 319; *Hodgson* v. *Fox*, 9 Ch. D. 673; *Re Orpen*, 16 Ch. D. 202; and should the bankruptcy occur after the testator's death, the executor by proving would lose such right: *Stammers* v. *Elliott*, L. R. 3 Ch. 195.

Specific Bequests.

of the moneys arising from the sale of the residuary real and personal estates of the said testator: NOW, I HEREBY BEQUEATH the said one-fourth part or share, and all my interest therein, to the said [*trustees*], their executors or administrators, UPON TRUST, &c. (*e.g.*, p. 886, *Form* [redacted]

residue under the will of his father-in-law to trustees.

53*b*. AND I DECLARE that the [redacted], dividends, and annual income accruing from or in respect of the said one-fourth part or share, from the day of my death until the actual payment or receipt thereof, shall be applied by the trustees or trustee of this my will for the benefit of the person or persons for the time being entitled to or interested in the said one-fourth part or share under the trusts hereinbefore declared of or concerning the same. AND in case the said one-fourth part or share, or any part thereof, shall have been received by me in my lifetime, then I BEQUEATH to the said [*trustees*], their executors and administrators, a sum of money equal to the sum or amount so received, upon such and the same trusts, and to and for such and the same trusts, intents, and purposes in all respects, as are hereinbefore expressed concerning the moneys arising from the said one-fourth part or share hereby bequeathed, such legacy or sum of money to be appropriated as soon as convenient after my death, and to bear interest at the rate of 4 per cent. per annum from the day of my death.

Destination of income of bequeathed residue.

In case bequeathed share should be received in testator's lifetime, bequest of equal sum of money on similar trusts.

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## BEQUESTS OF BUSINESS (*a*).

1. I BEQUEATH unto [*legatee*] absolutely all the stock in trade, fixtures, machinery, plant, utensils, and effects em-

Stock in trad and goodwill.

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(*a*) The place in which business clauses should be inserted in a will is a question of discretion and convenience, according to the circumstances of the particular case. Several of the forms here given may be accompanied by an appointment of the legatee of the business as special executor: see *ante*, p. 749. Where this is done, it may sometimes be convenient to commence the will with the appointment of the special executor, and then immediately to proceed to a bequest of the business with any ancillary clauses which may be required, and then to go on to appoint general executors and to dispose of the general estate by specific and pecuniary bequests, &c., and ultimately by a bequest of the

Business.

ployed in my trade or business of a ——, And also the goodwill of the said trade or business, [And all my leasehold interest in the messuage, manufactory, offices, and buildings situate at —— aforesaid in which the said trade or business is carried on or used for the purposes of the same,] But not any money or debts which shall be owing to me in respect of the said trade or business. [*Or*, And also the benefit of all contracts subsisting in respect of the same trade or business, and all book and other debts and moneys owing to me in respect of the same; PROVIDED always that the said [*legatee*] shall to the satisfaction of the [*general*] executors of this my will sufficiently indemnify my general estate from all debts and liabilities owing or incurred by me in respect of my said trade or business, and, if they shall so require, shall enter into a bond or covenant in that behalf at the cost of my general personal estate.]

Exception of credits.

[Variation including contracts and credits (*b*).]

Proviso for indemnity.

Appointment of successor in partnership, and bequest of share therein (*b*).

2. IN EXERCISE of the powers vested in me under or by virtue of the articles of partnership of the firm of —— and Co., in which I am a partner, and of all other powers me in this behalf enabling, I hereby appoint my son [*name*], to be my successor in the said partnership business [*or*, I hereby introduce my son [*name*] into the said partnership (*c*)], with all rights, powers, privileges, and authorities, which I am in anywise enabled to confer upon him as such successor, subject, nevertheless, to the provisions of the said articles of partnership, and to any other agreement for the time being in force in respect of the said partnership business; And I bequeath unto my said son [*name*] absolutely all my share and interest in the said partnership business and in the capital, stock in trade, property, goodwill, credits, profits, and effects thereof, and all arrears of profits and other moneys

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residue; the instrument will thus be divided into two distinct parts, each dealing separately and completely with distinct subject-matter. If this course is not adopted, the appropriate place for the insertion of bequests of business with ancillary provisions seems to be at the end of the specific legacies.

Other provisions relating to business will be found in the Precedents.

(*b*) As to the necessity of expressly mentioning book debts, &c., if intended to be included, see *Re Deller's Estate*, W. N. 1888, p. 62.

(*c*) The appointment of a successor in the partnership should follow the terms of the power contained in the article.

owing to me by the said firm; [*or*, But not any arrears of profits or other moneys owing to me up to the day of my death by the said firm, which shall be paid by the said [*son*] to the [*general*] executors of this my will as and when the same shall be received by him;] he, the said [*son*], sufficiently indemnifying my general estate from all debts and liabilities in respect of the said partnership business. Business.

3. I HEREBY authorise the trustees or trustee for the time being of this my will to continue and carry on for such period as they shall think fit [not exceeding —— years from the time of my death], the trade or business of a —— now carried on by me, and to employ therein the whole or such part as they shall think necessary or expedient of my personal estate after satisfaction and payment of my debts and of the legacies given by this my will, or any codicil thereto; [*or*, and to employ therein all the capital which at the time of my death shall be employed therein [and such additional capital as they or he may think it necessary or expedient to advance out of my general estate];] With power for my said trustees or trustee to manage the same in all respects at their and his uncontrolled direction, and to employ from time to time such managers or agents at such salaries or remuneration as they or he shall think fit, and to delegate to any such managers or any other persons or person all or any of the powers and authorities given to or vested in them in relation to the said trade or business, and generally to conduct and carry on the same in all respects as if they or he were absolutely the owners or owner thereof; And I declare that my said trustees or trustee shall not be liable for any losses, costs, charges, expenses, claims, or demands arising in respect of the said trade or business, but shall be fully indemnified therefrom out of my general estate. AND I DECLARE that all profits and interest which may accrue to my estate from the carrying on of the said business, and from the employment therein of my personal estate or any part thereof [*or*, of my capital [or of any part of my general estate so advanced as aforesaid]], shall be added to and considered and applied as part of my residuary estate. Power for trustees to carry on business forming part of the testator's general personal estate (*d*). Profits to fall into residue.

(*d*) As to the liability of executors or trustees carrying on a business whether alone or in partnership under the powers of a will, see sub tit. PARTNERSHIP, *ante*, Vol. IV., p. 420, n.

**Business.**

Recital that testator is in trade in partnership;

4. And whereas I now carry on the trade or business of a ——, as a partner with [*partner*], in the firm of [*firm*], under articles of partnership dated, &c., for a term of —— years, from the —— day of ——, 18—, but determinable as is mentioned in the said articles; And it may happen, that, at the time of my death, I may continue to be engaged in the said partnership, or may for some fixed period or otherwise, carry on trade or business either alone or in partnership with some other person or persons: Now, I hereby authorise my said trustees or trustee in their or his discretion to carry on or join in carrying on such trade or business either alone, or in partnership with any person or persons with whom I may be a partner at the time of my death, or who may thereafter be admitted into partnership by my trustees under the provisions in that behalf hereinafter contained, until some one of my said sons shall attain the age of twenty-one years and be desirous to take thereto, or all my sons shall die under that age or refuse to take thereto on attaining that age, or to discontinue the same, as to them or him shall seem expedient; And, from time to time, to enter into any new agreement or arrangement with any such partner or partners by way of substitution for, or addition to or modification of, any subsisting articles, agreements, or arrangements, and to extend, diminish, or alter or concur in extending, diminishing, or altering the said trade or business as to my said trustees or trustee may seem expedient; And, if they or he should think proper, upon the expiration of the term for the time being in any such partnership as aforesaid, to renew such partnership for such further terms or term, not extending beyond the period during which I have authorised them or him to carry on the said trade or business, as to my said trustees or trustee shall seem expedient; And, upon the renewal of any partnership for such further term or terms, to increase, if they or he shall think fit, the share therein of the said [*one of the partners*] to one equal third part of the profits thereof; And, during the continuance of any such term which may be in existence at the time of my death, or during such renewed or further term or terms, to admit or concur in admitting into any partnership for the time being subsisting in relation to the said business, any person or persons, upon such terms, and with or without premium, as my said trustees or trustee shall think proper, but without prejudice to the right or option of admission hereinafter given to my said sons; And to employ

discretionary power to trustees to carry on trade;

to renew partnership;

to increase share of any partner;

to employ all

Business.

in the said business all the capital which may be invested therein at the time of my death; and all arrears of profits then belonging to me and left in the said business, and the growing profits thereof which shall fall to my share after paying all the expenses of carrying on the same, or from time to time to add to and increase my said capital, [but so that such additions shall not at any one time exceed the amount of £—— in the whole,] or to withdraw from the said business and from the said profits arising therefrom any sum or sums which they or he shall think proper, and apply the same at once upon the trusts hereinafter declared of my residuary estate: And I hereby authorise my said trustees or trustee, either alone, or in concurrence with any such persons or person as aforesaid, for the purpose of carrying on any such business as aforesaid, to hire and employ such persons and with such salaries as they or he shall think proper, and to enter into such contracts and engagements respecting the said business as they or he shall think reasonable, [and to adjust and settle all accounts and transactions relating thereto, in which I shall be, or my estate shall after my death become, interested; And to compromise, or pay, allow, suspend, waive, and compound any debts, claims, or demands relating to the said business, and which may be owing from or to me, or be claimed or made against or in behalf of my estate, upon such evidence, whether strictly legal or not, as they or he shall deem just, and to refer any disputes concerning the same to arbitration (*e*),] and to make any sale or sales upon credit, and generally to transact all matters and concerns respecting the said business, and to do or cause to be done all acts and things relative thereto, in the same manner in all respects and as if they or he were absolutely entitled to or interested in the premises, or a share therein, as the case may be, without being responsible for any loss occasioned by any such act or thing: And I direct that all my share of and in any losses, charges, and expenses of and incident to the carrying on of any such business as aforesaid, shall be borne, paid, and defrayed, in the first instance, out of my capital therein and the profits thereof,

capital employed at testator's death;

to withdraw capital.

Powers of management.

To compound debts, &c.

(*e*) The words in brackets may be omitted, if desired, in reliance on the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 37.

Business.

and, if they should be insufficient, then out of my residuary estate; And all my share of and in the profits and increase of such business shall be added to and considered and applied as part of my residuary estate; PROVIDED ALWAYS, AND I HEREBY DIRECT, that subject to any provisions in that behalf contained in the said articles of the —— day of ——, 18—, or any other articles or agreements which may be subsisting at the time of my death, my said trustees or trustee shall place such one of my sons as shall first or alone attain the age of twenty-one years, and exercise his option (such option to be declared in writing within six calendar months after his attaining that age) to succeed to my said business (each and every of my sons who shall attain twenty-one taking a successive prior right, according to his priority of birth, to enter into the said business, in case no elder son shall have attained twenty-one and entered the same), into the full and complete possession of my said business and assets, or my share and interest therein, and make over to such son all securities, debts, goods, effects, and premises belonging to me and used or employed in carrying on the same, PROVIDED that my son, who shall so take to my said business, shall give security, by bond or otherwise, at his own expense, [*or*, at the expense of my residuary estate], to the satisfaction of my said trustees or trustee, for the payment, at such times and by such instalments as to my said trustees or trustee shall seem proper, of the whole amount or value of my capital in the said business at the time of his succeeding thereto (without regard to the value of the goodwill of the said business), with interest on such amount or value at the rate of —— per cent. per annum, such amount or value to be settled by two valuers, one to be appointed by each party, or by the umpire of such valuers; AND I DIRECT that the moneys so to be received from any of my said sons shall be held upon the trusts hereinafter by me declared of my residuary estate; And that at the request of such son my said trustees or trustee shall endorse upon such bond or security a memorandum of satisfaction thereof to the amount of the value of such son's share in my residuary estate under this my will or any codicil thereto. [*Continue as in Form 5 b, p. 785, omitting words in brackets.*]

Option to sons successively, at twenty-one, to take over the business;

on giving security.

Direction that wife shall carry on business.

5*a*. I DIRECT that my said wife shall carry on my trade or business of ——, at ——, during such period and for such

Business.

intents and purposes as are hereinafter mentioned; And for that purpose, I DIRECT that she shall, during the said period of her carrying on the same, have the occupation of the messuage or dwelling-house in which the same shall, at the time of my death, be carried on (the rent (if any) and taxes payable in respect whereof shall be charged to the account of the business), and the entire use, disposal, and management of all the capital, credits, stock, and effects which shall be employed in or due or owing in respect of my said business at the time of my death. AND I HEREBY AUTHORISE her [*Powers of management, ut ante, Form* 4, *mutatis mutandis*]. Subject, nevertheless, to such powers of control as are hereinafter expressly given to my trustees or trustee. AND I DIRECT, that my said wife shall so carry on my said business [during her widowhood] until my eldest son shall attain the age of twenty-one years, Or, in case of his death under that age, or in case, having attained that age, he should thereupon decline or neglect to take to and carry on the said business, then until some one of my other sons shall first attain the age of twenty-one years, and upon attaining that age shall be desirous to take to and carry on the said business, Or, in case no son of mine should live to attain the age of twenty-one years, and, having attained that age, be desirous to take to and carry on the said business, then my said wife may carry on my said business until the death [or marriage] of her my said wife. AND I HEREBY AUTHORISE my said trustees or trustee for the time being, so long as my said business shall be carried on by my wife as aforesaid, from time to time to augment or diminish the capital employed therein, according to their or his opinion of the exigencies thereof. AND I DIRECT, that my said trustees or trustee shall have at all times free access to the books, vouchers, and accounts relating to the said business, so long as the same shall be carried on, during the life of my said wife, either by her or by any of my sons as hereinafter provided. AND I DIRECT, that the clear profits to arise from or to be produced by my said business, during such time as the same shall be carried on by my said wife as aforesaid, shall be paid, applied, and disposed of in manner following; (that is to say), my said wife shall have and be entitled to one moiety of the said profits for her own use and benefit absolutely, and the remaining moiety of the said profits shall be

Direction as to dwelling-house.

Wife to carry on business until some son attains twenty-one and takes to it.

Power to trustees to augment or diminish the capital in the trade.

Trustees to have access to accounts.

One half of the profits to be retained by wife, the other half to be applied to maintenance of children at her discretion.

Business.

paid and applied for the maintenance, support, and education of all my children for the time being, in such shares and proportions, and in such manner as my said wife shall in her discretion think proper. PROVIDED ALWAYS that, if my wife should decline to carry on the said business, or should [marry or] die before any of my sons shall be able or willing to carry on the business, I AUTHORISE my other trustees or trustee either to discontinue or to carry on the same at their or his discretion, either personally or by deputy or deputies under their or his general control, with the like powers and authorities as are hereinbefore given to my said wife for that purpose, so long as there shall be a son of mine under age.

After death or marriage of wife, trustees to carry on business at their discretion.

Terms on which a son is to take the business.

AND I DIRECT, that such one of my sons as shall, within six calendar months next after he shall attain the age of twenty-one years, first signify in writing to my said trustees or trustee his desire to take to and carry on my said business, shall have and be entitled to my said business, and the goodwill thereof, and the capital, credits, stock, and effects then employed in, or due or owing in respect of the same, for his own use and benefit, upon the terms following; (that is to say), I DIRECT, that the messuage in which the said business shall at my death be carried on, and the capital, credits, stock, and effects of the said business (exclusively of the goodwill thereof, for which such son is not to be required to give any consideration), shall be valued by two persons, one of whom shall be chosen by my son so desiring to carry on my said business, and the other by my said trustees or trustee; and in case such two persons should not agree in their valuation, then the same shall be valued by such umpire as the said two persons shall, for that purpose, before or after entering upon such valuation, appoint. [*Proviso as to son giving security, ut ante, Form* 4, *the amount to be settled* "according to such valuation as aforesaid."]

Valuation.

Appropriation of the profits of the business carried on by the son.

AND I DIRECT, that in the meantime, after my said son shall take over and carry on my said business until the death of my said wife, the clear profits of my said business shall from time to time be paid, applied, and disposed of in manner following, (that is to say) two-fifth parts thereof shall belong to and be retained by such son for his own use and benefit absolutely, and the remaining three-fifth parts thereof shall be paid to my said wife to the intent that, [during her widowhood,] the same may be applied by her for the maintenance and support

Business.

of herself and my children for the time being (except my said son so carrying on my said business), and after the death [or marriage] of my said wife, the whole of the profits of my said business shall belong to and be the property of my said son so taking to and carrying on the same.

In case of the death of wife before any son shall attain twenty-one and consent to carry on the business, then the goodwill, stock, &c., to be sold, and the money to be considered as part of the residue.

*5b.* PROVIDED ALWAYS, that [in case my said wife should decline to carry on the said business, [or marry again,] or die before any one of my said sons shall attain the age of twenty-one years, and] my said trustees or trustee should not think fit to continue the said business, or in case not one of my sons should attain the age of twenty-one years, or within six calendar months after attaining that age, signify in writing to my said trustees or trustee his desire to take to and carry on my said business, or in case my wife should at any time be unwilling to carry on and manage the same as hereinbefore directed, then I DIRECT that, from and after the happening of any such event as aforesaid which shall first happen, the goodwill of my said business, and the capital, credits, stock, and effects which shall be then employed in or due or owing in respect of my said business, and the messuage in which the same shall be carried on as aforesaid, shall be forthwith sold by my said trustees or trustee, and the money which shall arise by such sale shall be subject to the trusts hereinafter declared of my residuary personal estate. AND as to the said bond or other security so to be given by my son who shall so carry on my said business as aforesaid, and the principal moneys thereby secured, and also as to all the residue of my goods, chattels, and personal estate, of what nature or kind soever, not hereinbefore by me otherwise disposed of, subject to the payment of my debts and funeral and testamentary expenses, I hereby give and bequeath the same unto my said trustees, their executors and administrators, UPON TRUST that my said trustees or trustee shall receive, recover, and get in the principal moneys which shall be secured by virtue of the said bond, (With power, nevertheless, if deemed expedient, to continue the loan to my son until the moneys shall be wanted for distribution); And also shall, as soon as conveniently may be after my death, sell, get in, and convert into money, all the residue of my personal estate. [*Discretionary powers*, pp. 869 *et seq.*, *and trusts for investment, &c.*, pp. 873 *et seq.*]

Trust for

6. I GIVE all my leasehold manufactory and buildings in

**Business.**

carrying on trade ;

residue of personal estate to be employed in business ;

business to be carried on by trustees during wife's life and minority of son ;

trustees may commit business to the management of a son or sons,

subject to their control ;

power to diminish capital ;

option to sons to purchase all or a specified part of the capital, &c. ;

—— Street and elsewhere, employed by me in my business of a ——, and all my stock in trade, capital, plant, implements, utensils, and effects employed in the said business, and all the residue of my personal estate not hereinbefore disposed of, unto my said trustees, their executors, administrators, and assigns : UPON TRUST, that my trustees or trustee for the time being shall, as they or he shall deem expedient, convert into money all such parts of my residuary personal estate as shall not be already employed in my said business, and add the same to the capital of such business : AND that my trustees or trustee shall, if they or he shall think fit, carry on and manage the said business at their or his discretion, until the death or marriage of my wife, or, in case my wife should die or marry during the minority of any son of mine, and no son of mine should be carrying on the said business under the provisions hereinafter contained, then until some son of mine shall attain the age of twenty-one years and agree to carry on the said business, or until there shall cease to be a son of mine under the age of twenty-one years, whichever shall first happen. [*Insert powers of management, &c., ante*, p. 780.] PROVIDED, that, in case any son or two sons of mine, being of age, should desire to manage the said business (the same not being then managed by any other son of mine under this provision), it shall be lawful for my trustees or trustee to permit such son, or the elder of such sons, or (with the consent of the elder of such sons) both of them, thenceforth to manage and carry on the said business, and to exercise all the powers hereinbefore given to my trustees or trustee, But subject, during my wife's life, to the superintendence and control of my trustees or trustee in the same manner and with the same power of dismissal as if such son or sons were the agent or agents of my trustees or trustee. PROVIDED, nevertheless, that it shall not be incumbent on my trustees or trustee to exercise any such superintendence or control, or in any manner to inquire into the conduct of the said business by such son or sons. PROVIDED ALSO, that my trustees or trustee may, at any time or times, withdraw from the said business such part or parts of the capital thereof as they or he shall think fit. AND, upon the death of my wife, or upon the discontinuance at any other time of my said business by my trustees or trustee, I EMPOWER such son or sons of mine as shall then manage the said business and desire to

Business.

purchase the same, or, if there be no such son, any son of mine (the elder to have priority of choice before the younger) to purchase all the leasehold property, stock in trade, capital, plant, implements, utensils, and effects which shall then be employed or engaged in the said business (excepting or including, at the option of such son or sons, all or any part of the stock in trade which shall then be manufactured and saleable, and also all or any of the debts which shall be owing to my trust estate on account of the said business: And also excepting or including, at the option of such son or sons, but only with the consent of my trustees or trustee, any such leasehold buildings and premises, with the plant, utensils, and effects therein, as my trustees or trustee may think would without material loss be saleable or disposable apart from the rest of the said trust premises). I DECLARE that the price to be paid by such son or sons for the trust-premises so purchased by him or them shall be ascertained by two valuers, of whom such son or sons shall appoint one, and my trustees or trustee shall appoint the other, or by an umpire to be appointed by such valuers, before they enter upon the valuation, in which valuation the goodwill of the said business is not to be considered; Such valuation to be made at the option of such son or sons, either previously or subsequently to his or their entering into a binding contract. AND in case no son of mine should be competent or willing to purchase the said trust-premises or any part thereof when the said business shall be discontinued by my trustees or trustee, and as to such parts of the said trust-premises as shall not be sold as aforesaid, I DIRECT my trustees or trustee to convert the same into money, and add the same to my residuary personal estate. I AUTHORISE my trustees or trustee, in their or his discretion, to allow any purchase-money for all or any part of my personal estate which shall be sold to any son or sons of mine, or to any other person or persons, to remain, for any time not exceeding five years, at interest at 4 per cent. or upwards, on such personal or other security as my trustees or trustee shall think fit. I DECLARE, that, while my business shall be carried on under the trusts of my will, one equal fourth part of the profits thereof shall be paid to any son or sons of mine who shall manage the same, in addition to any other benefit hereby given to him or them; And that, subject to such deduction of one-fourth part (if any) the clear profits of my said busi-

price to be ascertained by valuers;

general trust for conversion;

power to leave purchase-money on personal security;

son or sons to receive one-fourth of profits during management;

subject thereto, profits to be

Business.

deemed income.

ness, while the same shall be carried on under the trusts of my will, shall be deemed part of the income from my personal estate. I DIRECT my trustees or trustee from time to time to invest such parts of my residuary estate as shall come into their or his hands, and shall not be employed in the said business, or be immediately distributable under the trusts hereinafter declared in their or his names or name [or under their or his legal control].—[*Insert investment clause, &c., post*, pp. 874, *et seq.*; *and add trusts of residue, &c., post*, pp. 884, *et seq.*]

Bequest to trustees of coal and iron works, leases, &c.

7. I BEQUEATH all my coal and iron works, parts or shares of coal and iron works, and all my leases and parts or shares of leases of coal, ironstone, and iron ore, with all lands and other appurtenances thereto belonging, unto the said [*trustees*], their executors and administrators, upon the trusts following, (that is to say), UPON TRUST that the trustees or trustee for the time being of this my will shall carry on and conduct the same, and transact all matters and things relating thereto, either alone or in conjunction with the other persons or person then interested as partners or partner therein, as the case may be, for the space of —— years next after my death, but subject to the proviso hereinafter contained. [*Powers of management, ante*, p. 781, *Form* 4.] AND

Annual accounts to be taken;

I DIRECT, that my trustees or trustee for the time being shall from time to time, after my death, take annual accounts of the stock and capital employed in my said business, and shall make out annual accounts of the profits, losses, and expenses of the same business, and of all transactions relating thereto; Which accounts shall be audited and settled by my said wife and my said children, or such of them as shall from time to time be living and shall have attained the age of twenty-one years. AND in case my said wife and all my said children should die while my said business shall be carried on, then by the respective guardians of the several infant children of them my said children, or of such of them as shall leave children. PROVIDED ALWAYS, that if my said son should attain the age of twenty-one years, and should thereupon or at any time thereafter be desirous to enter into and participate in my said business, then my said trustees or trustee shall admit my said son into such part or proportion of my said business as they or he shall think proper, not

power to admit the son to a share of the concerns;

Business.

being less than one equal fourth share, nor exceeding in the whole one equal moiety or half share thereof, And shall thereupon assign and make over to my said son a like proportion of all the capital stock, leases, moneys, and other effects belonging to or used and employed in the said business, upon my said son giving security unto and to the satisfaction of my said trustees or trustee for the payment of the worth or value (to be settled by two indifferent persons one to be nominated by each party) of so much and such part of the premises as shall be assigned to my said son, with interest at the rate of 5 per cent. per annum; Which security may be the bond of my said son, if my said trustees or trustee should think proper to accept the same, but not otherwise.

power to discontinue the concerns, if disadvantageous;

PROVIDED ALWAYS, that if my trustees or trustee for the time being should at any time or times during the said period of —— years, to be computed from my death, find it disadvantageous, or deem it unadvisable to carry on my said business or any part or branch thereof, then and in any such case it shall be lawful for them or him, with the consent in writing of my said wife and my said children, or such of them as shall be then living and shall have attained the age of twenty-one years, and in case my said wife and all my said children should die while my said works shall be carried on, then with the consent in writing of the respective guardians of the several infant children, if any, of them my said children, or of such of them as shall leave children, and if there should be no such children, then in the discretion and of the sole authority of the said trustees or trustee, absolutely to close and discontinue my said business, or any part or branch thereof, and all accounts and transactions relating thereto.

upon the determination of the concerns, trustees to sell and pay debts;

AND I DIRECT, that, upon such determination of my said business or any part thereof, or else upon the expiration of the said term of —— years hereinbefore appointed for carrying on the same, my said trustees or trustee for the time being shall sell, collect, and convert into money, all the capital stock, leases, moneys, and other effects belonging to or used in the same; And shall thereout pay all debts and expenses owing and incurred from and on account on the same, and adjust and settle all accounts relating thereto.

and to stand possessed of all the residuary personal estate,

AND I HEREBY DECLARE that my said trustees or trustee shall stand possessed of and interested in all my said coal and iron works during the continuance of the same, and the moneys to

Business.

arise therefrom and from the conversion into money of the capital thereof when the same concerns shall be closed, and the stocks, funds, shares, and securities, in or upon which such gains, profits, and capital, shall be invested, or which shall otherwise form part thereof respectively, and the annual income thereof, upon the trusts hereinafter declared of and concerning my residuary personal estate, and the income thereof respectively.

upon following trusts.

Powers for executors to wind up testator's partnership business. Short form (*f*).

8. I DIRECT my executors, as soon as conveniently may be after my death, to concur with other persons interested in winding up the business of ——, now carried on by the firm of —— and Co., of which I am a partner, and to realise my share and interest therein; And for that purpose I AUTHORISE my said executors to enter into, make, execute and do all such agreements, arrangements, assurances, and things as they shall in their discretion think reasonable and expedient, having regard to the agreements and provisions of the articles of partnership under which the business of the said firm is carried on, or any agreement for the time being subsisting in modification thereof or substitution therefor, without being answerable for any loss which may be occasioned by any such agreement, arrangement, assurance, or thing.

The same. Full form.

9. I DIRECT my executors to concur with other persons interested in winding up the business of ——, now carried on by the firm of —— and Co., in which I am a partner, or any business in which I may be engaged as a partner at the time of my death; And for that purpose I AUTHORISE my said executors to adjust and settle all accounts and transactions relating to the said partnership business and to accept any statements of account either with or without the production of vouchers or other evidence, and to ascertain the amount or value of any share and interest in the said

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(*f*) This form, so far as the authority given is concerned, is merely declaratory, as by sect. 37 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), powers of arranging, compromising, &c., are given to trustees and executors which are generally sufficient for winding up an ordinary business. The provisions of the next Form, however, are more ample than the statutory powers.

Business.

business either upon the footing of the articles of partnership under which the same is carried on or any agreement for the time being subsisting in modification thereof or substitution therefor, or upon the footing of any other agreement or arrangement, or such terms, and in such manner as may be agreed upon between my executors and the surviving partners or partner and other persons (if any) interested in the said business; with full power to compromise, compound, abandon, submit to arbitration, or otherwise settle or concur in compromising, compounding, submitting to arbitration, or otherwise compounding all or any of my rights or liabilities as between my estate and the surviving partners or partner or other persons (if any) interested in the said partnership business, and creditors of, or debtors to the firm, or persons under contract therewith; and in particular to leaving to the surviving partners or partner or any of them or to any agents or other persons, the collecting or gathering in of the outstanding debts of the firm, and to sell or dispose of my share by valuation, agreement, or otherwise, on such terms and in such manner as my executors shall think fit; And to accept or concur in accepting payment of my share therein, or of any estimated, agreed, or awarded sum in satisfaction thereof, by such instalments, on such terms, and generally in such manner as they shall think fit, and either with or without taking security for the same; And to postpone such winding up of the said business, and ascertainment and disposal of my share therein for such period as they shall deem proper or expedient; And to allow the whole or any part of my share in the capital of the said business to remain as a loan to the persons or person for the time being carrying on the same, for such time, upon such security, personal or otherwise, at such rate of interest, either fixed or varying with profits, and on such terms and in such manner as my executors shall think fit; And generally to act in relation to such business as they shall in their uncontrolled discretion think proper or expedient and as if they were the absolute owners thereof, without being answerable for any loss which may be occasioned thereby.

## GENERAL PECUNIARY BEQUESTS.

Legacies to wife : one to be paid immediately.

1. I GIVE to my wife, [*name*], £——, to be paid immediately, or as soon as may be, after my death for her immediate use ; I ALSO GIVE to her £——, to be paid within twelve months after my death, with interest at the rate of 5 per cent. per annum from my death, payable quarterly in the meantime (*e*).

Legacy to be paid by instalments.

2. I BEQUEATH to my wife, [*name*], the sum of £——, to be paid to her by four equal instalments, the first immediately after my death, and the others at the end of three, six, and nine calendar months respectively after my death.

Legacies to trustees ;

to one of the trustees ;

3. I BEQUEATH the legacies following, namely :—To each of my said trustees and executors, who shall prove my will, the sum of £——, as an acknowledgment for his trouble in executing the office of trustee and executor of my will ; To the said [*trustee*] individually the sum of £—— ; and whether or not he shall prove my will, or accept the trusts thereof (*f*),

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(*e*) An immediate pecuniary legacy to the testator's widow is always a proper concomitant of a residuary gift for life, or other provision which may not be immediately available ; such a legacy has priority over other legacies : *Re Hardy*, 17 Ch. D. 798.

As to legacies to trustees.

(*f*) It is always better to show explicitly, as here, whether legacies to trustees are or are not to be regarded as given to them as a compensation for their trouble, in order to exclude questions respecting their claim in case they renounce, or neglect, or from mental or bodily infirmity are unable to undertake, the trusts, or in case their appointment is revoked by the testator : see *Burgess* v. *Burgess*, 1 Coll. 367. The general rule seems to be against their title in such a case, except in the case of a *residuary* gift, *Griffiths* v. *Pruen*, 11 Sim. 202 ; *Christian* v. *Devereux*, 12 Sim. 264, unless the testator has shown, by positive expression, that the legacy was intended to be independent of the office : *Read* v. *Devaynes*, 3 Br. C. C. 95 ; *Stackpoole* v. *Howell*, 13 Ves. 417 ; *Hanbury* v. *Spooner*, 5 Beav. 630. See *Dix* v. *Reed*, 1 S. & St. 237 ; *Compton* v. *Bloxham*, 2 Coll. 201. As an executor may act before probate, however, his death without having proved the will does not necessarily defeat his claim to a legacy, though given expressly for his trouble : 4 Ves. 212. See *Hollingworth* v. *Grasett*, 15 Sim. 52. A legacy to executors for their trouble defeats their claim to commission on Indian assets : *Freeman* v. *Fairlie*, 3 Mer. 24 ; *Sheriff* v. *Axe*, 4 Russ. 33.

Pecuniary Bequests.

in addition to the sum of £—— hereinbefore bequeathed to him as executor and trustee thereof: To &c., [*other pecuniary legacies* (*g*)]. [And I direct the legacy hereinbefore bequeathed to my said wife to be paid or retained out of the first moneys which shall come to the hands of my trustees and executors, and the other legacies hereinbefore bequeathed to be paid or retained [clear of legacy duty] at the end of one year from my death, unless my executors should think fit sooner to pay or retain the same.] time of payment.

4. I direct my trustees or trustee to purchase, within a year from my death, or to set apart from such funds as I may be possessed of, the sum of £——, —— per Cent. Consolidated Stock, and be possessed thereof In trust for such child or children of my sister, [*name*], living at my death or born afterwards, and such child or children of any child or children who may die before me, of my said sister, as shall at any time or times, before or after the death of my said sister, attain the age of twenty-one years, or (being a girl or girls) attain that age or marry under that age, if more than one in equal shares as between brothers and sisters; But so that the child or children collectively of any deceased child shall take such share only as his, her, or their parent would have taken if living.

Direction for purchase of stock for the children of a living person, at twenty-one or marriage.

Substitution of children of deceased children.

5. I bequeath the sum of £—— to [*legatee*] to be paid out of the proceeds of sale of a sufficient part of the sum of £—— Two and Three-quarters per Cent. Consolidated Stock on this day standing in my name; [Provided always that if at the time of my death there shall not be any, or not be a sufficient amount of such stock standing in my name to provide for payment of the said legacy of £——, I direct that the whole or the deficient part of the same sum shall be made good and paid out of my residuary personal estate (*h*).]

Demonstrative legacy.

Proviso as to ademption.

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(*g*) No exemption from duty on legacies under 20*l.* is now allowed: see *ante*, p. 204. And the duty at the rate of 1 per cent. on legacies to lineal ancestors or issue is abolished where probate duty has been paid, that is to say, on all such legacies given out of personalty locally situate within the jurisdiction of our Courts: see *ante*, p. 248; see also p. 174.

(*h*) The words in brackets are merely declaratory, and may be omitted; a demonstrative legacy is not liable to ademption: *Mullins* v. *Smith*, 1 Dr. & Sm. at p. 210.

Pecuniary Bequests.

Legacy in trust.

6. I BEQUEATH to [*trustee*], of, &c., and [*trustee*], of, &c., the sum of £——, to be held by them upon the trusts and with and subject to the powers and provisions hereinafter declared of and concerning the same.

Legacies to friends for mourning rings.

7. I GIVE to my friends, [*names*], the sum of £—— each, for the purchase of mourning rings (*i*).

Legacies to clerks, servants, &c.

8. I GIVE unto such of my clerks, [*names*], as shall be in my service or employ at the time of my death, the sum of £—— apiece, to be paid at the end of three calendar months next after my death. I GIVE to each of the servants who shall be in my service at the time of my death, and shall have lived with me continuously three years or upwards, two years' wages; And to each of the other servants who shall be in my service at the time of my death, and shall have lived with me continuously one year or upwards, one year's wages, in addition to what may be due and owing to them respectively on account of wages at the time of my death (*j*).

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(*i*) Legacies for mourning rings are undistinguishable from other pecuniary legacies in regard to their carrying interest, &c., and the legatees are entitled, if they please, to receive the legacies in money: *Apreece* v. *Apreece*, 1 V. & B. 364. See *ante*, p. 516.

As to legacies to servants.

(*j*) A legacy to servants applies to such only as spend their whole time in the testator's service, and not to one who is occasionally employed only, such as a steward of courts: *Townshend* v. *Windham*, 2 Vern. 546. But a farm bailiff is a servant within the meaning of such a gift: *Bulling* v. *Ellice*, 9 Jur. 936; *Armstrong* v. *Clavering*, 27 Beav. 226. It has been held not to extend to a coachman supplied by a job master, for he is not the testator's servant: *Chilcott* v. *Bromley*, 12 Ves. 114; or a boy occasionally employed to clean boots and knives, &c.: *Thrupp* v. *Collett*, 26 Beav. 147. The expression "domestic servants" will not include out-door servants not boarded by the testator, as gardeners, gamekeepers, stable servants, &c.: *Ogle* v. *Morgan*, 1 De G. M. & G. 359. See *Howard* v. *Wilson*, 4 Hagg. 107. Where, by a codicil, a testator gave "to the following persons who have lived many years in my family: viz., to Mrs. D., 1000*l.*, to Mr. J., 1000*l.*, to Mr. F., 1000*l.*; to the other servants 500*l.* each," it was held that a servant who was in the testator's service at the date of the codicil, but had quitted it before the testator's death, was entitled: *Parker* v. *Marchant*, 1 Y. & C. C. C. 290. But generally, under gifts to servants, those only can take who were in the testator's service when he died: *Jones* v. *Henley*, 2 Ch. Rep. 162; *In re Marcus*, W. N. 1887, 168. A temporary absence from actual service at the time of the testator's death will not disentitle a servant to the benefit of the legacy: *Herbert* v. *Reid*, 16 Ves. 486. But a servant

Pecuniary Bequests.

£—— to be paid to a widow by weekly instalments; surplus for her burial.

9. I GIVE to my trustees or trustee £——, upon trust thereout to pay or apply, for the benefit of [*name*], widow, the sum of —*s.* weekly, [monthly,] during her life, or until such sum shall be exhausted; such payment to commence from the day of my death: And after her death to apply all or a competent portion of the surplus (if any) for her burial, and to add the ultimate surplus (if any) to my residuary personal estate.

Allowance for son.

10. I GIVE the sum of £—— to the trustees of my will, to be held by my trustees or trustee for the time being, IN TRUST for my son, [*name*], and to be paid to him by way of allowance during his minority in such portions, or to be otherwise applied for his benefit in such manner, as my said trustees or trustee for the time being shall think proper; And in case of all or any part of such sum not being applied as aforesaid during my said son's minority, such sum, or the unapplied part thereof (as the case may be), shall be paid to him on his attaining the age of twenty-one years, and in case of his dying before me, or under that age, shall form part of my residuary personal estate. AND I DIRECT that the income (if any) to arise from the said sum of £——, or any part thereof, shall be added to the capital and be applicable in all respects as part thereof.

Legacy to a creditor.

11. I BEQUEATH to [*legatee*] the sum of £——, to be paid to him in addition to and not by way of satisfaction of the amount of any debt I may owe to him at my death.

Direction as to legacies to creditors.

12. I DECLARE that any legacy hereby bequeathed to any person to whom, or to whose husband or wife, I shall be

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who has permanently quitted the testator's service either voluntarily or by dismissal from whatever cause, or even by wrongful dismissal, is not entitled to participate in a legacy to servants "living with me at my death:" *Darlow* v. *Edwards*, 1 H. & C. 547; *Re Serres' Estate*, 10 W. R. 751; *Re Hartley's Trusts*, 26 W. R. 590.

It has been held that under a gift to the testator's *two* servants living with him at his death, a third servant engaged after the date of the will was entitled: *Gleech* v. *Torrington*, 2 Ves. sen. 560.

A legacy of a year's wages is confined to such servants as are hired by the year: *Booth* v. *Dean*, 1 My. & K. 560; *Blackwell* v. *Pennant*, 9 Hare, 551.

**Pecuniary Bequests.**

indebted at my death, shall be paid to him or her in addition to and not by way of satisfaction of any moneys which may be owing to him or her, or to his or her wife or husband (*k*).

Legacy to son (liable to lapse).

13. I BEQUEATH to my son, [*name*], [in case he should survive me (*l*),] the sum of £——, with interest thereon at the rate of — per cent. per annum from the day of my death.

Legacy to vest at twenty-one, without interest.

14. I BEQUEATH to my son, [*name*], the sum of £——, if and when he shall attain the age of twenty-one years, but without interest in the meantime (*m*).

Legacy to carry interest.

15. I BEQUEATH unto my brother, [*name*], the sum of £——, to be paid as soon as convenient after my death; Such legacy, if not paid within one calendar month, to carry interest at the rate of 4 per cent. per annum, from the date of my death.

Legacy to testator's niece at twenty-one or marriage.

16. I BEQUEATH unto my niece, [*name*], the sum of £——, if and when she shall attain the age of twenty-one years, or marry under that age: [And I declare that in such last mentioned case her receipt, notwithstanding her minority, shall be a valid and effectual discharge for the same (*n*).]

Legacy at twenty-one

17. I BEQUEATH to my son, [*name*], the sum of £——, if and

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(*k*) See notes to *Ex parte Pye*, 2 Wh. & Tud. L. C. Eq.; see also Theob. Wills, 592.

(*l*) This provision is necessary if the testator does not intend that the representatives of the son should take the legacy in the event of his dying before the testator and leaving issue surviving the testator. See 1 Vict. c. 26, s. 33, *ante*, p. 479.

(*m*) A contingent legacy will not generally carry interest; but if the legatee is a child of the testator, or a person to whom the testator stands *in loco parentis*, it would be presumed that the intention was that the legacy should carry interest, which would be applicable for maintenance of the legatee under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 43. If this is not the intention, the presumption should be expressly negatived, as in the text.

(*n*) A declaration that the legacy is for her sole and separate use would be superfluous. It seems doubtful whether a declaration that the receipt of an *infant* for her separate property should discharge the trustees notwithstanding her infancy, would be effectual: see *Re Cardross*, 7 Ch. D. 728; *Re d'Angibau*, 15 Ch. D. 228.

Pecuniary Bequests.

when he shall attain the age of twenty-one years, with interest thereon at the rate of — per cent. per annum from the day of my death, such interest to be paid during his minority to his guardians or guardian for his maintenance and education: PROVIDED (*o*), that such legacy shall not vest as a transmissible interest in my said son unless and until he shall attain the age of twenty-one years: And if my said son should die before me, or under the age of twenty-one years (*o*), I BEQUEATH the same sum of £—— [and interest] to C. D., absolutely. [*Or*, I DECLARE that the said legacy shall fall into and form part of my residuary personal estate.]

with interim maintenance;

gift over in case of lapse on death under age.

18. I BEQUEATH the sum of £—— unto and among my children equally, who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry, with interest on such respective legacies at the rate of — per cent. per annum from the day of my death, [such interest to be applied by my trustees or trustee in their discretion, for or towards the maintenance and education of such children respectively, or, if they or he shall think fit, to be paid by them or him without being concerned to see to the application thereof, to the guardians or guardian of such respective children.] PROVIDED ALWAYS (*p*), that the legacy lastly hereinbefore bequeathed shall not vest as a transmissible interest in any such child unless such child shall attain the age of twenty-one years, or being a daughter attain that age or marry.

Legacy to class of children with interim maintenance (*o*).

19. I GIVE to my nephew, [*legatee*], of, &c., the sum of £——, and if at the time of my death he shall not have attained the age of twenty-one years, then I authorise my executors at any

Legacy to infant to be paid to his parent or guardian.

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(*o*) A gift to such members of a class of children as shall attain a specified age vests only in those who actually attain that age: see *Dewar* v. *Brooke*, 14 Ch. D. 529.

For more elaborate provisions to a similar effect, see *post*, Form 32, p. 803.

It will be observed that, in this and the preceding form, the application of the whole income for maintenance, &c., is obligatory; if this is not desired the words in brackets will be omitted.

(*p*) This proviso is intended to rebut the presumption that the gift of interim interest vests this legacy (which would otherwise be contingent on the legatee attaining twenty-one) in the legatee on the testator's death: see *Hanson* v. *Graham*, 6 Ves. 239; *Re Parker*, 16 Ch. D. 44; *Re Bunn*, 16 Ch. D. 47. A gift over or direction that the legacy should fall into the residue should also be inserted.

Pecuniary Bequests.

time during such minority to pay the same sum to my brother [*name*] the father of the said [*legatee*], or if my said brother shall be then dead, to the guardian or guardians of the said [*legatee*], and I declare that the receipt of my said brother or of such guardian or guardians shall be a sufficient discharge to my executors.

Legacy to son, to be vested at twenty-two, and the interest in the meantime to be applied for maintenance, with power to apply principal for his advancement.

20. I BEQUEATH unto my son, [*name*], the sum of £——, if and when he shall attain the age of twenty-two years, but not otherwise. AND I DIRECT, that interest on the said sum, after the rate of — per cent. per annum, shall, in the meantime, from my death until my said son shall attain the age of twenty-two years or die under that age, be paid and applied for or towards the maintenance and education of my said son. AND I FURTHER DIRECT, that it shall be lawful for my said trustees or trustee for the time being, with the consent of my said wife, to be testified by writing under her hand, but if my said wife should be then dead, in the proper discretion of my said trustees or trustee for the time being, to advance and pay the said sum of £——, or any part thereof, for the benefit or advancement in the world of my said son, notwithstanding that he may then be under the age of twenty-two years: PROVIDED ALWAYS, &c., that the said legacy of £—— shall not vest as a transmissible interest in my said son unless and until he shall attain the age of twenty-two years: AND I BEQUEATH to my said son, [*name*], the sum of £——, if and when he shall attain the age of twenty-four years, in addition to the legacy hereinbefore bequeathed to him, AND I direct that the said legacy of £—— shall be paid to my said son, without interest, on his attaining that age, if the same should happen after the death or marriage of my said wife; But if the same should happen during her widowhood, then the raising and payment, but without interest, of the said legacy of £—— shall be postponed till after the death or marriage of my said wife, whichever shall first happen. And if my said son shall die under the age of twenty-two or of twenty-four years, I direct that both the legacies, or the last mentioned legacy (as the case may be), hereinbefore bequeathed to him, shall fall into and form part of my residuary personal estate.

Second legacy to the son to be vested at twenty-four, but not payable till the death or marriage of wife.

Vested legacy payable at twenty-one.

21. I BEQUEATH to [*legatee*], of, &c., the sum of £——, with interest thereon at the rate of — per cent. from the day

Pecuniary Bequests.

of my death, such legacy to be an interest vested in the said [*legatee*] at my death and transmissible accordingly, but not to be paid to him until he shall attain the age of twenty-one years (*q*).

Legacy to collateral relative not to lapse.

22. I BEQUEATH the sum of £—— to [*name*], of, &c., who is a son of my uncle, [*name*] (*r*), or if he should die in my lifetime to his executors or administrators (*s*), to vest in them as part of his general personal estate, in the same manner as if he had survived me and died immediately after my death.

Another form, to several (*t*).

23. I BEQUEATH the following legacies, that is to say, to my nephew, [*name*], the sum of £——, to my niece [*name*], the sum of £ ——, &c. But if any of such legatees shall die in my lifetime, leaving issue living at the time of my death, I declare that his or her legacy shall not lapse, but shall take effect as if the death of the legatee so dying had happened immediately after my death.

Legacy to A. B.

Substitution of children or issue in case of lapse.

24. I BEQUEATH the sum of £—— to [*legatee*], of, &c., or, if he should die before me, to such his child or children [and such issue of any his child or children dead before me] as shall be living at my death and shall attain the age of twenty-one years, or being a daughter or daughters marry under that age, if more than one, in equal shares; [But so that the child or the children collectively of any deceased child, or other issue, shall only take such share as his, her, or their parent would have taken if living.]

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Relationship of legatee should be stated.

(*q*) As to interest on legacies payable *in futuro*, see *Crickett* v. *Dolby*, 3 Ves. 10; *Leake* v. *Robinson*, 2 Mer. 384; *Wood* v. *Penoyre*, 13 Ves. 326; *Donovan* v. *Needham*, 9 Beav. 164; *Earle* v. *Bellingham*, 24 Beav. 448; *Lord* v. *Lord*, L. R. 2 Ch. 782.

(*r*) Whenever a legacy, either specific or pecuniary, is given to a relation, the fact and degree of relationship should be stated, as the statement in the will is generally acted upon at the Stamp Office without further evidence.

(*s*) It may be convenient to direct payment to the personal representative for the convenience of administration, and in order to exonerate the present testator's executors from the responsibility of seeing to the application of the legacy. See *Long* v. *Wilkinson*, 17 Beav. 471; *Re Clay*, W. N., 1884, p. 53.

(*t*) This is an adaptation of the provisions of the 33rd section of the Wills Act (see *ante*, p. 734), which applies only to children and other issue of the testator. See *Re Coleman & Jarrom*, 4 Ch. D. 165.

**Pecuniary Bequests.**

The same, to several.

25. I BEQUEATH the legacies following, that is to say, to [*legatee, No.* 1], of, &c., the sum of £——, to [*legatee, No.* 2], of, &c., the sum of £——, &c.; But if any of the said legatees should die before me, then I give his or her legacy to such his or her child, &c. [*continue as in Form* 24].

Legacy to married woman with restraint on anticipation during coverture (*u*).

26. I BEQUEATH to [*legatee*], the wife of [*name*], of, &c., the sum of £——: PROVIDED ALWAYS, and I hereby direct that if the said [*legatee*] shall at the time of my death be under her present or any other coverture my trustees or trustee shall retain the said sum during such coverture, and invest the same, with the consent of the said [*legatee*], in or upon any of the stocks, funds, shares, or securities hereinafter mentioned and authorised for the investment of my residuary personal estate, and in the like manner and with the like power of varying investments, but with the consent of the said [*legatee*]; And shall pay the income arising from such investment to the said [*legatee*] from time to time during such coverture, without power of anticipating such income by way of assignment, charge, or otherwise; And subject thereto, shall, during any such coverture, hold the said sum of £—— and the income thereof, Upon such trusts and for such purposes as the said [*legatee*] shall by will or codicil appoint; And in default of, and subject to any such appointment, In trust for the said [*legatee*] absolutely.

Legacies to several, with restraint on anticipation by female legatees during coverture.

27. I BEQUEATH the following legacies, that is to say, &c., [*legacies to several*]: And I declare that the legacies lastly hereinbefore bequeathed to such of the legatees thereof as are females shall be without power of anticipation: And I direct that if any such legatees shall at the time of my death be under any coverture, my trustees or trustee shall retain the legacy or legacies during the covertures of such legatees respectively, and invest the same, with the consent of the legatees entitled thereto respectively, &c., [*ut ante, Form* 26], and with the like power of varying investments with the consent of the

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(*u*) Where an absolute gift of personalty is made with a restraint on anticipation, the legatee is not entitled during coverture to claim payment of the corpus, which she can only appoint by will: see *Re Bown*, 27 Ch. D. 411; *Re Grey's Settlements*, 34 Ch. D. 712; *Re Hutchings*, W. N. 1887, p. 217; see also Lewin on Trusts, pp. 783, 784. The distinction between income-bearing and other funds laid down in *Re Clarke's Trusts*, 21 Ch. D. 748, must be regarded as not well founded, see *Re Bown, supra.*

Pecuniary Bequests.

legatees entitled to the legacies so retained respectively; And shall pay the income arising from such investments to the legatees entitled to the legacies producing such income respectively from time to time during their respective coverture, without power of anticipating such income by way of assignment, charge or otherwise.

Legacy upon special trusts for the benefit of a married woman (*x*).

28. I BEQUEATH to the said executors and trustees of this my will the sum of £—— upon trust, to invest the same in or upon any of the stocks, funds [shares] or securities hereinafter mentioned and authorised for the investment of my residuary personal estate, and in the like manner, and with the like power of varying investments, and to stand possessed of such trust fund and the investments and income thereof, upon trust for such person or persons and for such purposes as she shall while not under coverture by deed or will, or while under any coverture by will appoint: And in default of any such appointment or so far as any such appointment shall not extend upon trust to pay the income of the said trust fund to the said [*legatee*], without power of anticipation, during her life, and after her death stand possessed of the capital of the said trust fund in trust, if the said [*legatee*] should die discovert, for the said [*legatee*], her executors, administrators, and assigns, but if she shall die under coverture, then in trust for such person or persons as would have become entitled thereto under the statutes for the distribution of the personal estates of intestates at the time of her death, if her husband had died immediately before her, [*or*, if such *is the intention*, as if she had never been married (*y*)], and as if she had died possessed thereof and intestate, such persons, if more than one, to take as tenants in common in the shares in which they would have taken under the same statutes.

Legacy in trust for the benefit of a lunatic.

29. I BEQUEATH to the said [*trustees*] the sum of £—— upon trust, that the trustees or trustee for the time of this my will shall invest the same in or upon any of the stocks, funds, shares, or securities hereinafter mentioned, and authorised for the investment of my residuary personal estate, and

(*x*) These trusts are intended to give the legatee full powers of disposition while discovert, but to restrict such powers as far as possible during coverture.

(*y*) As to this expression, see *ante*, p. 660.

**Pecuniary Bequests.**

shall stand possessed of the said trust fund and the investments and income thereof upon trust, during the life of [*lunatic*], of, &c., to pay or apply the whole or so much as shall in their or his judgment be sufficient of the income [and capital] of such trust fund to such person or persons, or for such purposes and in such manner and upon such trusts, for the maintenance, clothing, comfort, or otherwise for the benefit of the said [*lunatic*], and either subject to the control or superintendence of any said trustees or trustee, or otherwise, as they or he shall think fit; And from and after the death of the said [*lunatic*] I direct and declare that the said legacy of £—— shall fall into and form part of my residuary personal estate.

Legacy in trust for the family of a son who is or may become bankrupt, &c.;

as son shall appoint;

or as trustees shall think fit.

30. I BEQUEATH the sum of £—— to my said trustees, IN TRUST to pay and apply the same sum, and the income thereof, or any parts thereof respectively, unto and for the benefit of the wife and children for the time being of my son, [*name*], or of some or one of them, for such interest or interests, and with such conditions and restrictions, and in such manner in all respects as my said son shall appoint; And in default of such appointment, and, subject thereto, and in the meantime until any such appointment shall be made, UPON TRUST to pay and apply the said legacy and the income thereof, or so much thereof respectively as shall not have been appointed by my said son as aforesaid, unto and for the benefit of the wife and children for the time being of my said son, in equal shares [*or*, unto and for the benefit of the wife and children for the time being of my said son, or some or one of them, and in such proportions, for such interest or interests, and with such conditions, restrictions, and provisoes, and in such manner and in all respects as my said trustees or trustee for the time being, in their, his, or her absolute discretion, shall think proper]; and if there should be only one of such objects, then unto and for the benefit of such only object.

Legacy in trust for improvident son.

31. I BEQUEATH to my said trustees the sum of £——, IN TRUST to invest the same in the names or name of my said trustees or trustee for the time being in, &c. [*add investment clause*, see *post*, pp. 874 *et seq.*, or *incorporate clause for investment of residue by reference, as in Form* 35, p. 806], with power for my said trustees or trustee from

**Pecuniary Bequests.**

time to time to vary any such investments; And to be possessed thereof in trust to pay the income thereof unto my son [*name*], until he shall commit or suffer some act, default, or process, which but for this limitation would have the effect of giving the benefit of such income either wholly or partially to any other person or persons; and thenceforth during the life of my said son, to pay or apply the said income to or for the benefit of the wife and child or children for the time being of my said son [*name*], or such one or more of them, and in such shares, if more than one, and in such manner as my said trustees or trustee shall think fit; And while there shall be no such wife or child, then to invest and accumulate the income in augmentation of the capital of the said legacy or trust-fund, but with power to resort to such accumulations before or after my said son's death, as if the same were income; And if and when such accumulations shall cease to be lawful, to apply the future income in the manner in which it would be applicable if my said son [*name*], were dead; And after the death of my said son, to pay the income from the said legacy or trust-fund to his widow (if any); And after her death to transfer or divide the capital of the said legacy or trust-fund to or among such of his child or children as shall attain the age of twenty-one years or marry, in equal shares if more than one; And if no child of my said son should take a vested interest in the said legacy or trust-fund, then, subject to the trust aforesaid, the same shall be held in trust for (*ulterior trusts*).

Income for son until alienated, then for son's wife and children, as trustees shall think fit;

if no wife or child, to accumulate.

After son's death, for widow for life, then for children at twenty-one or marriage.

32. I GIVE to my said trustees the sum of £——; In trust to invest the same, or so much thereof as for the time being shall not be applied under the trusts hereinafter declared, in the name or names of my said trustees or trustee, in or upon any such investments or securities as are hereinafter authorised with regard to the investment of my residuary personal estate, with the like power of varying any such investments, or, in their or his discretion, in the purchase from Government or any public company, or, on sufficient freehold, copyhold or leasehold security, from any private person or persons, of an annuity or annuities, absolute or redeemable, for the life of my son, [*name*], or for the life of the survivor of my said son and his wife for the time being; AND I AUTHORISE AND EMPOWER my said trustees or trustee for the time being,

Legacy in trust for benefit of a bankrupt and his wife and children,—the income and capital being applicable during the son's life as trustees shall think fit.

Pecuniary Bequests.

from time to time, if and when and at such times and in such manner as they or he, in their or his absolute discretion, shall think fit, to pay or apply the income of the said trust-fund, or any part or parts, or the whole of the capital thereof, to or for the maintenance and support of my said son (*z*), or for the maintenance and support or otherwise for the benefit of his wife and child or children (if any) for the time being, or such one or more of them, exclusively of the others or other of them, and in such shares, if more than one, as my said trustees or trustee shall think fit; And to invest and accumulate so much of the income from the said trust-fund as shall not for the time being be so applied, or the whole thereof if no part thereof shall be so applied, and add such accumulations to the capital thereof, with power to apply the same in manner aforesaid; and, if and when such accumulations shall cease to be lawful, to pay or apply the future income to or for the maintenance and support of my said son, or for the maintenance and support or otherwise for the benefit of his wife and child or children for the time being, or some or one of them in manner aforesaid. And after the death of my said son to pay the income of the said trust-fund, or of so much thereof (if any) as shall not have been applied under the trusts or powers hereinbefore contained, to his widow (if any), and after her death to transfer or divide the capital of the said trust-fund, or so much thereof (if any) as shall not have been applied as aforesaid, to or among such of his children as shall attain the age of twenty-one years or marry, in equal shares if more than one. (*Add advancement clause, see* p. 914).

Accumulation.

After son's death any surplus to be for widow for life, and then for children.

Legacies to younger sons (*a*).

33. I BEQUEATH to each of my sons, other than and except such one of my said sons (if any), as, at the time of my death, shall be entitled, under the limitations aforesaid, to an estate for life in possession in the real estates respectively hereinbefore [*or*, hereinafter] devised and appointed, the sum of

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(*z*) See *Twopenny* v. *Peyton*, 10 Sim. 487; see also *Godden* v. *Crowhurst*, 10 Sim. 642; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98. As to the effect of the trustees refusing to exercise their discretion, see *Re Coe's Trust*, 4 K. & J. 199.

(*a*) For conditional legacies to be refunded on succeeding to an estate, &c., see *post*, under the heading MISCELLANEOUS CLAUSES, p. 979.

£——, the same to be a vested interest in each such son immediately on my death, but not to be payable until the expiration of eighteen calendar months after my death; Nevertheless, I DECLARE, that each of the said legacies shall carry interest at the rate aforesaid from the time of my death, to be payable quarterly, the first quarterly payment to be paid at the expiration of three calendar months after my death.

Pecuniary Bequests.

Interest.

34. I BEQUEATH the sum of £—— to [*name*], of, &c., the natural [*or*, reputed] son of [A. B.], late of, &c., deceased.

Legacy to natural son of A. B.

35. I BEQUEATH to each and every of my children who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, [including my daughter [*illegitimate daughter*], who resides with me, and is now aged —— years, or thereabouts (*b*) (which my children, including the said [*illegitimate daughter*], are hereinafter collectively referred to as "my said children")], the sum of £——, the same several legacies to be paid as soon as may be after my death, and to bear interest from the day of my death at the rate of 4 per centum per annum. AND I DIRECT, that the legacies of such of my said children as at the time of my death shall have attained the age of twenty-one years, or, being a daughter or daughters, shall be married under that age, shall be paid to them respectively within twelve calendar months after my death; and that the

Legacy to children (including a natural daughter) to be invested.

Directions as to payment of legacies to children, and investment during minorities.

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(*b*) Any description sufficient to identify the person is sufficient, without disclosing the fact of illegitimacy. But where the fact is not generally known, and it is desired to prevent any suspicion of it from arising, it is better to extend the same particularity of description to all the children, thus:—

As to describing illegitimate children.

"I GIVE to each of my five children now born, namely [*names of legitimate children and of illegitimate child*], and to every other child of mine hereafter to be born."

Children now born, and future children.

In subsequently referring to the children as a class, it is well always to particularise the children, adding the words "and to every other child," &c., or to expressly include the illegitimate children by reference as in the text. For an illegitimate child will not necessarily, apart from indications of intention, be included in subsequent provisions referring to children as a class: see *Bagley* v. *Mollard*, 1 Russ. & M. 581; *Megson* v. *Hindle*, 15 Ch. D. 199; *Drummond* v. *Leigh*, 30 Ch. D. 110; *Brouston* v. *Weightman*, 35 Ch. D. 551. See further as to gifts to illegitimate children, *ante*, pp. 645 *et seq.*

**Pecuniary Bequests.**

legacies of such of my said children as shall, at the time of my death, be under the age of twenty-one years and, being a daughter or daughters, unmarried, shall be invested in any of the stocks, funds, [shares,] or securities, and in manner hereby authorised or directed with regard to the investment of my residuary personal estate, with the like power of varying investments (*c*). [*Insert here, if desired, maintenance and accumulation clauses, post,* pp. 910 *et seq.* (*d*); *and advancement clause, post,* p. 914]; And the capital of such legacy or respective legacies, [or so much thereof as shall not have been applied for the maintenance, education, or benefit or for the advancement of my said children or any of them [under the provisions in that behalf hereinbefore contained], together with any unapplied accumulations of the income thereof, shall be paid or transferred to such child or children respectively, when and as he, she, or they respectively shall attain the age of twenty-one years, or, being a daughter or daughters, marry under that age. AND in case any of my said children shall die under the age of twenty-one years, and, being a daughter or daughters, without having been married, then I DIRECT, that the legacy or legacies hereinbefore bequeathed to such child or children respectively, together with any accumulations of the income thereof, shall [(subject, nevertheless, to any advancement or advancements which shall or may have been made thereout as aforesaid),] fall into and form part of my residuary personal estate. PROVIDED ALWAYS, that, in case any of my said children should die before me, or (being a son) should survive me and die under the age of twenty-one years, and any child or children of any such child of mine should be living at my death, then, and in every such case, I BEQUEATH the legacy hereinbefore intended for such child of mine so dying, with interest thereon as aforesaid, and in case of a son of mine surviving me and dying under age, any accumulated income accrued during such son's life, unto such his or her child or children, and if more than one, in equal shares (*e*).

Legacies of children dying under age and unmarried to sink into residue.

Clause substituting children of any child dying before testator.

(*c*) For Investment Clauses, see *post,* pp. 874 *et seq.*

(*d*) Maintenance and accumulation clauses will be generally unnecessary: see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 43 (1).

(*e*) The 33rd section of the Statute of Wills (*ante,* p. 734) would furnish, in many cases, a sufficient provision against lapse by

Pecuniary Bequests.

And I declare that the provisions hereinbefore contained as to the time of payment of the legacies hereinbefore given to my said children, and as to the investment thereof in the meantime, and the application of the income thereof [and as to advancements out of the same legacies], and as to the sinking into the residue of the legacies intended for any legatees who shall die under the age of twenty-one years, or, being a daughter or daughters, unmarried, shall apply and extend to such grandchild or grandchildren of mine as aforesaid, and the legacies hereby given to him, her, or them.

Legacy among children, *nominatim* equally.

36*a*. I bequeath the sum of £—— unto my [six other] children, [*names*], equally to be divided among them, and to be paid to them respectively at the end of twelve calendar months next after my death, but without interest in the meantime; but the respective shares of my said [six] children to be interests vested in them respectively immediately upon my death.

Shares of children under age to be invested.

And in case any of my said [six] children should not have attained the age of twenty-one years, or (being a daughter or daughters) have previously married with the consent of my said wife, if living, at the expiration of the said twelve calendar months next after my death, then I direct, that the share of each such child who shall not have attained the said age, or (being a daughter) have sooner married as aforesaid, of and in the said sum of £——, shall be invested in the stocks or funds, [shares,] or securities, and in manner hereinafter authorised with regard to the investment of my residuary personal estate, with the like power of varying investments, In trust for such respective child of mine who shall be under age and (being a daughter) unmarried as aforesaid, and to be transferred to such child upon his or her attaining the age of twenty-one years, or (being a daughter) on her marriage with the consent of my said wife, if living, as aforesaid.

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the death of a child of the testator leaving issue. But where the legacy is limited not to vest, or not to be raised except on certain conditions or in certain events, or when it is intended only to admit the issue of the deceased legatee, and to exclude his creditors and any parties who might claim under his will, or collaterally as next of kin of a child of the legatee dying in infancy, the legacy should be expressly given to the issue by substitution, which will exclude the operation of the 33rd section.

**Pecuniary Bequests.**

Substitution of issue of children dying before testator.

36*b*. PROVIDED ALWAYS, that in case any of my said [six] children [lastly mentioned] should die in my lifetime, or (being a son or sons) under the age of twenty-one years, leaving a child or children (*f*) who shall be living at my death, and who shall live to attain the age of twenty-one years or (being a daughter or daughters) marry under that age, then the child or children attaining the said age or (being a daughter or daughters) marrying, of each such child so dying in my lifetime, or (being a son) under the age of twenty-one years, shall represent and stand in the place of his, her, or their deceased parent, and shall be entitled to the same share or shares, as well original as accruing, in the said legacy or sum of £——, which his, her, or their deceased parent would have been entitled to, if living at the time of my death and attaining the age of twenty-one years or (being a daughter) marrying; and such share and shares to be divided between or among such children, if more than one, in equal proportions, and if there should be only one child, then to go to such only child. PROVIDED ALSO, and I further declare, that in case any of my said [six] children should die in my lifetime or (being a son or sons) under the age of twenty-one years, and no child of any such child should be living at my death and attain the age of twenty-one years or (being a daughter) marry, or in case any of my said [six] children (being a daughter or daughters) should die under the age of twenty-one years and unmarried, then, and

Clause of accruer as to the shares of children dying in testator's lifetime or under age.

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Respective extent of the words "children" and "issue."

(*f*) This clause, it will be observed, lets in, by way of substitution for the deceased legatees, their children merely, and not issue generally; so that it would not embrace the share of a child dying in the testator's lifetime leaving a grandchild but no child. In using the words "issue" and "children," attention should always be paid to their respective and various import. If, by the word "issue," the testator meant to designate issue of every degree, the intention should be declared in so many words, or, at all events, every expression which might give rise to an argument for restricting the word "issue" to children should be carefully avoided. On the other hand, if the testator's bounty is intended for children exclusively, the objects of the gifts should be invariably described and referred to by the word "children," in preference to "issue," as more completely preventing misconstruction. It seems, that where the share to which issue are to succeed is described as their *parents'* share, the testator is considered to have explained himself to employ the word "issue" in the sense of *children*. See *ante*, p. 609.

Pecuniary Bequests.

in every such case, the share or respective shares [as well original as accruing (*g*),] of my child or children respectively so dying, of and in the said legacy or sum of £——, shall be held (*h*) UPON TRUST for such of my other children or their issue as shall eventually become entitled, under the limitations hereinbefore contained, to participate in and to receive actual payment of the other shares or share of the said legacy or sum of £——, and if more than one in the like shares and proportions. [*Add, if desired, advancement clause*, p. 914.]

Testator's wife to take the interest on children's legacies until payable, to maintain the children.

37*a*. I DIRECT, that my said wife shall be entitled to interest after the rate of 4 per cent. per annum, in respect of the said sum of £—— hereinbefore bequeathed as aforesaid, [or such part of the said sum of £—— as I shall not have advanced to my said children as hereinafter mentioned,] which shall accrue between my death and the expiration of the said twelve calendar months when the said several legacies will become payable, to the intent that my said wife shall, by and out of such interest, keep up a household and establishment,

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(*g*) These words will not be required unless the variation in the next note is adopted.

(*h*) In the Precedent from which this Form was taken, the legacy was given to six of seven children, there being a separate provision for the seventh (a married daughter), and the gift over in this place was thus expressed :—

Alternative form of clause as to accruer.

"Shall go and belong to and be divided equally among all my children who shall be living at the time of my death, [including my said daughter, [*married daughter*], if she should be then living,] and the child or children of any child or children who shall be then dead, such grandchild or grandchildren to take the share or respective shares of his, her, or their deceased parent or parents only; the shares of the said children and grandchildren respectively to be vested and payable or transferable at the like ages or times, and in the like manner in all respects, as his, her, or their original share or shares is or are hereby directed to be vested and to be paid or transferred: And the share of my said daughter, [*married daughter*], to be subject to and held upon the same trusts, and for the same intents and purposes, as are hereinbefore expressed concerning the legacy or sum of £—— hereby bequeathed in trust as aforesaid."

Pecuniary Bequests.

and provide for the maintenance and education of my said children, or for whose benefit the same bequests are hereinbefore bequeathed, in such manner as she shall think proper during the said twelve calendar months, without being liable to be called to an account for or by reason of any irregularity in the distribution or division of the said interest.

Power to trustees to settle the legacies of daughters marrying under twenty-one years of age.

37*b*. PROVIDED ALWAYS, AND I HEREBY DIRECT, that in case any of my daughters should, after my death, marry, while she or they respectively shall be under the age of twenty-one years, then, and in every such case, it shall be lawful for my trustees or trustee for the time being, if they or he should think proper, but not otherwise, to settle the whole or any part of the legacy or legacies, as well original as accruing, hereinbefore bequeathed to such daughter or daughters respectively, [UPON TRUSTS for the benefit of such daughter or daughters respectively, and her or their child or respective children or more remote issue, similar to and corresponding with the trusts hereinbefore declared concerning the legacy of £——, hereby bequeathed in trust for my said daughter, [*married daughter*], and her children and more remote issue, as aforesaid, or] upon such [other] trusts, and subject to such [other] powers and provisions for the benefit of the daughter or daughters respectively so marrying, and her or their husband or husbands, child or children, or more remote issue and next of kin, or any of them, and reserving such powers and authorities to the trustees for the time being of such settlement, in relation to the said legacy or legacies respectively, as my said trustees or trustee shall think proper. [*Or specify the trusts upon which the settlement is to be made.*]

Costs of settlement.

AND I FURTHER DECLARE, that the expense of every such settlement shall be paid out of the funds comprised therein (*i*).

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(*i*) It is often convenient to give trustees a power of settling the legacy of a female marrying during minority, not only as a protection to the legatee against the consequences of an imprudent marriage, but because it may happen, that, otherwise, no effectual settlement can be made, except by means of an application to the Court under the Infants' Settlement Act, 1855 (18 & 19 Vict. c. 43): see as to Ireland, stat. 23 & 24 Vict. c. 83. Such is necessarily the case where the intended husband, as well as the wife, is a minor, since neither party can be concluded by any act done whilst in this state of disability. An infant's marriage settlement is, however, voidable only, not void: *Davies* v. *Davies*, L. R. 9 Eq.

Pecuniary Bequests.

Legacy in trust for children of sister.

38*a*. I BEQUEATH the sum of £—— to [*trustees*] IN TRUST for all and every such children or child of my sister [*name*] living at my death or born afterwards and such children or child of any children or child of my said sister who shall be then dead, as shall attain the age of twenty-one years or marry, and if more than one in equal shares as between brothers and sisters: But so that the children collectively or child of any deceased child shall take such share only as his her or their parent would have taken, if living.

Presumptive shares.

38*b*. I DIRECT my said trustees or trustee to invest the said sum of £—— in manner hereinafter provided, and to pay to each adult son or grandson, and to each adult or married daughter or granddaughter, the income of his or her presumptive share for the time being (*k*). AND I AUTHORISE my trustees or trustee, if they or he should think fit, to distribute the said sum of £—— in the lifetime of my said sister, at any time after she shall have attained the age of fifty years.

Authority to divide the funds when mother shall have attained a certain age.

Legacies to daughters on marriage.

39. I GIVE to each of my daughters who shall marry, the sum of 7000*l*.; AND I DIRECT that the same shall vest in and be paid to her upon her marriage; And, if any of my said daughters should attain the age of twenty-one years, and die without having been married, I DECLARE that it shall be lawful for each such daughter, by will or codicil, to bequeath 1000*l*. (part of the sum of 7000*l*. so intended for her) to such person or persons, and for such purposes [(other than charitable or religious purposes)], as she shall think proper; And, if any of my daughters should die before me, or without having been married, I DIRECT that the sum of 7000*l*., to which each such daughter so dying would have been entitled if she had survived me and been married, (but deducting out of the same the sum of 1000*l*., if she shall have made an effectual bequest thereof in exercise of the power given to her for that purpose, or so much of such sum of 1000*l*. as she shall have so effectually disposed of), shall be paid to such of

Power to daughters dying unmarried to bequeath £——.

Accruer.

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468; *Smith* v. *Lucas*, 18 Ch. D. 543; *Burnaby* v. *Equitable Reversionary Interest Soc.*, 28 Ch. D. 416.

Apportionment of income.

(*k*) If a child were born in the interval between two days of payment, this would be a determination *pro tanto* of the interest of any adult child or children in the income here directed to be paid, and the Apportionment Act (33 & 34 Vict. c. 35) would therefore apply.

Pecuniary Bequests.

my other daughters as shall survive me and marry, to be divided between or among them, if more than one, in equal shares, so far as to make the legacy or portion of each of my said daughters who shall survive me and marry, amount to the sum of 10,000*l.*, and not further; And any surplus shall sink into the residue of my estate. And I direct that the said contingent legacies or portions to my said daughters shall carry interest, payable quarterly, from the time of my death; And while any of my daughters shall be under the age of twenty-one years and unmarried, an adequate part of the interest on her presumptive legacy shall be paid and applied by my said trustees or trustee for the time being for or towards her maintenance and education, and the residue thereof shall be accumulated, and the accumulations thereof shall, if required, be applicable for or towards her maintenance and education, and if not wholly applied for that purpose, the said accumulations, or the unapplied portion thereof, shall become an interest vested in and be paid to her if and so soon as she shall attain the age of twenty-one years, or on her marriage, which shall first happen, and if she should die under the age of twenty-one years and unmarried, such accumulations or the unapplied part thereof shall go over and be paid to such of my other daughters, if any, as shall survive her and shall attain the age of twenty-one years or marry, and shall not be considered as an addition to the capital of their respective legacies or portions within the meaning of the provision hereinbefore contained for limiting the amount thereof to 10,000*l.* (*l*); And if such daughter should attain the age of twenty-one years without having been married, the whole accruing interest of her then presumptive legacy or portion shall, from that time until she shall marry or depart this life, be paid to or for her own use and benefit. Provided always, that, if any of my said daughters, before she shall have been married, shall profess herself a nun in any religious community in England or abroad, or make any vow or enter into any engagement of that nature, the bequest to her of the aforesaid

Interest on contingent legacies.

Maintenance.

Substitution of smaller legacy and annuity for any daughter who shall become a nun.

(*l*) It seems clear that express clauses for maintenance and accumulation will be here required, as the legacies are held for infants contingently on the occurrence of events (*i.e.* their respective marriages), which need not necessarily occur *before* the infants attain twenty-one years: see Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 43 (1).

Pecuniary Bequests.

sum of 7000*l.* or 10,000*l.*, as the event may be, and of the interest thereof, and the power given her to dispose of the sum of 1000*l.*, shall thereupon become absolutely void; And, in lieu thereof, I BEQUEATH to her the sum of 1400*l.*, to be paid to her upon her profession; And in such event I also GIVE AND BEQUEATH to her an annual sum of 50*l.*, to be paid to her during her life, until she shall commit or suffer some act or default which (but for this limitation) would have the effect of giving the benefit of the said annuity either wholly or partially to some other person or persons; And the first quarterly payment thereof to be made to her at the expiration of three calendar months next after her profession: And I charge my estate at —— with the payment thereof; And the surplus which shall remain of the legacy or portion intended for her, after the payment of the said sum of 1400*l.*, shall survive or accrue to, between, or among such of her said sisters as shall survive me and marry, subject to the restriction hereinbefore mentioned, in the same manner as if she were then actually dead and unmarried.

Legacies to nephew and niece to be paid at twenty-one or marriage, with cross limitations and gift over.

40. I GIVE to my nephew, [*name*], if he attain the age of twenty-one years, the sum of £——. I GIVE to my niece, [*name*], £——, if she attain that age or marry. AND, if either my said nephew should die before me or under age, or my said niece should die before me or under age and without having been married, I GIVE the legacy intended for such nephew or niece so dying to the other of them, if he or she attain his or her majority, or (as to my said niece) if she marry; AND, if both should die before me or under age and (as to my said niece) unmarried, I GIVE their respective legacies to my cousin, [*name*].

Legacy to the six children of A. B. Substitution of children and widow or

41. I GIVE the sum of £—— to or among such of the six children of my late cousin, [*name*], as shall survive me (*m*), and such child or children and widow or widows or widower or widowers of any other or others of them as shall not survive

(*m*) A gift to "the six children of A.," as tenants in common, not being a gift to a class, would be liable to lapse as to the share of any legatee dying before the testator. But a gift under the same circumstances to "the child or children of A.," as tenants in common, would wholly vest in those who survived the testator: vide *ante*, p. 463.

**Pecuniary Bequests.**

widower of any deceased child. Widow or widower to take one-half share.

me, if more than one, as tenants in common; But so that the share of the widow or widower of any such deceased child shall be one-half of the share taken by any such surviving child (*n*), or by the child or children alone, or by the child or children and widow or widower (as the case may be), of any deceased child, and the share of the child or children of any deceased child, together with the share of the widow or widower of such deceased child (if any), shall be equal to the share which such deceased child would have taken if living. [*Or*, But so that such widow or widower and child or children, or widow or widower alone, or child or children alone (as the case may be), of any deceased child shall take such share only as such deceased child would have taken if living; And when both a widow or widower and a child or children of deceased child shall survive me, such widow or widower shall take one moiety of the share which such deceased child would have taken if living.]

Legacy among living persons by name, and the children of deceased persons *per stirpes*.

42. I BEQUEATH the sum of £—— unto such of the following persons, [*names*], as shall attain the age of twenty-one years, or die under that age leaving a surviving husband or wife or issue, and the child or children who shall attain the age of twenty-one years, or die under that age leaving a surviving husband or wife or issue, of [*deceased persons*], respectively deceased, in equal shares; But so that the child or the children collectively of one parent shall take one share only, to be divided equally among them; And in case any of the said intended legatees should die before me, leaving a husband or wife or issue living at my death, I GIVE the share which each such legatee would have taken, if he or she had survived me, unto his or her executors or administrators, as part of his or her general personal estate.

Substitution of personal representatives of legatee dying before testator, and leaving a widow, husband, or child.

Legacies to nephews at twenty-one.

43. I GIVE £—— to each of my four nephews, [*names*],

(*n*) To say that the widow or widower of a deceased child shall take one-half of the share which such child would have taken if living, would not express the intention in the case of a child leaving a widow or widower and no issue. For, suppose five of the children to survive, and one to have died leaving a widow but no child, then the intention is, that the widow should take half as much as each of the survivors, or one-eleventh of the entire legacy. But one-half of the share which the deceased child would have taken if living would be one-twelfth.

(children of my late brother [*name*],) who shall survive me, and attain the age of twenty-one years. I GIVE the like sum to or equally among the child or children who shall attain the age of twenty-one years or die under that age leaving issue of each of my said nephews who shall die before me, or under the age of twenty-one years. I GIVE £—— to each of my three nieces, [*names*], (children of my said late brother,) who shall survive me and attain the age of twenty-one years, or marry under that age. I GIVE the like sum to, or equally among, the child or children who shall attain the age of twenty-one years, or die under that age leaving issue, of each of my said nieces who shall die before me. AND I GIVE such of the said legacies intended for my said nephews and nieces respectively, or their issue, as shall not take effect under the bequest hereinbefore contained, unto and among such of my said nephews and nieces, and their issue, as shall take vested interests or a vested interest under the said bequest; and if more than one, to be divided between or among them, in proportion to the respective amounts of their respective original legacies under the said bequest hereinbefore contained.

**Pecuniary Bequests.**

Substitution of children of deceased nephews.

Legacies to nieces at twenty-one or marriage.

Substitution of children of deceased niece.

Clause of accruer.

44. WHEREAS I provided for my daughter, [*name*], the wife of [*husband*], on her marriage, a fortune of £——, and my said daughter died some time since, leaving her said husband and several children her surviving; AND WHEREAS, under the terms of an indenture of settlement dated, &c., and made between [*parties*], which was executed in contemplation of the said marriage, I have a remote contingent interest as next of kin of my said daughter in the said sum of £—— so provided by me as aforesaid, and comprised in the said settlement in the event of no child of my said deceased daughter living to attain a vested interest in the said sum of £——; NOW I BEQUEATH all such interest (if any) as I may have in the said sum of £—— as aforesaid unto the said [*husband*] absolutely for his own use and benefit.

Bequest of a contingent interest under a settlement.

45. IN EXERCISE of the powers contained in my marriage settlement, I DIRECT the annual sum of £—— to be raised and paid to my wife, during her life, without power of anticipation. AND I APPOINT to each of my sons, being an object of the power in that behalf contained in my marriage settlement, who shall attain the age of twenty-one years or marry,

Appointment of portions under power in settlement.

Pecuniary Bequests.

the sum of £——; And, by virtue of the same power, I APPOINT to each of my daughters who shall attain the age of twenty-one years or marry, the sum of £——, without power of anticipation, I DECLARE, that the sum of £——, which I have expended in the purchase of a partnership share in the firm of —— & Co. for my son, [*name*], is to be considered as a satisfaction to that extent of the portion hereby appointed to him; AND that the sum of £——, which I settled upon the marriage of my daughter, [*name*], is to be considered as a satisfaction to that extent of the portion hereby appointed to her. I DECLARE, that any advancements which I have made or may make for the benefit of any of my children, to a greater amount at any one time than £——, shall be taken in satisfaction, to that extent, of the portions hereby appointed to him, her, or them; AND I DECLARE, that all such advancements as aforesaid, already made or to be made, shall be deemed to have been made in exoneration of the estates comprised in my marriage settlement, and which I have power to charge with portions.

Advancements in testator's lifetime to be considered as in satisfaction (*o*).

Advancements to be in exoneration of estates charged.

Legacy in satisfaction of covenant in a marriage settlement.

46. IN SATISFACTION of a covenant entered into by me, and contained in an indenture of settlement dated, &c., and made between [*parties*] (being the settlement executed on the marriage of my daughter, [*name*]), I hereby bequeath to the persons or person who shall be, at the time of my death, the trustees or trustee of the same settlement, the sum of £——, with interest thereon from the day of my death until payment thereof at the rate of —— per cent. per annum.

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Ademption of legacies.

(*o*) Legacies and portions will generally be presumed to be adeemed by subsequent gifts to the legatee in the testator's lifetime, if the testator is the father of the legatee or stands to him *in loco parentis:* see *Boyd* v. *Boyd*, L. R. 4 Eq. 305; *Leighton* v. *Leighton*, L. R. 18 Eq. 459; *Taylor* v. *Taylor*, L. R. 20 Eq. 155: or if a moral obligation other than parental or quasi-parental is recognised by the will: *Re Pollock*, 28 Ch. D. 552. But the presumption does not generally arise in the case of a mother: *Bennet* v. *Bennet*, 10 Ch. D. 479. The rule applies to gifts of residue: *Thynne* v. *Earl of Glengall*, 2 H. L. C. 131; *Montefiore* v. *Guedalla*, 1 De G. F. & J. 93; *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670; but not to advances for a particular purpose, or occasional gifts of small amount: see *Schofield* v. *Heap*, 27 Beav. 93; *Ravenscroft* v. *Jones*, 32 Beav. 669; *Watson* v. *Watson*, 33 Beav. 574; *Hatfield* v. *Minet*, 8 Ch. D. 136. See further on this subject, Theob. Wills, 594. For other provisoes as to ademption by advancement, see *post*, pp. 984 *et seq.*

**Pecuniary Bequests.**

Legacy upon trusts of a marriage settlement.

47. I BEQUEATH the sum of £—— to the persons or person who shall be at the time of my death the trustees or trustee of an indenture of settlement, dated, &c., and made between [*parties*], being the settlement executed on the marriage of my daughter, [*name*], to be held by them and him upon the trusts, and with, under, and subject to the powers, provisions, and declarations in and by the same settlement declared and contained of and concerning the property thereby settled or agreed to be settled by or on the part of my said daughter, and therein collectively referred to as "the wife's fortune," or such of the same trusts, powers, provisions, and declarations as may then be subsisting or capable of taking effect with respect to the same, and so that all such trusts, powers, provisions, and declarations shall take effect with regard to the said sum of £—— hereby bequeathed in all respects (except as is hereinafter otherwise expressly provided), so far as circumstances will permit, as if the same sum had been originally comprised in the said indenture of settlement, and had formed part of the said wife's fortune therein referred to: PROVIDED ALWAYS, &c. [*insert a more extended investment clause, see* pp. 874 *et seq., or any modification of the trusts, &c., which may be desired*].

Legacies charged on specific realty

48. I BEQUEATH the following legacies charged upon and to be raised and paid out of my real estate situate at ——, hereinafter devised to [*devisee*], that is to say, to [*legatee*], of, &c., the sum of £——, to other [*legatee*], of, &c., the sum of £——, &c.

Legacy to son resident abroad, and who has not been heard of for a long time (*p*).

49. I BEQUEATH to my son, [*name*], who is, as I believe, now residing in South Africa, but who was last heard of at ——, on or about the month of ——, 18—, the sum of £——: PROVIDED ALWAYS, and I hereby direct, that unless at the time of my death positive information shall have been obtained whether or not he shall have been then living, or have died in my lifetime leaving issue then living, my executors shall retain the said sum of £—— and invest the same, in manner hereinafter provided (*q*): And shall from

(*p*) As to presumption of death after long absence, see *ante*, Vol. I., p. 25, note (*n*); see also *Re Corbishley's Trusts*, 14 Ch. D. 846; *Re Rhodes*, 36 Ch. D. 586.

(*q*) A separate investment clause and power of varying investments may be here inserted, if preferred: see *post*, pp. 874 *et seq.*

Pecuniary Bequests.

time to time accumulate and invest as aforesaid the income arising from investments, for a period of —— years from the time of my death, or until such positive information as aforesaid shall have been sooner obtained: And that my executors shall during the said period of accumulation cause to be advertised in each of the following towns [*specify them*], by publication in such newspapers as they shall think fit, therein published respectively, at intervals of not less than —— weeks, notices of the date of my death, and that my said son, [*name*], or his issue, is or are entitled under this my will, provided such positive information as aforesaid is obtained within —— years after my death, to the said legacy of £—— and the accumulations thereof, with power to insert in such notices respectively any conditions as to mode of claim, or evidence of identity, or otherwise, as my executors shall think fit: And I further declare that my executors shall stand possessed of the said legacy of £——, and the investments, income, and accumulations thereof (hereinafter called my son's trust fund), upon trust in the first place to pay all legacy duty payable in respect thereof, and the expenses of carrying out my directions with respect to my son's trust fund, and to pay over and transfer the same trust fund to my said son or his issue, as the case may be, so soon as such positive information shall have been received within —— years after my death, or such further period as is hereinafter mentioned; But in case no such information shall have been obtained to the satisfaction of my executors within that period, then, upon the expiration thereof, I direct that my son's trust fund shall fall into and form part of my residuary personal estate, unless my said executors, in consequence of information then obtained as to my said son or his issue, shall in their absolute discretion see fit to extend the period of accumulation for a further period not exceeding —— calendar months after the expiration of the —— years aforesaid.

Direction as to priority of a legacy.

50. I DIRECT that the legacy of £—— hereinbefore bequeathed to the said [*legatee*], shall be paid in full in priority to any other pecuniary legacy [*or*, legacy, whether pecuniary, demonstrative or specific (*r*)] bequeathed by this my will, or any codicil thereto.

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(*r*) Specific legacies are not liable to contribution, for the benefit of pecuniary legatees, without express provision.

**Pecuniary Bequests.**

The same, as to several legacies.

51. I DIRECT that, in case of a deficiency of assets for the full payment of all the pecuniary legacies hereinbefore bequeathed, the said legacies shall be paid in full respectively in the order of priority in which they are hereinbefore given, so far as the assets applicable for the payment thereof will extend: PROVIDED ALWAYS that any legacies given to a class shall rank and be paid *pari passu* as between themselves.

Direction as to abatement of particular legacies.

52. I DIRECT, that in case of a deficiency of assets for the full payment of all the pecuniary legacies hereinbefore bequeathed, the two legacies of £—— and £—— hereinbefore bequeathed to the said [*legatees*], respectively, shall abate rateably and in proportion before any other legacy.

Direction that legacies shall be free of duty.

53. I DIRECT that all the pecuniary legacies hereinbefore bequeathed shall be paid clear of legacy duty [or succession duty], which shall be paid out of my general personal estate.

Power to postpone the raising of legacies bequeathed in trust.

54. PROVIDED ALWAYS, and I hereby direct that the several legacies hereinbefore bequeathed in trust respectively, or any part thereof respectively, shall not be raised (unless my executors shall in their absolute discretion see fit sooner to raise the same, or any of them, or any part thereof respectively), until the capital of such respective legacies or some part thereof respectively shall become payable; And I further direct that until the said several legacies hereinbefore bequeathed in trust shall be fully raised and paid or appropriated, interest thereon respectively, or on such part thereof respectively as shall for the time being be unpaid or unappropriated, shall be paid or applied by my executors out of my residuary estate for the benefit of the persons for the time being entitled to the said respective legacies.

Advancements not to be in satisfaction of legacies.

55. I DECLARE that any advancements or sums of money, to the amount at any one time of £——, or more respectively, which I may make or apply for the benefit of any of my children, shall be in addition to, and not in satisfaction of any legacy or legacies or other provision or benefit made or given to him, her, or them, unless a contrary intention is therein expressed.

Advances to son to be in

56. I DECLARE that the sum of £—— advanced by me to my son, [*name*], and any further advances which I may here-

Pecuniary Bequests.

satisfaction of legacy (*rr*).

after make to him, [to the amount at any one time of £—— or more,] [*or*, I DECLARE that the sums now standing opposite the name of my son, [*name*], and no other sums, whether already advanced or which may hereafter be advanced by me to him,] and the interest payable thereon [respectively], or so much of the said sum [*or*, sums, respectively,] [and further advances, if any, respectively,] and interest, as shall not have been repaid at the time of my death, shall be taken in or towards satisfaction of the legacy and provisions given to and made for my said son by this my will or any codicil thereto, unless a contrary intention is therein expressed.

Charitable legacy to be invested for benefit of master of grammar school.

57. I DIRECT my trustees or trustee to purchase, out of such part of my personal estate as may be lawfully bequeathed to charitable purposes, and in priority to all other pecuniary legacies given by my will (*s*), the sum of £—— $2\frac{3}{4}$ per cent. Consolidated Stock now standing in my name to be transferred into the names of the trustees for the time being of the Free Grammar School at ——, or into the names or name of such persons or person as such trustees shall from time to time appoint, IN TRUST to pay and apply the income therefrom in augmentation of the salary or stipend of the head master for the time being of the said school for ever.

Charitable legacy to a hospital.

58. I BEQUEATH to the Infirmary [*or* Hospital] at ——, for the general purposes of the institution, the sum of £——, [free

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(*rr*) See as to this, *Aird* v. *Quick*, 12 Ch. D. 291; *Re Taylor's Estate, Tomlin* v. *Underhay*, 22 Ch. D. 495; *Ward* v. *Ward*, 32 Ch. D. 517; and as to advances made subsequent to the will, see *Whateley* v. *Spooner*, 3 K. & J. 542; *Smith* v. *Conder*, 9 Ch. D. 170. And as to incorporation of documents, see *ante*, pp. 537 *et seq.*

Direction as to fund for payment of charity legacies.

(*s*) A direction that the charitable legacies shall be paid out of the pure personalty is sufficient to entitle the charity to the full amount of the legacy as against the next of kin, and will save the charitable legacies from abatement in case the pure personalty should be insufficient to pay not only those legacies but also all the other pecuniary legacies given by the will, so that an express declaration that they shall have priority does not seem to be necessary: *Robinson* v. *Gildart*, 3 Mac. & G. 735; see *Nickisson* v. *Cockill*, 3 De G. J. & S. 622. But this does not exempt the pure personalty from liability to contribute to payment of debts: *Beaumant* v. *Oliveira*, L. R. 4 Ch. 309. A testator can, however, expressly exonerate the pure personalty from such liability: *In re Fitzgerald, Adolph* v. *Dolman*, 26 W. R. 53.

Pecuniary Bequests.

of legacy duty (*t*),] to be paid [together with the duty thereon,] out of such part of my personal estate as may be lawfully bequeathed to charitable purposes; And I declare that the receipt of the treasurer, or other person properly authorised to give receipts, shall be a sufficient discharge for the same, and effectually exonerate my trustees or trustee from seeing to the application thereof.

Several charitable legacies.

59. I BEQUEATH unto the Society for the Promotion of Christian Knowledge the sum of ——, and to the Infirmary at ——, in the county of ——, my native town, the sum of £——: AND I DIRECT, that such legacies respectively shall be paid to the treasurers for the time being of the said several institutions, to be applied to the general purposes thereof respectively. And I declare that the receipts of the respective treasurers or other persons properly authorised to give receipts on behalf of the said respective societies and institutions shall be, &c. (*ut supra*, *Form* 58). AND I DIRECT, that the said charitable legacies shall be fully paid out of such part of my personal estate as may legally be bequeathed for charitable purposes, and shall be paid out of that fund in preference to all other pecuniary legacies bequeathed by this my will; And I charge such part of my estate as may not legally be bequeathed for charitable purposes with the payment of my debts, and funeral and testamentary expenses, and the legacies other than charitable legacies given by this my will or any codicil thereto, in exoneration of or in priority to such part of my personal estate as may legally be so bequeathed; And I declare that only in case that the part of my estate so charged shall prove insufficient for such payments, recourse may be had to such part of my estate as may lawfully be bequeathed for charitable purposes. [*Or*, PROVIDED ALWAYS, that in case my personal estate, of whatever kind, should not be sufficient to pay all the legacies given by my will in full, the two charitable legacies hereinbefore bequeathed shall abate rateably and in proportion with the other legacies.]

Direction as to fund for payment.

60. I GIVE, out of such part of my estate as may be Legacy to a

(*t*) This, in effect, is a gift to the charity of the legacy duty which cannot therefore be paid out of impure personalty: *Wilkinson* v. *Barber*, L. R. 14 Eq. 96.

Pecuniary Bequests.

scientific institution.

lawfully applied for that purpose, to the treasurer for the time being of the Royal Society of London, the sum of £——, to be invested on permanent security, and kept apart as a fund, to be called "——'s Fund"; the income whereof I DESIRE the President and Council of the said Society, annually, and not by anticipation, to apply in such manner as they may deem expedient for the advancement of science; And I declare that the receipt, &c. [*Form* 58].

Legacy to a charity, upon condition.

61. I BEQUEATH the sum of £—— to the Governors of the —— Infirmary [*or*, Hospital], to be raised out of such part of my personal estate as may be lawfully applied for that purpose, and to be paid at the expiration of six calendar months next after my death, but without interest in the meantime, and to be applied in carrying on and supporting the charitable design of the same society; But upon the express condition, that the said Governors do and shall, on the receipt of the said £——, authorise and empower, by some writing under their hands, the churchwardens for the time being of the parish of —— aforesaid, to recommend and procure the admittance of two in-patients annually into the said Infirmary for ever; And in case the said Governors should refuse or neglect by the space of six calendar months after my death to sign such authority or permission as aforesaid, then, and in such case, I do hereby REVOKE the said legacy of £——, And declare that the same shall fall into and form part of my residuary personal estate.

Legacy to such charities as trustees shall select.

62. I BEQUEATH the sum of £——, [free of legacy duty,] to be paid out of my pure personalty to such charitable institution or institutions in the United Kingdom and for such purposes of a charitable nature as my trustees or trustee for the time being shall select, such power of selection to be exercised within one year from my death.

Sum to be invested in names of Bishop, minister, and churchwardens.

63. I HEREBY DIRECT, that my said trustees or trustee for the time being shall, within twelve calendar months next after my death, by, with, and out of such part of my personal estate as may lawfully be given for charitable purposes, and in priority to other legacies given by my will, raise the sum of £——, and lay out and invest the same sum in the public stocks or funds of Great Britain, in the names or name of the

Pecuniary Bequests.

persons who at the time of such investment shall respectively be the Bishop of ——, and the minister and churchwardens of the parish of —— aforesaid, for the time being, in such manner as to produce by the dividends thereof equal quarterly sums; And that the Bishop of ——, and the minister and churchwardens of the parish of —— aforesaid for the time being, shall receive and take the dividends of the stocks and funds as and when the same shall become due and payable, and shall lay out the same in such manner as they shall think most advisable for the education, in such useful learning and arts as they shall think best, of as many poor children as the amount of the fund will reasonably permit. PROVIDED ALWAYS, and I hereby declare, that the Bishop of ——, and the minister and churchwardens for the time being of the parish of —— aforesaid, shall be the trustees and administrators of the said fund; and that when the trustees for the time being, in whose names the stocks or funds to be purchased with the said £—— shall stand, shall, by death or otherwise, be reduced to three, then and in such case, and so often as the same shall happen, the same stocks and funds shall be transferred into the joint names of the Bishop of ——, and the minister and churchwardens of the parish of —— aforesaid for the time being.

for education of poor children;

direction as to change of trustees.

64. I DIRECT that the legacies for charitable purposes, given by my will or any codicil thereto, shall be paid clear of legacy duty and exclusively out of such part of my personal estate, not specifically bequeathed, as may lawfully be given for such purposes; And that such legacies shall abate only in case there should be no other fund for the payment in full of the other legacies given by me; in which case I direct that such charitable legacies shall abate before any other legacy [*or* rateably with the other pecuniary or general legacies].

Charitable legacies to be paid out of pure personalty; other legacies thrown on the other funds; charitable legacies to abate before others.

## GIFTS OF ANNUITIES (*u*).

Bequest of annuity.

Direction to purchase annuity.

1. I BEQUEATH to [*annuitant*] an annuity of £—— (*x*) during his life, clear of legacy duty and all other incidental expenses and deductions (*y*). AND I DIRECT my executors, as soon as convenient after my death, to purchase in their names such an annuity, either from Government or from one of the public offices or companies concerned in granting annuities, or upon freehold, copyhold, or leasehold, or other real or chattel real security from some private person or persons, as my executors shall deem expedient; Such annuity to commence from my death (*z*), and to be paid to the said [*annuitant*] by equal quarterly payments, the first of such payments to be made at the expiration of three calendar months from the time of my death (*a*). AND I DIRECT, that, until such purchase

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(*u*) As to the nature and incidents of annuities, and the remedies for recovery thereof, see *ante*, sub tit. "ANNUITIES," Vol. I., pp. 647 *et seq.* For limitations of jointures, &c., charged on land, see *post*, under the heading "STRICT SETTLEMENT."

Legatee's right to take value of annuity.

(*x*) A person for whom an annuity is directed to be purchased, as in the text, is entitled to elect to take the price or value instead of the annuity. The same right vests in his representative, if the legatee happens to have died before the purchase, and who, of course, declares his election to receive the price: *Dawson* v. *Hearn*, 1 R. & M. 606; *Ford* v. *Battey*, 17 Beav. 303. See also *Yates* v. *Compton*, 2 P. Wms. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Bayley* v. *Bishop*, 9 Ves. 6; *Palmer* v. *Craufurd*, 3 Swanst. 482; *Brown* v. *Ross*, cit. 1 Russ. & M. 607; *Woodmeston* v. *Walker*, 2 R. & M. 197. A clause providing that the annuitant shall in such a case not be entitled to elect to receive the price or value of an annuity is ineffectual: *Stokes* v. *Cheek*, 28 Beav. 620.

Legacy duty.

(*y*) Annuities should generally be given free from legacy duty, because, the legatees having no capital out of which it is payable, the impost is necessarily thrown on the income.

Annuity commences from testator's death.

(*z*) An annuity given by will commences from the testator's death, although, as in the case of other legacies, payment is not demandable from the executors until the end of the first year: *Houghton* v. *Franklin*, 1 S. & St. 390; *Stamper* v. *Pickering*, 9 Sim. 176. But see *Storer* v. *Prestage*, 3 Mad. 167, which suggests the propriety of an express declaration as to the time from which the annuity is to be computed.

Direction to purchase annuity.

(*a*) It is sometimes convenient to provide for annuities in the manner here suggested, in order to avoid keeping open the accounts and the final distribution of the general estate, which otherwise is suspended during the continuance of the annuity. See the form

shall be made, the said annuity shall be paid out of my general personal estate at the times and in manner aforesaid. Annuities.

2. I DIRECT my trustees or trustee, out of the income of the said trust-fund, to pay an annuity of £——, clear of legacy duty and all other incidental expenses and deductions, to [*annuitant*], during her life, [without power of anticipation (*b*),] by quarterly payments, on such quarter days as shall be most convenient with regard to the investment of the said trust-fund, the first payment to be made within three calendar months from my death, and to be proportional to the time which shall then have elapsed. Direction to pay annuity.

3. I BEQUEATH to [*annuitant*] an annuity of 30*l.*, during his life, clear of legacy duty and all other incidental expenses and deductions; And I DIRECT my said trustees or trustee to purchase such annuity in the name of the said [*annuitant*], Annuity (not exceeding 30*l.*) to be purchased through a savings' bank.

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where the payment of legacies to children is postponed till the payment of annuities has been fully provided for, p. 834.

The Commissioners for the Reduction of the National Debt were originally empowered to grant life annuities by the stat. 43 Geo. 3, c. 142. This Act, and several auxiliary Acts subsequently passed, were repealed by the 9 Geo. 4, c. 16; and the granting of Government annuities is now regulated by a series of enactments commencing with the statute 10 Geo. 4, c. 24. As to Government annuities.

The Government Annuities Act, 1882 (45 & 46 Vict. c. 51), enacts (sect. 1) that this Act and the Acts of 1829 to 1873 may be cited together as the Government Annuities Acts, 1829–1882.

This last Act amends or repeals certain parts of the preceding Acts.

The Government Annuities Acts, 1853 (16 & 17 Vict. c. 45) and 1864 (27 & 28 Vict. c. 43), provided for the purchase of such annuities through the medium of a savings bank, and are amended by the Act of 1882, which, by sect. 7, also enacts that "all enactments for the time being in force relating to saving banks" shall, subject to certain conditions, apply for the purposes of that Act.

It is, in general, proper to give the trustees an option to purchase elsewhere than from Government; because it is sometimes extremely difficult, if not impossible, to comply with the rules as to proof of age, &c., which are strictly enforced in granting Government annuities.

(*b*) A direction to purchase an annuity for a woman without power of anticipation is not effectual (if at the date of the testator's death she is unmarried) to prevent her being entitled to claim the value of the annuity in bulk: *Woodmeston* v. *Walker*, 2 R. & M. 197; *Power* v. *Hayne*, L. R. 8 Eq. 262.

Annuities.

and, if possible, of Government, through the medium of a savings' bank, to be paid to the said [*annuitant*] during his life; and if they cannot so purchase the said annuity, then to purchase an annuity of a like amount either from, &c. [*continue as in Form* 1, *ante*, p. 824].

Annuities to several.

4. I GIVE to A. B. an annuity of £—— during his life: To C. D. an annuity of £—— during her life; And to E. F. an annuity of £—— during her life; but the two last mentioned annuities to be without power of anticipation during any coverture by the respective annuitants. I AUTHORISE my trustees or trustee to set apart or purchase, in their or his names or name, sufficient sums of the $2\frac{3}{4}$ per cent. Consolidated Stock to satisfy the said annuities, by equal quarterly payments, clear of legacy duty and all other deductions; and in the meantime to pay such annuities out of my general personal estate; the first quarter's payment of each such annuity to be made in full on the first day for the payment of dividends of either of the said funds which shall occur after my death (from the quarter day preceding which day of payment such annuity is to be deemed to commence) (*c*); and the last payment of each such annuity to be made in full on such one of the said dividend days as shall first occur after the death of each such annuitant respectively and no apportionment shall take place (*d*).

Funds to be set apart to pay annuities.

Direction as to commencement and termination of annuities.

Direction to appropriate stock for payment of annuity.

5. I DIRECT my trustees or trustee to purchase or appropriate a sufficient fund of the $2\frac{3}{4}$ per cent. Consolidated Stock for the payment of each of the annuities hereby given, [*or*, of the said annuity]; After which purchase or appropriation, the residue of my estate shall be exonerated from all liability in respect of such annuities, [*or*, of the said annuity]; And,

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(*c*) As to the necessity for the parenthesis, see *Irvin* v. *Ironmonger*, 2 R. & M. 531.

(*d*) This provision is intended to exclude the operation of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), see sect. 7. The stat. 4 & 5 Will. 4, c. 22, has been held to apply to annuities which *cease* at the time when the apportionment is required, as, for example, at the death of the annuitant: *Trimmer* v. *Danby*, 2 W. R. 380; *Sutton* v. *Ennis*, 4 Ir. R. Eq. 325. Although this Act is still in force, it is practically superseded by the Apportionment Act, 1870, which would clearly seem to embrace such annuities.

subject thereto, the said fund shall form part of my residuary estate. Annuities.

6. [*Annuities to several, Form* 4, p. 826]. I DIRECT my said trustees or trustee for the time being, to provide for the several annuities hereinbefore bequeathed, by setting apart a sufficient portion of the said trust-premises [*or*, of the produce of my residuary [real and] personal estate] for that purpose, or by purchasing, in the names or name of them or him the said trustees or trustee, an annuity or annuities of the like amount or respective amounts from Government, or from any public company. AND I DECLARE, that, if any part or parts of the same trust-premises [*or*, of the produce of my said residuary [real and] personal estate] should be so set apart as aforesaid, and the annual produce or income of such part or parts respectively should, at the time or respective times of their being so set apart, be sufficient to produce the annuity or respective annuities for which the same shall be set apart, the setting apart of such part or parts respectively of the said trust-premises [*or*, of the produce of my said residuary [real and] personal estate] shall be deemed and taken to be a complete satisfaction of the trust to provide for the annuity or annuities for which the same shall be so set apart, and shall be a complete exoneration of the other parts of my estate therefrom, although such part or parts respectively shall afterwards prove insufficient to provide for the same annuity or respective annuities; But the capital of such part or parts respectively shall, if necessary, be applicable to the payment of the annuity or respective annuities to provide for which the same shall have been set apart. PROVIDED ALWAYS, AND I HEREBY DIRECT, that the said annuities respectively hereinbefore bequeathed shall be, as to such of the said annuitants as are females respectively, without power of anticipation during any coverture. AND I FURTHER DIRECT, that no annuitant shall be entitled to receive the value of his or her annuity in lieu thereof, and if any of them [the said *annuitants*] whether under disability or not (*e*),

Direction to trustees to set apart a fund for annuities.

Proviso in case fund set apart proves insufficient.

In case of deficiency of funds set apart, annuities to be paid out of capital.

Annuities to be for inalienable use of female annuitants.

Proviso for cesser on alienation (applicable to male or female annuitants).

As to restraints on alienation.

(*e*) The established doctrine is, that a *feme covert* may be restrained from alienation without any gift over or clause of cesser; but a person not under coverture, whether man or woman, cannot be restrained: see *Power* v. *Hayne*, L. R. 8 Eq. 262; *Halton* v. *May*, 3 Ch. D. 148. A distinction has indeed been taken in some

Annuities.

shall assign, dispose of, or charge the annuity hereinbefore bequeathed to him or her, or any part thereof, or in case he or she shall become bankrupt, then, and in every such case, the said annuity with respect to which the same shall happen shall immediately thenceforth cease, as if he or she were dead, to all intents and purposes whatsoever; and thereupon the portion of the said trust-premises [*or*, of the produce of my residuary [real and] personal estate] so set apart as aforesaid, or the unapplied part thereof, shall fall into and form part of my residuary personal estate.

(*Trusts of residue*)—to appropriate fund for payment of annuity.

7. Upon trust to appropriate and set apart so much of the said stocks, funds, [shares,] and securities, as shall at the time of such appropriation yield and produce the annual sum of £——, and to pay unto or otherwise empower my said wife, or her assigns, to receive and take the annual produce and income of such appropriated fund (*f*) for and during such time

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cases depending upon whether the annuitant has a legal or equitable interest in the annuity, and it has sometimes been considered that a proviso in restraint of alienation might be effectual in the case of an equitable annuitant, even where there is no gift over or clause of cesser: *Day* v. *Day*, 1 Drew. 569; but such a distinction cannot be safely relied upon: see the cases cited above.

Where a proviso for cesser or alienation is inserted, care must be taken to direct that the annuity shall be purchased in the names of the trustees, not in the name of the annuitant: see *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285. See also Vaizey on Settlements, pp. 967 *et seq.*

Remarks upon the appropriation of fund for annuity.

(*f*) Where a testator directs a fund to be appropriated to the payment of an annuity, it should be made distinctly apparent whether the legatee is to be entitled to his annuity out of the capital, if the income of the fund should become insufficient to answer it, or his claim is to be restricted to such income. Many questions of this nature have arisen on the successive reductions of various Government annuities to stock of a lower denomination. The more convenient course certainly is, to give the annuitant the entire income of the fund, which, at the time of the appropriation, produced the annuity (as in the text), regardless of subsequent fluctuations, as it would be troublesome to pay over to the residuary legatees, or accumulate for them, any trifling excess, and still more so, from time to time to sell small portions of the capital to make up any deficiency in the income to answer the annuity. Perhaps, indeed, it may be thought that this plan places too much discretionary power in the hands of the trustees, who might select a security (for instance a mortgage) yielding a rate of interest higher than could ordinarily be obtained, and thereby expose the

Annuities.

as she shall remain my widow. And I direct, that, until such appropriation as aforesaid shall be made, the said annual sum of £—— shall be paid out of my general residuary estate in equal half-yearly portions, the first half-yearly payment thereof to be made at or before the expiration of six calendar months next after my death, and to be proportional to the time which on the day of such payment shall have elapsed from my death. But if my said wife should marry again, then my said trustees or trustee shall, out of the income of such fund, or failing the same, then with or out of the principal fund, pay unto my said wife during her life, without power of anticipation, an annuity of [*reduced annuity*], in lieu of the said annuity of [*original annuity*]; The said annuity of [*original annuity*] or [*reduced annuity*], as the case may be, to be paid clear of legacy duty and all other deductions and incidental expenses (*g*), in equal half-yearly portions, on the —— day of ——, and the —— day of ——, in every year; the first payment of the said annuity of [*original annuity*] to be made in full on such of the said half-yearly days of payment as shall next happen after my death, from the half-yearly day preceding which event the said annuity is to commence; and the first payment of the said annuity of [*reduced annuity*] to be made on such of the said half-yearly days of payment as shall next happen after the marriage of my said wife; And, until such appropriation as aforesaid, the said annuities respectively to be paid out of my general personal estate; Provided always, and I hereby direct, that, in case the said annuity of [*reduced annuity*] should become payable by means of the second marriage of my said wife, then my trustees or trustee for the time being shall continue and keep appropriated so much and such part only of the stocks, funds, or securities which they or he shall have originally appropriated to answer the said annuity of [*original annuity*], as shall be sufficient, with or out of the annual produce and income thereof at the

But if she should marry again, then a less annuity.

Either annuity to be paid half-yearly;

and, until such appropriation, to be paid out of general personal estate.

If reduced annuity become payable, trustees to reduce the fund.

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annuitant to a probable diminution of income when the security is changed, but this may be guarded against by authorising the payment of the annuity out of the capital, if the income is deficient, as in the form.

(*g*) These words would exempt the annuitant from legacy duty if she were only the reputed wife of the testator.

Annuities.

time of such appropriation, to discharge the said annuity of [*reduced annuity*]; and the residue of the stocks, funds, or securities so appropriated shall fall into and form part of my residuary estate and funds hereinafter disposed of. And, as to the residue of the moneys to arise from my real estate, and also as to my personal estate and the moneys to arise therefrom, and the stocks, funds, or securities in or upon which all such moneys shall be invested after the appropriation by me before directed of funds to answer the said annuity of [*original annuity*] or [*reduced annuity*], as the case may be, to my said wife as aforesaid, and also as to the whole of such appropriated funds after the death of my said wife, and as to a proportional part thereof as aforesaid after her second marriage, if that event should happen, I HEREBY DIRECT, that my said trustees or trustee for the time being shall stand and be possessed of and interested in all and singular the said residuary moneys, stocks, funds, securities, and premises (*upon ulterior trusts*).

Trusts of appropriated funds subject to annuities.

Annuity to testator's mother to be paid out of income of residue.

8. I DIRECT my said trustees or trustee for the time being, out of the annual produce and income of and from my residuary estate, to pay to my mother [*name*] an annuity of £——, during her life, clear of legacy duty and all other deductions, by equal quarterly payments on such quarter days as shall be most convenient with reference to the state or investments of the fund or funds to be appropriated for payment of the said annuity; the first payment to be made on the first of such days which shall occur after my death, and to be proportional to the period which shall have elapsed up to the day of such first payment from such of the four quarterly days with reference to which I usually pay an annuity of the same amount to my said mother (namely, the —— day of ——, and the other corresponding quarter days), as shall last occur before my death (*h*). [*Add authority to set apart a fund, as in Form 5, ante*, p. 826.]

Clause authorising

9. PROVIDED ALWAYS, AND I HEREBY DECLARE, that if the said [*annuitant*] should be living at the death or marriage again

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Annuity intended as a continuation of an allowance paid by testator.

(*h*) This annuity is supposed to be a continuation of an allowance made by the testator during his life, and is directed to be made on the days on which that allowance is usually paid.

Annuities.

trustees in a certain event to purchase annuities.

of my said wife, so that the continuance of the annuity hereinbefore given to her shall become an obstruction or impediment to the complete and final distribution of the trust funds and premises, the income whereof is charged with the payment of the said annuities or annuity respectively, then and in such case it shall be lawful for my said trustees or trustee, if they or he should deem it expedient so to do, to apply an adequate portion of such trust-funds and premises in the purchase, for the said [*annuitant*], of a life annuity equal in amount to the annual sum or sums hereby directed to be paid to her; such purchase to be made from Government or some corporate body or bodies, or from some individual or individuals, who shall secure the same upon lands or other hereditaments; And when and immediately after the annuity or respective annuities so purchased shall commence, the annual sum or sums hereby bequeathed to the said [*annuitant*] shall absolutely cease, anything hereinbefore contained to the contrary notwithstanding (*i*).

Annuity for wife to be for maintenance of herself and daughters until marriage :— direction as to what each daughter may claim for maintenance.

10. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the annuity or provision hereinbefore by me given to or made for my said wife during her widowhood as aforesaid, was and is so given and made upon trust for the maintenance, support, and mutual benefit of herself and my daughters, or such of them as shall for the time being be living and unmarried, and until their respective marriages in the lifetime of my said wife; But so nevertheless that no such last-mentioned daughter shall, previously to her attaining the age of twenty-

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Convenience of enabling trustees to purchase annuities in certain cases.

(*i*) It often happens, that the distribution of a residue is protracted by the continuance of small annuities payable out of the income; such would be the case in the present instance, if the testator's mother should be living at the death or marriage of his wife, when the distribution of the residue would, but for the annuities, take place. The best mode of guarding against this inconvenience seems to be, as in the text, to authorise the trustees under such circumstances to purchase a Government or other life annuity for the legatee in lieu of the one given by the will. The difference between the clause in the text and that which occurs in the forms, &c., is, that *there* the purchase is to be made absolutely, and in the first instance (the general residue out of which the annuity is payable being distributable in regard to some of the legatees instanter); while *here* the annuities are only to be purchased in certain events.

Annuities.

one years, be entitled to have or claim the payment or expenditure, by and out of the said annual income, or provision of my said wife, of more than the annual sum of £—— for her maintenance, support, and benefit; And that no such daughter, having attained the age of twenty-one years, shall be entitled to have or claim by and out of the said annual income or provision more than the annual sum of £—— for her maintenance, support, and benefit. And I declare, that it shall not be incumbent on my said trustees or trustee for the time being to see to the due application of the sum or sums of money which ought to be applied by my said wife to the purposes and in manner aforesaid.

(*Trusts of residue*)—to set apart a weekly sum, and, at the discretion of the trustees, to apply all or any part for the benefit of an improvident son or of his wife, and to accumulate any surplus.

11. Upon trust, during the life of my son, [*name*], out of the income therefrom, to set apart the weekly sum of £——, and be possessed thereof upon trust, from time to time, to pay the whole, or so much (if any) of the said weekly sum of £——, as my said trustees or trustee shall in their or his absolute discretion think fit, to my said son, [*name*], or apply the same for his benefit in any way my said trustees or trustee shall think fit; And as to any residue of the said weekly sum, or the whole thereof, if no part thereof be so paid or applied, either, at the absolute discretion of my said trustees or trustee, to pay the same to or for the benefit of any wife of my said son, or to invest and accumulate the same, with power from time to time to apply such accumulations in any manner in which my said trustees or trustee are hereby authorised to apply the said weekly sum. And, after the expiration of twenty-one years (*k*) from my death, if my said

Unapplied portion of annuity to sink into residue.

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As to provisions against alienation.

(*k*) The only way in which a strictly inalienable provision can be made for the benefit of a person not under coverture, is either by means of a proviso for cesser and gift over on alienation (which deprives the object of any possibility of future benefit from the provision), or by giving to trustees a discretion to choose between the object in question and some other person or persons; and even here, if insolvency or bankruptcy intervenes, the trustee would not be justified in afterwards making any payment to the insolvent or bankrupt, though the interest of his assignees in the benefit of an appointment might probably be purchased at almost a nominal price; and in such event, unless the discretionary powers of the trustees are very large, the object or objects in whose favour the alternative

Annuities.

son should be living, I DIRECT that so much of the income from such trust-fund and accumulations as shall not be applied for the benefit of my said son shall sink into the residue of my personal estate; And, after the death of my said son, I direct that the said trust-fund and accumulations shall fall into my residuary personal estate. And as to such accumulations as shall remain unapplied at my said son's death, to pay or divide the same to or among, or apply the same for the benefit of, his surviving wife and child or children (if any), or any one or more of them, in such shares and manner as my said trustees or trustee shall think fit; and if there be no such wife or child, then to add such accumulations to my residuary personal estate (*l*).

Accumulations at death of son, for his widow and children, as trustees shall think fit.

General directions as to annuities:

to commence from testator's death;

payable quarterly.

12. I DIRECT, that (subject to any special directions contained to the contrary in my will or any codicil thereto), every annuity given by this my will, or any codicil hereto, shall commence and be computed from the time of my death, and shall be payable, clear of legacy duty and other incidental expenses and deductions, quarterly, on such days as shall be most convenient with regard to the fund or provision for the payment thereof; the first of such payments to be made on such of the said days as shall first happen after my death, either out of the fund or funds to be appropriated for the same, or out of my general personal estate, and to be proportional to the time which shall then have elapsed from the day of my death; [And that every annuity given to a female shall be for her inalienable use during coverture; And that, if any annuitant commit or suffer any act, default, or process, which but for this condition would have the effect of giving the benefit of his or her annuity, either wholly or partially, to any other person, such annuity shall thereupon cease.] And

Apportionment (*m*).

Inalienable use;

cesser on alienation.

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trust is declared, might perhaps be entitled to call upon the trustees for an immediate transfer of the fund.

Limit of accumulation.

(*l*) The accumulation of income beyond twenty-one years being prohibited by the Thellusson Act, it is proper expressly to exclude any doubt as to the application of the future income.

Apportionment.

(*m*) See *ante*, p. 826. Under the proviso for cesser it is conceived that the annuity would not be apportionable; but if it were given over, it clearly would be apportionable for the benefit of the annuitant's assignee. See *Shipperdson* v. *Tower*, 8 Jur. 485; *Clive* v. *Clive*, L. R. 7 Ch. 433.

Annuities.

that, in respect of every such annuity, a proportional part shall be paid, if necessary, to complete the period from the day of my death to the day on which such annuity shall by any means (other than forfeiture) be determined: And that, if my trustee or trustees appropriate for paying any annuity or annuities a fund or funds which at the time of such appropriation shall produce a sufficient income to answer the same, such annuity or annuities shall thenceforth be exclusively charged on such fund or funds in exoneration of the residue of my estate, and shall in case of any future deficiency of the income of such fund or funds be made up out of the capital thereof.

If a fund is appropriated for annuities, general estate to be exonerated.

Trustees may vary times of payment.

13. I DIRECT, that (subject to any special directions in my will or any codicil thereto to the contrary), every annuity given by my will or any codicil thereto shall be computed from my death, and be paid half-yearly, on such days as may be most convenient with regard to the respective funds out of which the same shall be payable; And that every such annuity shall be made good for the full period from the day of my death to the day of the determination thereof (otherwise than by forfeiture), by apportionment if necessary; And that my trustee or trustees may from time to time vary the days of payment of any annuity in case a change of investment should render it convenient so to do, and in such case a proportional part shall be paid in respect of the broken period occasioned by such change.

Charge of annuities on real estate.

14. I CHARGE the annuities given, or to be given, by my will, exclusively on my real estates (*mm*), and if the same be deficient, such annuities shall abate rateably.

Annuities to be free of duty.

15. I DIRECT that all the annuities given by my will or any codicil thereto shall be provided for and paid to the respective annuitants clear of legacy duty [and succession duty (*mm*)] and all other expenses.

Annuities to have priority over legacies.

16. AND I FURTHER DIRECT AND DECLARE, that none of the legacies to my children hereinafter bequeathed shall be paid

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(*mm*) By the stat. 51 Vict. c. 8, s. 21 (2), stated *ante*, p. 272, legacies by way of annuity charged on, or payable out of the proceeds of sale of real estate, are liable to succession duty, including the additional duties imposed by that Act.

until full and adequate provision shall have been made for the payment of the annuities of £—— and £—— hereinbefore bequeathed. Annuities.

17. And, for the purpose of facilitating the execution of the trusts of the said annuity, I authorise my said trustees or trustee, while my said son, or any wife or child of my said son, shall be in Australia or elsewhere abroad, to employ any agent or agents in Australia or elsewhere abroad, and to delegate to such agent or agents all and every or any of the discretionary or other powers or authorities which my said trustees or trustee would have, or might personally exercise, in relation to the said annuity, without being answerable for the acts or defaults of any such agent or agents. Power to appoint agents in Australia, and to delegate powers.

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## SETTLED LEGACIES (*n*).

1. I direct my trustees or trustee, within a year from my death, to invest the sum of £4000 in their or his names or name, upon government, parliamentary, or real securities in England or Wales (but not in Ireland) (*nn*), but not in any other mode of investment; With power to appropriate for that purpose any security or securities of any of the kinds aforesaid which I may have at my death at the value thereof at the time of such appropriation; And with power, from time to time, to vary such investment; And to pay the income therefrom to my nephew [*name*] during his life, and after his death to transfer the same in such manner for the benefit of any of his child or children or other issue (born in his lifetime), as he shall by deed or will appoint, and, subject thereto, to transfer the same trust fund unto such child or children of my said nephew as shall attain the age of twenty-one years or marry, in equal shares [as between sons or as between daughters, but so that the share of a son

Direction to invest £4000, or appropriate securities to that amount;

in trust for nephew for life, and after his death for his issue.

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(*n*) See also *post*, "*Trusts of Residue*," pp. 884 *et seq.*, where alternative forms of trusts will be found.

(*nn*) Investments on real securities in Ireland are authorised unless expressly forbidden (see stat. 22 & 23 Vict. c. 35, s. 32), but are not generally advisable under present circumstances.

Settled Legacies.

shall be double the share of a daughter]. Provided, that no child shall take, both by appointment and in default of appointment, a greater share than he or she would have taken if no appointment had been made. I AUTHORISE my trustees or trustee, after the death of my said nephew, at their or his discretion, to apply for the benefit of any child or children not more than one-half of such child's presumptive share. AND if there shall be no child of my said nephew who, being a son, shall attain the age of twenty-one years, or being a daughter shall attain that age, or marry, then, subject to any such appointment as aforesaid, I declare that my trustees or trustee shall hold the said trust fund upon trust to pay, apply, and transfer the same and the future income thereof, upon such trusts and in such manner as are herein declared and mentioned with respect to my residuary personal estate.

Advancement.

Bequest of a sum, with interest till payment, to trustees, upon trust for investment;

2*a*. I BEQUEATH unto the said [*trustees*] the sum of £——, with interest thereon at the rate of 4 per cent. per annum from the day of my death, and clear of legacy [and succession (*o*)] duty and all other deductions, Upon Trust, to invest the same sum in or upon some of the stocks, funds, shares, or securities hereby authorised with respect to the investment of the proceeds of sale and conversion of my residuary estate, with the like power of varying investments [*or insert a separate investment clause, for forms of which, see post*, pp. 874 *et seq.*] AND I DIRECT that the said [*trustees*] and the [survivors or] survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being of this my will (hereinafter called "my trustees or trustee"), shall stand and be possessed of and interested in the said trust monies, and the stocks, funds, shares, and securities in or upon which the same shall or may for the time being be invested (hereinafter called the trust fund). UPON TRUST, from time to time to pay the income arising therefrom to my said daughter [*name*] for her life, but without power of anticipation; And from and after her death,—

trusts of settled legacy for inalienable use of married daughter for life;

power for daughter to appoint life interest in a moiety to husband;

2*b*. UPON TRUST, in case my said daughter [*name*], whether married or sole, should by deed, or will, or codicil so appoint, to pay unto any surviving husband of

(*o*) These words should be inserted if the legacy is to be paid out of the proceeds of real estate: see *post*, p. 992, note (*g*).

Settled Legacies.

my said daughter, during his said life or for any less period to be so appointed by my said daughter [any part not exceeding one-half of] the income of the trust fund; And, subject to any such payment to be so appointed as aforesaid. UPON TRUST to pay or transfer the trust fund, Unto or among such one or more of the children, or more remote issue, of my said daughter [*name*] (whether the parent or ancestor of such issue shall be living or dead (*p*), but such issue to be born in the lifetime of my said daughter), and at such time or times, and, if more than one, in such shares and proportions, and subject to such conditions, restrictions, and limitations, and generally in such manner, for the benefit of some or one of such children or issue, as my said daughter [*name*] shall, whether covert or sole, by deed, revocable or irrevocable, or by will or codicil appoint. PROVIDED that no child or other issue of my said daughter [*name*], shall take a vested or absolute interest under any such appointment as aforesaid, until such child or issue shall attain the age of twenty-one years, or (being a girl) shall attain that age, or be married (*q*); And in default of and subject to any such appointment, UPON TRUST for such child or children of my said daughter [*name*] as (being a son or sons) shall attain the age of twenty-one years, or (being a daughter or daughters) shall attain that age or be married, and also the child or children of any son of my said daughter who shall die under the age of twenty-one years, and if more than one, to be divided between or among them in equal shares and proportions, as between brothers and sisters, but so that the child

trusts for daughter's issue, as she shall appoint;

appointee not to take a vested interest while under age and discovert;

in default of appointment, for her son at twenty-one or daughters at twenty-one or marriage. Substitution of children of sons dying under twenty-one;

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(*p*) It seems in general to be better not to confine these powers to the issue of *deceased* children, as cases may often occur in which it would be advisable to appoint to the issue of a living child.

Power to appoint to issue of living children.

(*q*) The design of this clause, it will be observed, is to prevent the abuse of the power sometimes practised in making an absolute appointment to a child at a very early age and in precarious health, in order that at the death of the child the appointed fund may devolve to the parent, who, on taking out administration, would become entitled to the personal property of such deceased. The remark equally applies to more remote issue, to whom, therefore, the condition is properly, though less frequently extended. The same object is sometimes attained by restraining the exercise of the power to objects who shall survive the appointor, as at *post*, p. 1028; but, in general, it is not desirable to disable the tenant for life from making an immediate appointment to an adult child.

As to restriction on appointments to infants.

Settled Legacies.

or the children collectively of any deceased son of my said daughter shall take only the share which such son would have taken if living, and if more than one, in equal shares and proportions. PROVIDED ALWAYS, that no child or grandchild of my said daughter [*name*], who or whose issue shall take any share or shares of the trust fund by virtue of any appointment to be made by my said daughter under the power hereinbefore contained shall, without any express direction to that effect in such appointment to be contained, be entitled to any share of the unappointed part of the trust fund under the limitations or trusts in default of appointment hereinbefore contained, unless such child or grandchild shall bring the share or shares appointed to him or her into hotchpot, and account for the same accordingly: AND IN CASE there should be no child of my said daughter [*name*], who (being a son) shall attain the age of twenty-one years, or (being a daughter) shall attain that age or be married, or if there shall be no child of any son of my said daughter, who shall die under the age of twenty-one years, then (subject to any such appointment as aforesaid): UPON TRUST to pay or transfer the trust fund and the income thereof, unto or for the benefit of such person or persons, upon such trusts, for such purposes, and in such manner and form as my said daughter [*name*] shall, by deed, or will, or codicil, appoint: AND in default of such appointment, and so far as any such appointment shall not extend: UPON TRUST for such person or persons as, under the statutes for the distribution of the personal estates of intestates, would be entitled to the same trust fund in case my said daughter [*name*] had died absolutely entitled thereto as part of her personal estate and intestate, and without leaving a husband [*or*, UPON TRUST for my said daughter, her executors and administrators]: PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my trustees or trustee, at any time or times in the lifetime of my said daughter [*name*], with her consent in writing, and after her death [with the consent in writing of her surviving husband (if any), and after the death of my said daughter and of her surviving husband (if any)] at the discretion of my trustees or trustee, to raise any part or parts not exceeding in the whole one-half of the fund or share to which any child or issue of my said daughter shall be presumptively or actually entitled, and to pay or apply the same

hotchpot clause;

in default of issue to take under foregoing trusts,

power for daughter to appoint generally by will, or, while discovert, by deed;
in default of appointment for daughter's next of kin.

power to advance portions;

for the advancement or benefit of such child or issue, in such manner as my trustees or trustee shall think fit.

Settled Legacies.

3. (*Legacy to trustees, with power to invest and change securities, as in form* 1 *or form* 2)—UPON TRUST to pay the income arising from the trust fund unto my sister-in-law [*name*], the widow of my late brother [*name*], for her life; And after her death to apply a competent part of the said principal sum of £—— for her funeral expenses, in case she should not leave sufficient property for that purpose; And, subject thereto, to divide the said principal sum of £——, or the residue thereof, or the investments and securities for the time being representing the same, among such of her five children, namely [*names*], as shall be living at the time of the death of the survivor of myself and my said sister-in-law, and such child or children then living of any of her said children who may then be dead, as shall attain the age of twenty-one years, or marry under that age, in equal shares and proportions, as between or among brothers and sisters; But so that the child or the children collectively of any such deceased child of my said sister-in-law shall take such share only as his, her, or their parent would have taken if living. (*Add here, or in a subsequent part of the will, provision for advancement of infant grand nephews and grand nieces, or of minors generally*).

Legacy in trust for widow for life;

on her death to apply part of capital for her burial;

and to divide the surplus among the survivors of five children and the issue of those who may be dead.

4. I BEQUEATH to my said trustees the sum of £——, to be retained and appropriated by them within six calendar months after my death, and, if not then appropriated, with interest at 4 per centum per annum from the expiration of the said six months, UPON TRUST, to invest (*with power to vary investments as in form* 1 *or form* 2), and to stand possessed thereof, upon the trusts following (that is to say), UPON TRUST, to pay the income of the said trust fund to my aunt [*name*], for her life, but without power of anticipation, subject nevertheless to the proviso hereinafter contained; And from and after her death, UPON TRUST, to pay or transfer the said trust fund unto and between [*names*], the daughters of my said aunt, or their respective executors, administrators, or assigns, in equal shares, the same to be vested interests in them respectively immediately on my death; AND I DECLARE, that in case at any time or times

Legacy to trustees, to be invested;

in trust for inalienable use of testator's aunt (a married woman) for life;

and after her death, upon trust for her two daughters;

if *cestui que trust* becomes

**Settled Legacies.**

imbecile, &c., trustees may apply income for her benefit;

hereafter the said [*aunt*] should, from infirmity or any other cause, be incapable of giving a discharge for the said income, it shall be lawful for my said trustees or trustee to apply the same in such manner for her benefit as they or he, in their or his discretion, shall think proper (*r*): PROVIDED ALWAYS, that, in case the said [*aunt*] should at any time, while discovert, assign or dispose of the said income of the said trust fund, or any part thereof or interest therein, or in case by any means whatsoever the same should (or, but for this present proviso, would) become vested in or payable to any husband of the said [*aunt*], or any other person or persons, then and in such case the trust hereinbefore declared in favour of the said [*aunt*] shall immediately thereupon cease, and the said income shall, during the remainder of her life, be applied by the said trustees or trustee to and for the benefit of (*s*) all or any of the said daughters of her the said [*aunt*] or their or her issue for the time being, or some or one of such objects exclusively, and in such shares, if more than one, as my said trustees or trustee in their or his absolute and uncontrolled discretion shall think proper.

proviso for cesser of life interest on alienation.

Legacies to unmarried daughters to vest immediately, but payable at the death or marriage of the wife;

power of advancing one-half on marriage;

5. I BEQUEATH unto each of my five daughters [*names*], or such of them as shall be living at the time of my death, the sum of £——. AND I DIRECT, that my said five daughters shall have vested interests in their respective legacies immediately upon my death; But the payment thereof shall be postponed until after the death or marriage as aforesaid of my said wife, and without interest in the meantime. PROVIDED ALWAYS that, in case of any of my five daughters hereinbefore named should happen to marry during the widowhood of my said wife, with the consent or subsequent approbation of her or

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As to trusts in favour of persons of weak mind, &c.

(*r*) This trust is adapted to the case of a person who is subject to attacks of lunacy, or labours under any other species of mental imbecility. A trust in favour of a deaf and dumb person also requires some such provision.

As to objects of gift over on alienation.

(*s*) If desired, the following words may be here inserted *quantum valeat*:

"of her the said [*aunt*], or, &c. (*as in the text*).

But these words would seem to be of doubtful efficacy, and might mislead the trustees. The aunt's bankruptcy during discoverture would entitle her trustee in bankruptcy to charge the trustees with everything they might subsequently pay to or expend on her. See *ante*, p. 832, note (*k*).

Settled Legacies.

their guardian or guardians for the time being, then it shall be lawful for the trustees or trustee for the time being of my will [*or*, of the trust-fund hereinafter provided for the payment of the said several legacies of £—— each], during the widowhood of my said wife, with her consent (testified by writing under her hand), to raise and pay to each such daughter so marrying as aforesaid one moiety of her said legacy of £——, for her absolute use and benefit. PROVIDED ALSO, and I hereby further declare, that it shall be lawful for the said trustees or trustee for the time being and my said wife, if they should think proper, to settle the said moiety of the legacy or respective legacies, the payment whereof shall be accelerated under this present provision, of any daughter or daughters of mine so as aforesaid marrying during the widowhood of my said wife, UPON TRUST for the benefit of such daughter or daughters, and her or their intended husband or husbands, and the issue of such marriage or marriages, or for the benefit of some one or more of such objects, in such manner in all respects, and with such accompanying powers and provisions as my said wife and trustees (either with or without the concurrence of such marrying daughter or daughters) shall think proper. AND I DIRECT AND DECLARE, that my said trustees or trustee for the time being, upon their paying or transferring to the trustees or trustee of any settlement or settlements to be made as aforesaid, the moiety so settled of the legacy or legacies of such daughter or respective daughters of mine marrying as aforesaid, shall be exonerated and discharged from all further responsibility in respect thereof.

power to wife and trustees to settle moiety of legacies of daughters marrying during widowhood of wife.

## BEQUESTS OF LEASEHOLDS (*t*).

1. I BEQUEATH my leasehold messuage or dwelling-house, situate and being No. —— in —— Street, with the stabling in rear of the same, situate and being No. —— in

Bequest of house and stabling in London to one.

(*t*) For a form of bequest of leaseholds with an appointment of the legatee as special executor in respect thereof, see *ante*, p. 750,

Bequests of Leaseholds.

—— Mews, in the parish of ——, in the County of Middlesex, with the appurtenances thereof respectively, unto [*legatee*], of, &c., his executors, administrators, and assigns, for all the residue which shall be unexpired at the time of my death, of the terms for which the same premises respectively are holden, he, the said [*legatee*], his executors, administrators, and assigns paying the rents reserved by, and at his and their own costs performing and observing the lessee's covenants and conditions contained in the several leases under which the same premises are holden respectively, and keeping my general estate indemnified in respect thereof.

Bequest of leasehold house and grounds, &c., in the country to trustees.

2. I BEQUEATH my leasehold messuage or dwelling-house, with the stabling, outbuildings, lodges, garden, and pleasure grounds held therewith, situate and being in the parish of ——, in the county of ——, and commonly known as ——, and now in the occupation of [*tenant*], with all rights, easements, and appurtenances belonging to, or reputed to belong thereto, or held or enjoyed therewith (*u*), unto [*trustee*], of, &c., and [*trustee*], of, &c. [*or*, the trustees hereinbefore appointed], their executors, administrators, and assigns, for all the residue which shall be unexpired at the time of my death, of the term for which the same premises are holden, and subject to the rent reserved by, and to the lessee's covenants and conditions contained in the lease under which the same premises are holden, UPON TRUST that the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, or other the trustees or trustee for the time being of the same premises [*or*, my

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Form 12; and as to the advisability of such appointment, see note (*p*) on that page. For a form of bequest of a leasehold farm, see *ante*, p. 700. And for a form of bequest of a leasehold manufactory, together with the testator's business carried on thereat, see *ante*, p. 785, Form 6.

(*u*) These words should be inserted if the testator has any adjoining property, or rights or easements over such property. A gift of a house "as now in the occupation of A," will not of itself pass an easement enjoyed by A. as occupant: *Polden* v. *Bastard*, L. R. 1 Q. B. 156. The necessity for inserting the words in the text is not done away with by sect. 6 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), as that section imports "general words" only into "conveyances" as defined by sect. 2 (v.) of the Act.

trustees or trustee], shall, by and out of the rents and profits thereof [*or*, out of the income of my general personal estate], pay the rent reserved by the said lease, and all necessary outgoings in respect of the said leasehold premises, and the expenses of keeping the same premises insured and in good repair, and otherwise performing and observing the lessee's covenants and conditions contained in the said lease; AND UPON TRUST to pay the [residue of] the rents and profits of the said leasehold premises unto my wife [*name*] during her life; and, after her death, UPON TRUST to assign the same premises unto my son [*name*], his executors, administrators, or assigns absolutely.

**Bequests of Leaseholds.**

3. I BEQUEATH my leasehold messuage or dwelling-house, with the stabling, &c., held therewith, situate, &c.; which premises I hold under a lease, dated, &c., for all the residue (if any) which shall be unexpired at the time of my death, of the term for which the same premises are holden, and also all my fixtures, furniture, and household effects (*w*) in, about, and belonging to the said leasehold premises unto my wife [*name*] during her, [life or until she shall marry again,] she paying all rents, taxes, rates, assessments, and outgoings in respect of the said leasehold premises, and keeping the same insured against loss or damage by fire to the full value thereof, and also keeping the said furniture and effects insured and in good preservation, fair wear and tear excepted; AND from and after the death [or second marriage] of my said wife I BEQUEATH the said leasehold premises for all the residue then unexpired of the said term, and the said fixtures, furniture, and effects to my son [*name*], his executors, administrators, and assigns absolutely.

Bequest of house and furniture, &c., to wife for life or during widowhood;

with remainder to son absolutely.

4. I BEQUEATH to the said [*trustees*], their executors, administrators, and assigns, ALL THAT, my leasehold mes-

Bequest of leasehold messuage to

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(*w*) For full and particular bequests of furniture and effects, see *ante*, p. 761, Forms 15 *et seq.*

(*x*) For a form giving to the remainderman full power of enforcing the tenant for life's obligations to repair, &c., see *post*, p. 856, Form 26. These powers would of course, in the case of leaseholds, be given to the remainderman, "his executors, administrators, or assigns."

**Bequests of Leaseholds.**

trustees to permit his wife to occupy it for her residence; and after her death, or if she should decline to reside, upon trust to sell same;

suage, situate, &c., and the stables, buildings, and other appurtenances thereunto belonging, for all the term, and interest which I shall have therein at the time of my death, Upon trust to permit my said wife to reside in and occupy the said leasehold premises so long as she shall think proper, she paying the ground-rent, taxes, and rates payable in respect of the same, and keeping the said premises in good and tenantable repair, and insured in the sum of £—— against loss or damage by fire during the period of such residence; and from and after the death of my said wife, or so soon as she shall decline or, for the space of six calendar months consecutively, cease to reside in or occupy the said leasehold premises (*y*), then I direct that my trustees or trustee shall sell the said leasehold messuage and premises. Provided always, that no purchaser of the said leasehold premises shall be bound to inquire whether my said wife has so declined or ceased to reside in and occupy the same or not: I direct that the money to arise by such sale shall fall into and form part of my residuary personal estate. And I empower the said trustees or trustee, in their or his discretion (notwithstanding the trusts aforesaid), to postpone the sale of the said leasehold premises so long as they or he shall think proper, and during such postponement to pay the rents and profits thereof to the person or persons for the time being entitled to the income of my residuary personal estate. And I further empower my trustees or trustee, at their and his discretion, until the said leasehold premises shall be sold, to lease the same premises for any term or terms in possession, not exceeding —— years, at the best rent that can be obtained without taking fine or premium, subject to a power of re-entry, in case the rent should be in arrear for twenty-one days.

monies arising from sale to form part of personal estate;

power to postpone sale;

power to lease.

Bequest of renewable leaseholds to trustees;

5. I bequeath my leasehold messuages, lands, and tenements [*parcels*], with their appurtenances, unto the said

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Conditions of residence.

(*y*) Where a testator imposes an obligation to reside, it should be explicitly stated what length of continuous absence amounts to a breach of the condition: see on this point *Doe* v. *Steward*, 3 N. & M. 372. See also as to conditions of residence, *Wynne* v. *Fletcher*, 24 Beav. 430; *Walcot* v. *Botfield*, Kay, 534; *Clavering* v. *Ellison*, 7 H. L. C. 707; *Parry* v. *Roberts*, 19 W. R. 378; *Dunne* v. *Dunne*, 7 De G. M. & G. 207; and *post*, p. 855, note (*o*).

Bequests of Leaseholds.

[*trustees*], their executors, administrators, and assigns, for all such term or interest as I shall have or be entitled to therein at the time of my death, upon the trusts hereinafter declared concerning the same (that is to say): UPON TRUST, in the first place, from time to time, by and out of the rents and profits of the same premises, to pay and perform the several rents and covenants reserved by, and contained in the lease or leases now subsisting of the same premises respectively, or which by and in any renewed lease or leases thereof, to be from time to time taken, shall be reserved and contained, on the part of the lessee or lessees to be paid and performed: AND, UPON FURTHER TRUST, from time to time, by and out of the rents and profits of the said leasehold premises, or by mortgaging the same or any part thereof, to raise such sum or sums of money as shall be sufficient to defray the expenses of the fines and other charges of renewing the now subsisting lease or leases, or any other lease or leases hereafter to be taken of the same premises, when and as often as the same shall expire, or in the usual course or custom of such leases shall become renewable, And from time to time to renew or to endeavour to renew the same accordingly. AND I EMPOWER my said trustees and trustee for the time being, for the purposes aforesaid, to surrender the present or any future lease or leases to be taken of the said leasehold premises when and as the same shall become renewable as aforesaid. NEVERTHELESS, I HEREBY DECLARE that the trusts and directions hereinbefore contained shall not render it imperative or obligatory on the said trustees or trustee to renew the lease or leases by which the said leasehold premises shall for the time being be holden when and as the same shall become renewable, if the lessors shall demand or require a fine or premium for the granting thereof which my said trustees or trustee shall deem to be excessive and unreasonable (*z*): AND I FURTHER DECLARE, that it shall not be incumbent on any mortgagee or mortgagees of the said leasehold premises to inquire into or ascertain the necessity or propriety of any mortgage or mortgages made or executed

to pay rents, and perform covenants of lease;

to raise money to renew out of the rents or by mortgage;

and to renew;

trustees not to be bound to renew;

indemnity to mortgagees;

(*z*) It seems advisable, that clauses directing tenants for life or trustees to renew leases should not be so framed as to make it imperative on them to submit to unreasonable terms.

As to giving trustees a discretion in regard to renewals.

**Bequests of Leaseholds.**

or purporting to be made or executed by the said trustees or trustee by virtue of the power in that behalf hereinbefore contained: And I direct, that, subject to the aforesaid trusts, my said trustees and trustee shall stand and be possessed of the said leasehold premises, In trust for such son of mine living at the time of my death as shall first or alone attain the age of twenty-one years, for his absolute use and benefit. And if I should have no son living at my death who shall attain the age of twenty-one years, then In trust for such daughter of mine living at my death as shall first or alone attain the age of twenty-one years, or marry under that age with the consent in writing of her guardian or guardians for the time being, for the absolute use and benefit of such daughter; yet so that an elder daughter attaining the age of twenty-one years, or marrying under that age with such consent as aforesaid, shall take in preference to a younger daughter who may happen to marry with such consent as aforesaid before such elder daughter shall so attain the age of twenty-one years or marry. And I declare, that if I should not have any son living at my death who shall attain the age of twenty-one years, or any daughter who shall attain the age of twenty-one years, or marry with such consent as aforesaid, then and in such case, as to, for, and concerning the said leasehold premises, from and after such default or failure of children of mine as aforesaid, In trust for my said wife, [*name*], for her absolute use and benefit: Provided always, and I hereby direct, that in the meantime and until the said leasehold premises hereinbefore by me bequeathed shall vest absolutely, under the trusts aforesaid, in any son or daughter of mine, or until there shall be a failure or default of children of mine, entitled in expectancy under the trusts aforesaid, my said trustees or trustee shall from time to time receive the rents and profits of the said premises, and lay out and invest the same or so much and such part thereof as shall not be wanted for any of the purposes hereinbefore declared concerning the same, in their or his names or name in any of the public stocks or funds of the United Kingdom, or at interest upon real securities in England or Wales, but not in Ireland, and not in any other mode of investment, and shall receive the dividends, interest, and annual produce of the last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks,

subject to the aforesaid trusts,

in trust for such son of testator as shall first attain twenty-one;

if no such son,

in trust for such daughter as shall first attain twenty-one or marry;

if no such son or daughter,

in trust for his wife absolutely;

power to accumulate rents during minorities, and to invest the accumulations in the purchase of lands;

Bequests of Leaseholds.

funds, or securities of the like nature, (with power to vary the said stocks, funds, and securities from time to time as occasion shall require), And shall from time to time repeat such investments, so that all the resulting income and produce for the time being may, during such suspense as aforesaid, accumulate in the way of compound interest, And shall, at the end of such period of accumulation, convert the said accumulated fund into money, and lay out or invest such money in the purchase of freehold, customary, or copyhold estates of inheritance convenient to be held therewith or with the estates hereinafter devised: AND I DECLARE, that my said trustees and trustee shall stand seised and possessed of the estates so to be purchased as aforesaid, to uses, upon trusts, and for purposes corresponding with the uses, trusts, and purposes hereinafter expressed concerning my residuary real estate hereinafter devised, or as near thereto as the nature or quality of the tenure and circumstances will then admit of. PROVIDED ALWAYS, AND I DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at any time or times during such period of accumulation, or after the determination thereof, to apply all or any part of the said accumulated fund in payment of the fine or fines or other expenses of any such renewal or renewals of lease as aforesaid, or of any mortgage debt or debts which shall or may have been previously created for the purpose of enabling my said trustees or trustee to effect the same renewal or renewals respectively.

to be held on trusts of residuary real estate (*a*);

power to apply any part of the accumulations during minorities towards paying the fines on renewals.

6. I BEQUEATH all my improved ground rents issuing out of six leasehold messuages or tenements situate and being Nos. — to —, inclusively in —— street, in the City of ——, for all the residue unexpired at my death of my term and interest in the same premises respectively to [*legatee*], of, &c., his executors, administrators, and assigns, absolutely.

Bequest of leasehold ground rents.

(*a*) For trusts of leaseholds corresponding to uses limited in strict settlement of real estate, see *post*, p. 963, Form 47.

## SPECIFIC DEVISES.

Devise of freehold messuage and lands to one absolutely.

1. I DEVISE all my freehold mansion-house, with the stables, coach-house, out-buildings, gardens, and closes of land belonging to or held with the same, situate at ——, in the county of ——, containing in the whole —— acres, —— roods, and —— poles, or thereabouts, and commonly known as ——, now in the occupation of [*occupant*] (*b*), with all rights, easements, and appurtenances belonging or reputed to belong thereto, or held and enjoyed therewith (*c*), to the use of [*devisee*], of, &c., his heirs and assigns [*or*, in fee simple].

Devise of copyholds to one absolutely (*d*).

2. I DEVISE all my copyhold messuage, lands, tenements, and hereditaments, situate and being at ——, in the county of ——, containing, &c. [*ut supra*], to such uses as [*devisee*], of, &c., shall by deed or will appoint; and in default of, and subject to any such appointment, to the use of the said [*devisee*], his heirs and assigns.

Devise of freeholds to a

3. I DEVISE all [*parcels*], with the appurtenances thereof, to the use of [*devisee*], the wife of [*name*], of, &c., her heirs

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Reference to occupation.

(*b*) Disputes often arise as to the local extent, &c., of devised lands, and clearness in this respect is important. Where lands are described merely as "all my lands *at* A. in the occupation of B.," only lands actually in the occupation of B. will pass: *Slingsby* v. *Grainger*, 7 H. L. C. 383; *Travers* v. *Blundell*, 6 Ch. D. 436. But if the testator give a complete description of his estate, *e.g.*, "all my lands called 'Whiteacre,' at A. in the occupation of B.," all the estate may pass, though part may not answer the description as to occupation: *Goodtitle* v. *Sotheran*, 1 M. & S. 299; *Down* v. *Down*, 7 Taunt. 743; *Re Boulter*, 4 Ch. D. 741.

(*c*) See as to the necessity for inserting these words, *ante*, p. 842, note (*u*). They should be inserted in the following form if required.

As to giving devisee of copyholds a power of appointment.

(*d*) This form of devise of copyholds possesses advantages over a mere devise in fee simple, by having the effect of saving the expense of the admission of the devisee, and a surrender by him to a purchaser on sale of the property; for as the appointee would be in immediately under the will, he would be entitled to admission without a previous admission of the donee of the power, which would only become necessary in case of his retaining the property as devisee, or in case of the sale and admission of the purchaser not being effected before the lord's right of seizure *quousque* has accrued.

Specific Devises.

and assigns, but so that she shall not while under any [*or*, her present] coverture have power to dose of or charge the said hereditaments and premises, or any part thereof, or the future rents and profits thereof, by way of anticipation.

woman with restraint on anticipation.

4. I DEVISE all that [*parcels*], To SUCH USES as my daughter, [*name*], shall at any time or times (being unmarried) by deed appoint; AND, subject thereto, To THE USE of my said trustees, their executors, administrators, and assigns, during the life of my daughter, [*name*], IN TRUST for her inalienable use during her life; AND, subject thereto, To SUCH USES as my said daughter shall (whether married or single) by will appoint; AND, subject thereto, To THE USE of the person or persons who at my daughter's death would be entitled thereto by descent in case she had died seised thereof in fee-simple by purchase and intestate, if more than one in equal shares as tenants in common, and his, her, or their heirs and assigns.

Devise of freeholds or copyholds for the use of a woman, inalienable during coverture (*e*).

5. I DEVISE all [*parcels*] to the use of [*devisee*], of, &c., his heirs and assigns: And if the said [*devisee*] shall not be of age at the time of my death, I appoint the trustees or trustee for the time being of this my will, to be trustees during his minority for the purposes of the management of the same premises and the receipt and application of the income thereof, and for all other purposes mentioned in the 42nd section of the Conveyancing and Law of Property Act, 1881: BUT if the said [*devisee*] shall die in my lifetime, [without leaving issue living at my death,] or shall die afterwards before attaining the age of twenty-one years without leaving issue living at his death, then I DEVISE the same premises to [*other devisee*], of, &c., his heirs and assigns.

Devise of lands to an infant, with appointment of trustees for management, &c.;

gift over in case of death under twenty-one.

(*e*) The above limitations are not essential for the purpose of restraining a married woman from alienating a fee simple estate devised to her: *Baggott* v. *Meux*, 1 Coll. 138. But these limitations will have the effect of preventing the property, unless the power is exercised, from being liable for the debts of the donee of the property contracted during coverture, as her separate estate: see *Re Harvey's Estate, Godfrey* v. *Harben*, 13 Ch. D. 216; see also *Pike* v. *Fitzgibbon*, 17 Ch. D. at p. 466; *Hodges* v. *Hodges*, 20 Ch. D. 749.

**Specific Devises.**

Specific devise of real estate and bequest of leaseholds.

6. I DEVISE and bequeath all my freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments situate in the several parishes of —— and ——, in the county of ——, unto and to the use of [*devisee*], of, &c., his heirs, executors, administrators, and assigns, according to the nature and tenure of the same premises respectively.

Devise of freeholds so as not to lapse (*f*).

7. I DEVISE all [*parcels*] unto and to the use of [*devisee*], of, &c., his heirs and assigns, if he shall survive me; AND if he shall die in my lifetime leaving issue surviving me, then I DEVISE the same hereditaments and premises unto and to the use of the heirs or devisees of the said [*devisee*], as part of his estate, in such manner as the same would have devolved if the said [*devisee*] had survived me and had died seised thereof immediately after me.

Specific freeholds to nephew in fee, with power of appointment; if sold, the purchase money in lieu (*g*).

8. I GIVE my freehold and copyhold lands at ——, which were conveyed and covenanted to be surrendered to me by an indenture dated, &c., To SUCH USES as my nephew, [*name*], shall by deed or will appoint; AND, subject thereto, To THE USE of my said nephew, his heirs and assigns; AND, in case a contract which is now pending for the sale thereof be carried into execution, or in case the same lands, or any part thereof, be under any circumstances sold, then I give to my said nephew the purchase-money which I or my executors shall receive for the same. AND I DIRECT that all the costs of and incident to the said contract, whether the same be completed or not, shall be paid [out of my residuary personal estate and not] out of the said purchase-money.

Devise to an illegitimate child so as to prevent escheat (*h*).

9. I DEVISE [*parcels*] To SUCH USES as [*illegitimate child*] shall by deed or will appoint; And subject thereto To THE USE of the said [*child*] in tail; With remainder To THE USE of my own right heirs.

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(*f*) This form is necessary to carry out the intention indicated, where the gift is not to a child or other issue of the testator: see sect. 33 of the Wills Act, *ante*, p. 734.

(*g*) Where a testator devises an estate, and subsequently contracts to sell it, the devisee is not entitled to the purchase-money, in the absence of express provision to that effect in the will: *Moor* v. *Raisbeck*, 12 Sim. 123; *Farrar* v. *Earl of Winterton*, 5 Beav. 1.

(*h*) The stat. 47 & 48 Vict. c. 71, sect. 4, extends the law of

**pecific Devises.**

10. I DEVISE all [*parcels*] to the use of my son [*name*], his heirs and assigns subject and charged, in exoneration of my personal estate, and of any other my real estate charged therewith, to and with the payment of all principal and interest monies secured thereon by an indenture of mortgage dated, &c., and made between [*parties*], and also to and with all others (if any) the charges and incumbrances affecting the same premises at the time of my death: But any arrears of interest which shall be owing on any such mortgage charge or incumbrance at the time of my death shall be paid out of my general personal estate.

Devise of land *cum onere* except as to arrears of interest (*i*).

11. I DEVISE all [*parcels*] to the use of [*devisee*], his heirs and assigns, free and discharged from all principal monies and interest charged thereon by an indenture of mortgage dated, &c., and made between parties; [*or*, by any mortgage or mortgages, and from any other charges or incumbrances affecting the same hereditaments or any part thereof at the time of my death;] And I declare that all such principal monies and interest shall be paid and discharged out of my personal estate, in exoneration of the said hereditaments and premises hereby devised to the said [*devisee*].

Devise of lands free from mortgage.

12. I DEVISE all [*parcels*] to the use of [*devisee*], of, &c., subject to and charged with the payment of the legacy of £—— hereinbefore bequeathed to the said [*legatee*] in exoneration of my personal estate and of all other my real estate.

Devise of freeholds charged with a legacy. (Short form.)

13. I DEVISE all [*parcels*] to the use of [*devisee*], of, &c., his heirs and assigns, To THE USE, nevertheless, that [*legatee*],

Devise of freeholds, subject to a charge of an annuity;

escheat to any estate or interest, legal or equitable, in any incorporeal hereditament, and to any equitable estate or interest in any corporeal hereditaments.

(*i*) It is not necessary in a devise of mortgaged lands to direct that the devisee shall take *cum onere*: see Locke King's Act (17 & 18 Vict. c. 113), and see *ante*, sub tit. "MORTGAGES," Vol. III. pp. 870 *et seq.* But it may, however, be thought advisable to express the testator's intention; and this must be done where any modification of the statutory liability is intended. The charge of a mortgage debt on part of mortgaged lands in exoneration of the remainder will not of course affect the rights of the mortgagee.

Specific Devises.

of, &c., may receive thereout (in exoneration of my personal estate and all other my real estate) an annuity of £—— during his life to commence from the day of my death, and to be payable to him by half yearly [*or*, quarterly] payments on the —— day of —— and —— day of —— [*or*, on the usual quarter days], the first payment to be an apportioned payment if for a broken half year [*or*, quarter] to be made on such of the said days as shall happen next after my death; And subject to the said annuity and charge and to the powers and remedies for recovering the same, To THE USE of the said [*devisee*], his heirs and assigns. PROVIDED that, if the said charge should fail by lapse or otherwise, such failure shall be for the benefit of the said [*devisee*], his heirs and assigns.

power of distress and entry;

proviso for lapse.

Devise in fee subject to debts, &c. (Short form.)

14. I DEVISE all [*parcels*] subject to and charged with the payment of my debts, funeral and testamentary expenses and legacies to the use of [*devisee*], of, &c., his heirs and assigns.

Devise of freeholds charged with debts, &c., to trustees of a settlement.

15. I DEVISE all [*parcels*] subject to and charged in exoneration of all other my real estate and my personal estate with the payment of my debts and funeral and testamentary expenses, and of the several legacies and annuities bequeathed by this my will or any codicil hereto, and the legacy duty upon such legacies and annuities as are or shall be bequeathed free of such duty, and to all powers and remedies for securing, raising, and recovering the same respectively, To THE USE of, [*trustee*], of, &c., and [*trustee*], of, &c., their heirs and assigns; To THE USES upon the trusts and with and subject to the powers and provisions declared and contained by and in an indenture of settlement dated, &c., and made between [*parties*] concerning the freehold hereditaments therein and thereby comprised and settled, or such of the same trusts, powers, and provisions as shall at the time of my death be subsisting and capable of taking effect, but not so as to multiply charges or powers of charging.

Devise to two as tenants in common in fee, with cross limitations on death under twenty-one, without issue.

16. I DEVISE all [*parcels*] to the use of [*devisees*], their heirs and assigns, in equal shares as tenants in common. BUT, if either of the said [*devisees*] should be dead at my death, or should afterwards die under the age of twenty-one years, without leaving issue living at my death, I DEVISE the

share intended for him unto the other of them, his heirs and assigns. Specific Devises.

17. I DEVISE all [*parcels*] to the use of [*devisees*], their heirs and assigns, in equal shares, as tenants in common. BUT I give the share or shares (as well accrued as original) of such of them as shall be dead at my death, or shall die under the age of twenty-one years without leaving issue living at his, her, or their death or deaths, unto the others or other of them, their, his, or her heirs or assigns, for ever, as tenants in common. Devise to several as tenants in common in fee, with cross limitations on death under twenty-one, without issue.

18. I DEVISE all [*parcels*] to the use of my children [*names*], their heirs and assigns, in equal shares, as tenants in common. Devise to testator's children *nominatim* (*k*).

19. I DEVISE all [*parcels*] to the use of all my children [*or*, the children of [*name*]] living at my [*or*, at his] death, and the issue then living of such of them as shall be then dead leaving issue living at my [*or*, at his] death, and their respective heirs and assigns, as tenants in common, in equal shares as between brothers and sisters, but so that the issue of any child so dying shall take between them only the share which their parent would have taken if living. Devise to children as a class with substitution of issue.

20. I DEVISE all my freehold hereditaments at ——, unto [*name*], of, &c., during his life, without impeachment of waste; With remainder to his widow, if any, during her life, without impeachment of waste; With remainder to his children, as tenants in common in tail; With cross-remainders, as to shares both original and accrued, in tail between them; With remainder to the said [*name*], or, if he be dead at my death, to such person or persons as shall be his heir at my death, and his, her, or their heirs and assigns. Devise for life, with remainder to children of devisor as tenants in common in tail.

21. I DEVISE all [*parcels*] to the use of [*devisees*], during their respective lives, in equal shares, as tenants in common; With cross-remainders as to the share or shares of each of Devise to several as tenants in

(*k*) Under this devise the share of every child who dies in the lifetime of the testator, leaving issue living at his death, will not lapse, but will take effect as if the child had died immediately after the death of the testator (see sect. 33 of the Wills Act, *ante*, p. 734), and, accordingly, will pass to the devisee or heir of such child. See *Re Coleman and Jarrom*, 4 Ch. D. 165.

Specific Devises.

them, whether original or accrued, to the others or other of them, for their respective lives, or his or her life; All such life estates to be without impeachment of waste. And, after the death of the survivor of them, I DEVISE the same hereditaments to such persons or person as shall then be my trustees or trustee, and their or his heirs and assigns, UPON TRUST that my trustees or trustee for the time being shall sell the same, at such time or times, and in such manner as they or he shall deem expedient, and pay the clear produce thereof to such child or children living at the death of such survivor of any of the said devisees for life, and such issue then living of any previously deceased child or children of any of the said devisees for life as shall attain the age of twenty-one years or marry, if more than one in equal shares *per stirpes*; Except that no child of any grandchild shall be included in this gift if such grandchild be then living; And that the child or children of any deceased child or grandchild shall take only such share as his, her, or their parent or parents would have taken if they, he, or she had lived to take a vested interest in such share; And if there should be no such issue I direct that the produce of the said hereditaments shall form part of my residuary personal estate; And until the final distribution of the produce of such sale, I direct my trustees or trustee to invest the same on Government Parliamentary or real securities in England or Wales [*or*, in manner hereinafter directed with regard to the investment of the proceeds of sale and conversion of my residuary estate], with power to vary investments at their or his discretion: [*Add Advancement Clause if required, see post,* p. 914].

common for life, with cross remainders; remainder to trustees for sale for benefit of surviving issue of devisees for life, *per stirpes*; ultimate gift; investment.

Devise to several for their lives jointly, with remainder over.

22. I DEVISE [*parcels*] to the use of [*devisee*], of, &c., and [*other devisee*], of, &c., during their joint lives: AND after the death of such one of them as shall first die I DEVISE the whole of the same hereditaments and premises to the other of them for his life: AND after the death of the survivor of them the said devisees, I DECLARE that the said hereditaments and premises shall sink into and form part of my residuary real estate.

Devise to wife for life, then to son in fee.

23. I DEVISE the freehold messuage, out-buildings, garden, and premises at ——, which I purchased of ——, TO THE USE of my wife, [*name*], during her life; and after the death

Specific Devises.

of my said wife, I DEVISE the said premises To THE USE of the said [*eldest son*], his heirs and assigns for ever.

Devise of copyholds to son in fee subject to trust for wife during her life (*l*).

24. I DEVISE all my copyhold messuage, &c., at —— in the county of ——, to the use of my son, [*name*], his heirs and assigns, upon trust during the life of my said wife to permit her to enjoy and occupy the same messuage and premises or receive the rents and profits thereof: AND from and after the death of my said wife, I DEVISE the said copyhold messuage and premises to the use of my said son, his heirs and assigns, for his and their absolute benefit.

Devise of copyholds, as tenant for life and remainderman shall appoint (*m*).

25. I DEVISE all my copyhold [*parcels*] at ——, in the county of ——, To such person or persons, and for such estate or estates determinable on the death of [*devisee for life*], of, &c., or sooner, as the said [*devisee for life*] shall by deed appoint; And subject thereto, To the use of the said [*devisee for life*] during his life: With remainder To such uses as [*devisee in remainder* (*n*)] shall by deed or will appoint; and subject thereto, To the use of the said [*devisee in remainder*] his heirs and assigns.

Devise to wife for life, with condition to residence, &c. (*o*), with remainder to son in fee;

26. I DEVISE my house at ——, with the garden and appurtenances unto and to the use of my wife, [*name*], during her life or so long as she shall continue my widow and to make the same her principal residence, and shall keep the

(*l*) The object of this mode of disposition is, of course, to save the expense of a double admittance. Care should be taken by the *cestui que trust* for life, that the devisee, if he be also heir, is admitted in the character of devisee, so that the rolls may carry notice of the will and the trust.

(*m*) Under a limitation of copyholds to such uses as the devisee shall appoint, he may transfer the right to admittance by way of mortgage or sale without the expense of a surrender. And if he sells the estate before the lord's right to enforce admittance has accrued, the purchaser may be admitted at once under the will. See *ante*, p. 848.

(*n*) A person *in esse*. The power would otherwise, unless restricted by apt words, be void for remoteness.

Conditions as to residence.

(*o*) The effect of this devise would seem to be that though breach of the condition as to residence before alienation of the property by way of sale or lease might defeat the widow's life interest if she were to absent herself for more than the prescribed period, yet, she might at any time sell or lease the property under the statutory powers of a tenant for life under the Settled

Specific Devises.

same in substantial repair and insured against loss or damage by fire; AND so soon as she shall die, or marry again, or cease to reside in such house for more than —— calendar months in any year, or to keep the same in repair or insured as hereinafter mentioned, I DEVISE the same house unto and to the use of my son [*name*], his heirs and assigns: PROVIDED ALWAYS, AND I HEREBY DIRECT, that my said wife or her assigns shall, at her or their own expense, during her life, to the satisfaction of my said son, [*name*], his heirs, or assigns, for the time being, keep all the said messuage, outbuildings, gardens, and premises in good, substantial, and tenantable repair and condition, in all respects; AND ALSO shall, during such time, keep all the messuages and outbuildings, with all fixtures, insured from loss or damage by fire to the amount of £—— [*or*, to the full value thereof respectively], in the joint names of herself and my said son, [*name*], his heirs or assigns, in some office or offices for insurance from fire, to be approved of by my said son, his heirs or assigns; And that the monies to be recovered under or by virtue of any such insurance shall be applied in reinstating the property in respect of the destruction or damage whereof the same shall be recovered or received; AND that, in case my said wife and her assigns should at any time or times neglect to keep the said messuages, outbuildings, garden, fixtures, and premises, or any of them in such repair and condition, and insured as aforesaid, it shall be lawful for my said son, his heirs or assigns, to supply or repair such neglect, default, or omission, in such manner and to such extent as he or they shall think proper: (but, as to any repairs of buildings, not without giving to my said wife or her assigns six calendar months' previous direction or notice to make such repairs); And further, that in case my said wife and her assigns should neglect to deliver to my said son, his heirs or assigns, the receipt for any premium of insurance which ought to be paid for the purpose of keep-

wife to keep house and estate in good repair and order.

Power for remainderman to repair on default of wife.

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Land Act, 1882 (45 & 46 Vict. c. 38): see sect. 58 (vi.). And it has been held that, having regard to the relief against forfeiture contained in sect. 51 of that Act, she would be entitled to a life interest in the purchase money or rent: *Re Paget's Settled Estates*, 30 Ch. D. 119. See as to the difficulty of enforcing conditions as to residence, Jarm. Wills, Vol. II. p. 57. See generally as to the provisions of the Settled Land Act, Vol. VI. sub tit. SETTLEMENTS.

ing insured the said messuages, outbuildings, and fixtures, so directed to be insured, within ten days after the same premium shall first become payable, then it shall be lawful for my said son, his heirs or assigns, to effect or keep on foot such insurance; And I DECLARE, that it shall be lawful for my said son, his heirs or assigns, to recover the expenses of so supplying or repairing any such neglect, default, or omission of my said wife and her assigns as aforesaid, together with interest thereon after the rate of 5 per cent. per annum, and all costs incident to the recovery thereof, by distress or entry upon and perception of the rents and profits of all or any of the said messuages and premises so devised to my said wife for her life, or by mortgaging or selling the life interest of my said wife therein.

Specific Devises.

27. I DEVISE my messuage or dwelling-house situate at —— aforesaid, with the gardens, lands, coach-houses, coachman's cottage, stables, coach-house, and outbuildings belonging thereto, and which may be held and occupied therewith at the time of my death either by me or by any lessee or tenant of mine, to my said trustees hereinbefore appointed, their heirs and assigns, UPON TRUST that my trustees or trustee shall sell the same and hold the proceeds of such sale upon the trusts and with, under and subject to the powers and provisions hereinafter declared and contained, concerning the proceeds of sale and conversion of my residuary estate: Provided always that my trustees or trustee shall not sell the same premises or any part thereof until the death or remarriage of my said wife, or until she shall cease for more than —— calendar months in any one year to make the said mansion-house her principal residence (whichever event shall first happen) without the consent in writing of my said wife, subject nevertheless as is hereinafter provided: PROVIDED ALWAYS, and I hereby direct that until the sale of the said mansion-house and premises hereinbefore devised in trust for sale my trustees or trustee shall permit my said wife to have

Devise of mansion-house, &c., to trustees;

trust for sale; (*p*)

consent of wife while residing in the house to be required;

direction that until sale, trustees shall permit wife to occupy the house, &c.;

(*p*) The effect of this trust for sale is that, even if the widow is to be regarded as a tenant for life, she could not exercise the statutory powers of selling or leasing without leave of the Court: see sect. 7 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18). See as to the provisions of the Settled Land Acts, Vol. VI. sub tit. SETTLEMENTS.

Specific Devises.

and enjoy the personal use and occupation of the same premises and every part thereof, but so that she shall have no power of leasing or letting the same or any part thereof (except that she may let the said mansion-house furnished together with the whole or any part of the remainder of the same premises for her own benefit to a weekly or monthly tenant for a period or periods not exceeding —— calendar months in the whole in any one year) nor of assigning, charging, or otherwise disposing (except as aforesaid) of the same premises or any part thereof, nor shall she take any estate or interest, except as aforesaid, therein: PROVIDED ALWAYS that so long as my said wife shall use and occupy the said mansion-house and premises hereinbefore devised in trust for sale, or any part thereof, she shall at her own cost sufficiently maintain and repair to the satisfaction of my trustees or trustee the same premises or so much thereof as shall for the time being be in her use and occupation and keep all buildings upon such premises insured to the full value thereof: [*or*, I DIRECT that all costs and expenses of maintaining and repairing the same premises (except expenses of cultivating and keeping in order the garden and pleasure-grounds) and that all costs and expenses of insurance shall be paid by my trustees or trustee out of the income of the proceeds of sale of my real and personal estate]: PROVIDED ALWAYS that my said wife shall be at liberty at any time or times by writing under her hand to release or relinquish the right of personal use and occupation hereby given to her as to the whole or any part of the said premises hereinbefore devised upon trust for sale, and thereupon the trust for sale hereinbefore declared shall immediately become exercisable by my trustees or trustee without the consent of any other person as to the whole or such part, wherein the aforesaid right of personal use and occupation shall have been so released or relinquished, of the same premises, but such right shall continue in force as to the residue (if any) of the same premises as to which such right shall not have been so released or relinquished: PROVIDED ALWAYS and I hereby empower my trustees or trustee, at their and his discretion, at any time or times after my said wife shall have ceased as aforesaid to reside in or use and occupy the said mansion-house and premises or any part thereof, until the same shall be sold, to lease all the said mansion-house and premises, or such part or parts thereof

proviso as to repair and insurance;

proviso that wife may partially relinquish her right of occupation;

power of leasing;

Specific Devises.

wherein my wife's right of personal occupation shall have been so released or relinquished as aforesaid, as the case may be, either together or in parcels, for any term or terms in possession not exceeding twenty-one years, but so that every such lease shall be at the best rent that can for the time being be reasonably obtained, without premium or foregift, subject to a power of re-entry in case the rent should be in arrear for twenty-one days: And I declare that the rents and profits of the said messuage and premises, or such part thereof as shall not be sold, or be enjoyed, used, or occupied by my said wife, shall be applied as if the same were income arising from my residuary personal estate.

rents and profits to be applied as income of residue.

28. I devise all that my advowson of the Rectory of ——, To the use of the said [*trustees*], their heirs and assigns, Upon trust, that my trustees or trustee shall sell the said advowson, and subject to such stipulations as to postponement of payment of or security for purchase-money, or otherwise, as they or he may think fit; And I declare, that the proceeds of the sale of the said advowson shall form part of my residuary personal estate. Provided always, that it shall be lawful for my trustees or trustee, with the consent of my said wife during her life, and after her death at their or his own discretion, to postpone the sale of the said advowson for the purpose of enabling my trustees or trustee to present to the said rectory such son of mine as shall first be qualified and willing to accept the same; And for that purpose, in case no son of mine should at the time of my death be qualified and willing to accept the said rectory, to fill the vacancy therein (if any) in such manner and upon such terms and conditions as my trustees or trustee may deem expedient. And I direct, that in case at any time after my death and before the said advowson shall have been sold under the power hereinbefore contained, a son of mine should be qualified and desirous to accept the said rectory or living, and should signify such desire in writing to any trustee of my will for the time being, then my trustees or trustee shall forthwith take and do all such measures, proceedings, and acts, as shall be requisite for the purpose of effectuating such desire; Provided always, that in case more than one son of mine should desire to be presented to the said rectory, the elder of such sons shall be preferred. I authorise my trustees or trustee,

Devise of advowson to trustees;

in trust to sell;

authority, with wife's consent, to postpone sale of advowson, for the purpose of presenting a son of testator;

to fill the vacancy in the meantime;

option to sons successively to be presented on giving notice to any trustee;

authority to sell advowson

Specific Devises.

to son who may be presented;

in their or his absolute discretion, to sell the said advowson to such son of mine as shall have been presented to the said rectory, upon such terms as such trustees or trustee may deem expedient, and in particular to leave all or any part of the purchase-money for the said advowson in the hands of such son at interest, upon such real or personal security or obligation as my trustees or trustee may think fit. PROVIDED ALWAYS, that in case any son of mine should be presented to the said rectory or living of ——, under the provisions hereinafter contained, then the benefit of such presentation shall be considered to be of the value of £——, and, in the division of my said residuary estate, such £—— shall be considered to have formed part of my residuary personal estate, and to have been paid to such son in part satisfaction of his share thereof.

value of living to be deducted from the share of the residue intended for son who shall be presented.

Devise by the owner of an advowson (being also incumbent) to trustees, in trust, to present a person, and then to sell.

29. WHEREAS I am entitled in fee-simple in possession to the advowson of the rectory of ——, in the county of ——, and I am the present rector or incumbent of the parish church of —— aforesaid: NOW, I HEREBY DEVISE all that the said advowson, with the appurtenances thereto belonging, TO SUCH uses as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor or other the trustees or trustee of my will, shall by deed appoint, and subject thereto, unto and to the use of the said [*trustees*], their heirs and assigns, upon the trusts following: that is to say, UPON TRUST, that my trustees or trustee for the time being shall forthwith after my death present to the said church such fit person (*q*), as they or he shall, in their or his discretion, think proper, in order that such person may be instituted and inducted the rector or incumbent of the said parish church; AND, subject to the foregoing trust, I DIRECT, that my said trustees or trustee for the time being shall, with all convenient speed, after such person shall

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(*q*) The presentation to a vacant living is unsaleable. If the living is vacant before and at the time of the patron's death, the right for that turn devolves upon the executor as a chattel; but when the vacancy is occasioned by the death of the patron, he being incumbent, the elder title of the heir or devisee is preferred: *Holt* v. *Winchester*, 3 Lev. 47. See 7 Barn. & Cr. 147; Vol. I. p. 45, *et seq.*

Specific Devises.

be so presented, instituted, and inducted as aforesaid, sell the said advowson with its appurtenances. And I direct, that my said trustees or trustee for the time being shall stand possessed of the monies so to be received, Upon the trusts following, that is to say:—[*Specify trusts*].

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## GIFTS OF RESIDUE.

Personalty to wife.

1. I bequeath all the residue of my personal estate and effects, whatsoever and wheresoever (including [*or*, except] leaseholds for years and other chattels real), after payment thereout of my debts, funeral and testamentary expenses, and of the legacies bequeathed by my will or any codicil thereto (*r*), unto my wife [*name*] absolutely.

Personalty to son (*s*).

2. I bequeath all the residue of my personal estate and effects [*or, as in preceding Form*] unto my son [*name*] absolutely.

Personalty to several in equal shares.

3. I bequeath all the residue of my personal estate and effects unto and between [*legatee*], of, &c., and [*legatee*] in equal shares absolutely.

Personalty to surviving children as tenants in common.

4. I bequeath all the residue of my personal estate unto such child and children of mine as shall survive me, and if more than one, in equal shares, to and for his, her, or their own absolute use and benefit (*t*).

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(*r*) A gift of residuary real and personal estate with a direction for payment of debts or legacies, charges them on the realty in aid of the personalty: *Greville* v. *Browne*, 7 H. L. C. 682; see also *Elliot* v. *Dearsley*, 16 Ch. D. 322.

(*s*) In case of the death of the son in the testator's lifetime leaving issue, the gift will not lapse, but will become part of the personal estate of the son: see sect. 33 of the Wills Act, *ante*, p. 734.

(*t*) The gift being to children as a class, is not within the provision of the 33rd section of the Wills Act as to lapse: *Olney* v. *Bates*, 3 Drew. 319; *Browne* v. *Hammond*, 1 Johns. 210. Generally, it is presumed the spirit of that enactment would be agree-

**Gifts of Residue.**

Personalty to children as a class.

5. I BEQUEATH all the residue of my personal estate and effects unto, between, and among my children [or the children of [*name*], of, &c.,] in equal shares absolutely: PROVIDED ALWAYS, that if any child of mine [*or*, of the said [*name*]] shall die before me leaving issue surviving me, the share of such child shall not lapse, but shall go and devolve as part of his or her estate in the same manner as if he or she had survived me and died immediately after me.

Personalty to children, with substitution of issue of deceased children.

6. I BEQUEATH all the residue of my personal estate, after the payment of my debts, funeral and testamentary expenses, and the legacies given by my will or any codicil thereto, unto such child or children of mine as shall survive me, and the child or children living at my death of any child or children of mine dying before me, and if more than one in equal shares as between brothers and sisters, but so that the child or the children collectively of any deceased child of mine shall take such share only as their parent would have taken if living.

Realty and personalty to one (*u*).

7. I DEVISE, AND BEQUEATH all the residue of my real and personal estate, whatsoever and wheresoever, unto [*name*], of, &c., his [*or* her] heirs, executors, administrators, and assigns, according to the natures thereof respectively, for his [*or* her] and their absolute use and benefit.

Realty and personalty to children and the issue of deceased children;

8. I GIVE the residue of my real and personal estate to such child or children of mine living at my death, and such issue of any my child or children then deceased, as shall survive me and attain the age of twenty-one years, and his, her, or their heirs, executors, administrators, and assigns respectively, in equal shares as between brothers and sisters; But so that no issue of any my surviving grandchild shall be included in this gift; And so that the child or the children collectively of any deceased child or grandchild shall take only the share which his, her, or their parent would have taken if living: AND I GIVE to my trustees or trustee full discretionary power to apportion my said residuary estate

power to apportion among devisees;

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able to the wishes of the testator, and for ordinary use one or other of the two next forms is to be preferred.

(*u*) For a form of proviso against lapse, see *post*, p. 987, Form 18.

Gifts of Residue.

among the persons entitled thereto ; and for that purpose, by any deed or deeds to appoint uses of any hereditaments, and, if they or he think fit, to sell or mortgage the same or any part thereof, or to charge any sum or sums on any parts or part thereof, for equality of partition. And I appoint my trustees or trustee to be the trustees and trustee for the purposes of management of lands comprised in, and for the receipt and application of income arising from, my residuary, real and personal estate during the minorities of any persons beneficially entitled thereto, or interested therein, and for all other purposes of the 42nd section of the Conveyancing and Law of Property Act, 1881.

appointment of trustees for management, &c., during minorities.

9. I devise and bequeath all my real estate and the residue of my personal estate, after payment of my funeral and testamentary expenses and debts, and of the legacies bequeathed by this my will, or any codicil hereto, and of the legacy duty and succession duty on such of them as are given free of such duty, to [*trustees*], or such other persons or person as at the time of my death may be trustees or trustee of my marriage settlement, their or his heirs, executors, administrators, and assigns, To uses and upon trusts corresponding as nearly as may be to the uses and trusts in the said settlement contained concerning the freehold estates thereby settled; With similar powers as to investment of trust monies and otherwise : [And I declare that the trustees for the time being of the said marriage settlement shall be the trustees of the settlement hereby created for the purposes of the Settled Land Acts.]

General devise and bequest to trustees of marriage settlement ;

10. I devise and bequeath all my real estate, whatsoever and wheresoever, including chattels real, in manner following, that is to say, As to one moiety or equal undivided half-part thereof, or so much thereof as shall be of copyhold or customary tenure, To such uses as my son [*elder son*] shall by deed appoint, And as to the whole of such moiety of my real estate and chattels real, but subject, as to so much thereof as shall be of copyhold or customary tenure, to any appointment in exercise of the power in that behalf hereinbefore contained, Unto and to the use of the said [*elder son*], his heirs, executors, administrators, and assigns according to the nature and tenure thereof; But if the said

Freeholds, copyhold, and leaseholds to two sons, with cross limitations in case of lapse ;

Gifts of Residue.

[*elder son*] shall die before me, and not leave issue surviving me (*u*), then To THE USES and in manner hereinafter expressed concerning the other moiety of my said real estate and chattels real: AND AS TO the other moiety or equal undivided half-part thereof, or so much thereof as shall be of copyhold or customary tenure, To such uses as my son [*younger son*] shall by deed appoint, And as to the whole of such last-mentioned moiety of my real estate and chattels real, but subject, as to so much thereof as shall be of copyhold or customary tenure, to any appointment in exercise of the power in that behalf hereinbefore contained, UNTO AND TO THE USE of the said [*younger son*], his heirs, executors, administrators, and assigns, according to the nature and tenure thereof; But if the said [*younger son*] shall die before me and not leave issue surviving me, then To THE USES and in manner hereinbefore expressed concerning the first-mentioned moiety of my said real estate and chattels real: AND I BEQUEATH all the residue of my personal estate and effects of every description, other than chattels real, unto my said two sons absolutely in equal shares.

Bequest of residuary personalty to sons in equal shares.

Real and personal estate to trustees. (Short form.)

11. I DEVISE AND BEQUEATH all the residue of my real estate, including chattels real, and of my personal estate and effects, UNTO AND TO THE USE of the said [*trustees*], [*or*, the trustees hereinbefore appointed,] their heirs, executors, administrators, and assigns, UPON TRUST, &c. [*Trusts for conversion and investment, post*, pp. 866 *et seq.*].

Real and personal estate to trustees where there are no copyholds.

12. I DEVISE AND BEQUEATH all my manors, and freehold, [copyhold (*x*),] and leasehold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate, and all my estate and effects of every description, whether real or personal,

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(*u*) The words "such issue," in the 33rd section of the Wills Act, are not confined to the issue living at the death of the devisee: *Re Parker*, 1 Sw. & Tr. 523.

(*x*) Where the testator's real estate does not, and is not likely to comprise copyholds, the words in brackets may nevertheless be inserted in order that the residuary devise may include any property which may prove to be of copyhold tenure. Otherwise, it is generally advisable to use the next following form, which will enable the trustees to convey copyholds and customary lands, without the necessity of being admitted, so as to save the fine on their admission: see *ante*, p. 848, note (*d*), p. 855, note (*l*).

Gifts of Residue.

not otherwise devised or bequeathed by this my will or any codicil hereto, UNTO AND TO THE USE OF the said [*trustees*], their heirs, executors, administrators, and assigns, according to the nature and tenure of the same premises respectively, upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same, that is to say, UPON TRUST, &c. [*Trusts for conversion and investment, post*, pp. 866 *et seq.*].

Real and personal estate to trustees, where there are copyholds.

13. I DEVISE all such of my messuages, lands, tenements, and hereditaments as are of copyhold or customary tenure not otherwise devised by this my will or any codicil thereto, TO SUCH USES upon such trusts and with and subject to such powers and provisions as the said [*trustees*] or the [survivors or] survivor of them or other the trustees or trustee for the time being of this my will (hereinafter called "my trustees or trustee" (*y*) ) shall by deed appoint for the purpose of effectuating a sale or sales of the same hereditaments and premises under the trust in that behalf hereinafter contained: AND I DEVISE all my manors, messuages, lands, tenements and hereditaments [*or*, all my real estate] of whatever tenure and wherever situate, and not otherwise devised by this my will or any codicil hereto, but, as to the said copyhold and customary hereditaments and premises, subject to any appointment under the power in that behalf hereinbefore contained, AND I BEQUEATH all my personal estate and effects of every description, not otherwise bequeathed by this my will or any codicil hereto, UNTO AND TO THE USE OF the said [*trustees*], their heirs, executors, administrators and assigns according to the nature and tenure of the same premises respectively upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same, that is to say, UPON TRUST, &c. (*Trusts for conversion and investment, post*, pp. 866 *et seq.*).

Copyholds to one of the trustees.

14. I DEVISE all my copyhold or customary hereditaments unto [*one of the trustees*], his heirs and assigns, UPON TRUST,

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(*y*) If this interpretation clause has already been inserted in an earlier part of the will, say here merely, "my trustees or trustee."

Gifts of Residue.

to be disposed of according to the directions of my trustees or trustee in accordance with the provisions concerning the same herein contained; And in case the said [*name*] should die before me, or before he shall be admitted tenant of the said copyhold or customary hereditaments respectively, Then I DEVISE the same, or such of them as the said [*name*] shall not have been admitted to, unto [*another trustee*], his heirs and assigns, upon the same trusts; Or in case he also should die before me, or before obtaining such admittance, then I DEVISE the same hereditaments, or such of them as he shall not have been admitted to, unto the said [*third trustee*], his heirs and assigns, upon the same trusts.

Real estate to son for life with remainder to trustees for sale.

15. I DEVISE AND BEQUEATH all the residue of my real estate, whatsoever and wheresoever situate, including chattels real, UNTO AND TO THE USE OF my son [*name*] during his life: AND after his death I DEVISE AND BEQUEATH the same UNTO AND TO THE USE of the trustees or trustee for the time being of this my will, and their or his heirs, executors, administrators or assigns, according to the nature and tenure of the same premises respectively, to be held by them or him, upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning my residuary personal estate.

Residuary personalty to trustees.

16. I BEQUEATH all the residue of my personal estate and effects of every description [*or*, all my personal estate and effects not otherwise bequeathed by this my will or any codicil hereto] [except chattels real] Unto the said [*trustees*] [*or*, the trustees hereinbefore appointed], their executors, administrators and assigns, UPON TRUST, &c. (*Trusts for conversion and investment, post*, pp. 866 *et seq.*)

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## TRUSTS FOR CONVERSION AND INVESTMENT.

Trust for sale and conversion of residuary realty

1. UPON TRUST that the said [*trustees*] or the [survivors or] survivor of them or other the trustees or trustee for the time being of this my will (hereinafter called "my trustees or

trustee" (*z*) ) shall sell, call in, and convert into money the said [real and] personal estate and premises: And shall out of the net proceeds of such sale, calling in, and conversion pay my funeral and testamentary expenses and debts and the pecuniary legacies bequeathed by this my will or any codicil hereto, and the legacy duty [or succession duty] on such of them as are bequeathed free of such duty, [or duties, but subject to the direction as to the manner of such payments hereinafter contained]: And shall hold the residue of the proceeds of such sale and conversion upon the trusts hereinafter declared of the same: [Provided always, &c. [*continue as in form* 31, p. 992] ].

**Conversion and Investment.**

and personalty.

Trusts of proceeds of sale, &c. (*a*).

2. Provided always that it shall be lawful for my trustees or trustee to sell or concur in selling all or any part of the real and personal estate and premises hereinbefore devised and bequeathed in trust for sale, either subject to any prior charges affecting the same or not, and either together or in parcels, by public auction or private contract, subject to any special stipulations as to title, evidence of title, biddings, compensation, indemnity, postponement of payment of purchase-money, or security for the same, or otherwise; with power to buy in at any auction, or to rescind or vary any contract for sale, and to resell, without being answerable for loss, and for the purposes aforesaid to execute and do all such assurances and things as my trustees or trustee shall think proper.

Powers relating to conduct of sales (*b*).

3. And I direct, that (without prejudice to any statutory or other powers of trustees incident to a sale by them of trust property) my trustees or trustee may consent that all or any part of the monies to arise from any such sale or sales as aforesaid, shall be appropriated and set apart in the names or name either of my trustees or trustee, or of any other persons or person to be appointed for that purpose, for a given time, or till a given event, to be limited in that behalf, as an indem-

Power to appropriate part of purchase-monies for indemnity of purchaser.

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(*z*) If this interpretation clause has been already inserted in an earlier part of the will, say here merely,

"my trustees or trustee."

(*a*) For a fuller form, see *post*, p. 873, Form 15. See as to the words in brackets, *post*, p. 992, and note (*g*).

(*b*) These powers may generally be omitted in reliance on the provisions contained in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect 35.

**Conversion and Investment.**

nity to the purchaser or purchasers of the said hereditaments respectively, and his, her, or their heirs, executors, administrators or assigns, in such manner and upon such trusts as my trustees or trustee shall in their, his, or her discretion think fit.

Power for trustee to purchase any part of trust estate.

4. And I declare, that my trustees or trustee, or any of them, shall be competent to purchase any part of my trust estate, either at any public auction or from a co-trustee or co-trustees by private contract, any rule of equity to the contrary notwithstanding.

Power for a son of testator, who is a trustee, to purchase any part of the trust estate.

Valuation.

5. And I declare that my said son [*name*], notwithstanding that he is or may be a trustee of this my will, and acting in the trusts thereof, shall be competent to purchase any part of my trust estate, either at any public auction or from his co-trustee or co-trustees by private contract, any rule of equity to the contrary notwithstanding; But so that if such purchase shall be by private contract, the sale shall be at a price to be fixed by a valuer to be appointed by my trustees or trustee other than my said son, and shall be in all respects conducted by such my other trustees or trustee: And I further declare that my trustees or trustee other than my said son [*name*] may, in their or his discretion, allow any purchase-money for all or any part of my trust estate which shall be so sold to him to remain for any time not exceeding —— years, at interest after the rate of 4 per cent. or upwards, on such personal or other security as such other trustees or trustee shall think fit: Provided always that my trustees or trustee, other than my said son [*name*], may call in and compel payment of the said purchase-money when the same shall become payable, but without being answerable for any loss caused by or arising from any omission so to do, or delay in so doing.

Power to allow postponement of payment of purchase-money.

Property to be offered to son or sons before sale, at a valuation;

6. Provided always, that no sale shall be made of any part of my freehold, copyhold, customary, or leasehold estates, or of my farming stock, farming utensils, or crops, in the lifetime of any adult son or sons of mine, until my said trustees or trustee, or one of them, shall, by writing under their or his hands or hand, have offered to such son or to such sons successively (according to priority of birth), the option of purchasing the same or any part thereof, at a valuation to be

Conversion and Investment.

made by a valuer appointed by my said trustees or trustee (such valuation to be made, at the option of my said trustees or trustee, either before or after the making of such offer to my said son or sons), nor until such son or each of such sons shall have neglected to notify by writing under his hand to my said trustees or trustee, within fourteen days from the making of such offer, his acceptance thereof; but so that my trustees or trustee may, in their or his discretion, extend the period hereby allowed for notifying any such acceptance if they or he shall think fit: And I direct that if any such son shall notify his acceptance of the said offer within such period as aforesaid, then, on payment of the amount of the said valuation, my trustees or trustee shall assure the said hereditaments and premises to the son purchasing the same or as he shall direct: Provided always, that no purchaser from my said trustees or trustee shall, nor shall any purchaser from or other person dealing with any such son after the said premises shall have been so assured as aforesaid, be affected or concerned to take notice of the powers of pre-emption hereby given to such son, or to inquire as to whether or not any of the provisions herein contained with regard to such pre-emption have been complied with or duly observed.

protection of purchasers.

7. Provided always, that my trustees or trustee [shall not sell or convert any reversionary or other property not yielding income unless and until they or he shall think such sale or conversion would be to the advantage of my residuary estate, and of the persons or person for the time being beneficially entitled thereto or interested therein; And] may, in their or his absolute and uncontrolled discretion, postpone the sale, calling in, or conversion of my residuary [real and] personal estate or any part thereof, [including leaseholds and other property of a terminable or wasting nature,] for such time as they or he shall think fit, without being answerable for loss; And I declare that, until sale or conversion, the [rents, profits, and] income arising from such part of my residuary [real and] personal estate as shall for the time being remain unsold or unconverted, shall be paid or applied by my trustees or trustee, upon the trusts, to the persons or person, for the purposes, and in manner, to whom, and for and in which the dividends, interest, and income arising from the investment of the proceeds of sale of my residuary real and personal

Power to postpone sale and conversion.

Destination of income till sale or conversion.

**Conversion and Investment.**

estate would have been payable or applicable under the trusts hereinafter declared concerning the same.

Power to suspend conversion of foreign government securities.

8. And whereas it is probable that, at the time of my death, some part of my personal property may be invested upon foreign government securities, and it may be inexpedient immediately to sell and convert the same, Now I authorise my trustees or trustee to suspend the execution of the trusts for sale and conversion hereinbefore contained in regard to such investment, so long as they or he shall think proper: And I declare that until sale or conversion the income arising, &c. (*destination of income, ut supra*).

Power to executors to continue loan to testator's son;

9. And whereas my son [*name*] is indebted to me in the sum of £——, for which I hold his bond, dated the —— day of ——, 18—, Now, I hereby authorise and empower my trustees or trustee, in their or his discretion, to postpone the calling in of such bond debt or any other debt which may be owing to me from the said [*son*] at the time of my death, for such period as my said trustees or trustee shall think proper: And I declare that until any such debt shall be called in all interest that shall be received by my trustees or trustee in respect of the same shall be paid, &c. (*destination of income, ut supra*). [And I declare that the said debt or debts shall, in the valuation and distribution of my residuary personal estate under the trusts of my will, be taken at the nominal amount or amounts thereof, and be appropriated, so far as the same, taken at such amount or amounts, shall be required or be applicable, in or towards satisfaction of the share of the proceeds of sale of my residuary real and personal estate hereby settled, upon trusts and subject to powers corresponding with the uses, trusts, powers, and provisions hereinbefore limited and contained concerning my said hereditaments at ——, purchased of ——. Provided, nevertheless, that the foregoing power to leave the said debt or debts outstanding shall extend to the full amount or amounts of such debt or debts, whether the same shall exceed the amount of the last-mentioned share or not.]

such debts to be taken at their nominal amount in distributing the residue.

Trusts of unconverted residuary estate.

10. And I direct and declare that my residuary real and personal estate, or such parts or part thereof as for the time being shall not be sold under the trust for sale herein-

Conversion and Investment.

before contained, shall be held, UPON AND FOR SUCH OR THE LIKE TRUSTS and purposes as are herein declared or contained concerning the proceeds of sale and conversion of my residuary estate, or as near thereto as the respective tenures and natures of the property will allow; And that the rents and profits from time to time to arise from or be produced by my residuary real and personal estate, or such parts or part thereof as for the time being shall not be sold, shall be held and applied upon such or the like trusts, and in such or the like manner, as if the same were part of the income arising from the proceeds of sale and conversion of my residuary estate: PROVIDED ALWAYS that no reversionary or other property, which shall not yield or produce any immediate income, shall be treated as producing income for the purposes of this my will: AND I DECLARE that such part of my residuary real estate as from time to time shall remain unsold and unconverted shall, from the time of my death, for the purpose of transmission, be deemed to be of the nature of personal estate.

Leaseholds, &c., to be considered as sold.

11. PROVIDED ALWAYS, that as to such portion of my estate the sale or conversion of which shall be postponed under the power in that behalf hereinbefore contained as shall at any time consist of leaseholds, reversions, or other property either of a perishable or increasing value, the person or persons who would have been entitled to the income arising from the proceeds thereof, if sold, shall be entitled only to interest on the actual value thereof as if the same were sold, and not to the annual produce thereof; Such value to be estimated by my trustees or trustee, in their or his absolute discretion, with power for them or him from time to time to vary such estimate; and such interest to be paid half-yearly, at the rate of 4 per cent. per annum, and to commence and be computed from the day of my death.

Whole of income of leaseholds and property of a wasting nature to be applicable for benefit of tenant for life (c).

12. I DECLARE that all rents, profits, or income arising from or receivable in respect of any leaseholds, or other property of a terminable or wasting nature, whether real or personal, and which may for the time being form part of my

(c) The general rule, with regard to property of a perishable or wasting nature given for life with remainders over (in the absence of any express or implied intention of the testator that it is to be

Conversion of

Conversion and Investment.

residuary estate and be vested in possession, shall, for all purposes of this my will and as between all persons interested hereunder, be applicable as from the day of my death as income under the trusts of this my will, no part thereof being in any event liable to be retained as capital.

Authority to postpone conversion;

13. And I hereby declare, that, notwithstanding the trust for sale and conversion hereinbefore contained, it shall be lawful for my trustees or trustee to postpone and defer the sale and conversion of any part of my said real or personal estate for such period permitted by law as to them or him shall seem expedient; And that until such sale and conversion, and until the money to be produced thereby shall be invested in the manner hereinafter directed, the income arising from my residuary real or personal estate shall be invested by my said trustees or trustee in augmentation of the capital of the said trust-estate; And my trustees or trustee shall from time to time raise out of my residuary estate and pay and apply as or in lieu of income of my residuary estate, under the trusts of my will, such an annual sum, to commence from my death, as my trustees or trustee shall, in their or his sole judgment, consider to be equal to the income which will be produced by the investment, at interest after the rate of — per cent. per annum, of the proceeds of my residuary estate when the same shall be sold or converted; And I authorise my trustees or trustee from time to time to revise and alter any such estimate, and increase or diminish such allowance for or in lieu of income accordingly.

actual income to be invested;

and a fair allowance for income to be made by trustees.

Reversions not to be sold until they fall into possession, unless trustees think fit (a).

14. But I direct and declare, that any estates or interests in remainder or reversion of or to which I may be possessed or entitled (other than reversions to which a beneficial rent is incident) shall not be sold until the same respectively shall fall

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property of a wasting natur.

enjoyed specifically), is that such property must be either converted and invested in manner permitted by law for investment of trust funds, or valued at the expiration of one year from the testator's death, and the tenant for life will be entitled only to the income arising from such conversion and investment, or to interest at four per cent. on the amount of the valuation, as the case may be: see *Howe* v. *Lord Dartmouth*, 7 Ves. 137; S. C. Tud. L. C. Eq. Vol. II. p. 289.

(a) As to the advisability of inserting express provisions as to postponing sales of reversionary interests, see *ante*, p. 489.

into possession, unless my said trustees or trustee for the time being shall think a prior sale expedient; And, for the purpose of accelerating or facilitating the sale of any such estate or interest, in case my said trustees or trustee should think it expedient to sell the same, I authorise and empower my said trustees or trustee to purchase the estate or estates, interest or interests, which shall be prior or precedent to such my estate or interest, upon such terms and conditions as they or he shall think fit, or to make any arrangement which they or he shall deem just for the sale of such prior or precedent estate or estates, interest or interests, together with such my estate or interest, and for the apportionment or division of the proceeds thereof, or for the payment to the owner or owners of such prior or precedent estate or estates, interest or interests, of the income from such proceeds, or of an annuity or annuities in lieu thereof.

Conversion and Investment.

15. And I declare, that my trustees or trustee shall stand and be possessed of the monies to arise from the sale, calling in, and conversion of or forming part of my [real and] personal estate, Upon trust thereout, in the first place, to pay or retain all the expenses incident to the execution of the preceding trusts and powers, and also my debts and my funeral and testamentary expenses; and in the next place, to pay the pecuniary legacies hereinbefore bequeathed, [and appropriate the funds hereinbefore directed to be appropriated for answering the annuities hereinbefore bequeathed, and in the meantime to pay the same annuities], and also to pay the legacy duty [or succession duty] on any legacies [or annuities] bequeathed free from such duty [subject nevertheless to the proviso as to the manner of such payments hereinafter contained (*b*); Provided always, &c. [*continue as in form* 31, p. 992].

Trusts of proceeds of sale and conversion to pay thereout expenses, debts, legacies, and annuities.

16. Provided always, and I hereby authorise my trustees or trustee to raise from time to time by mortgage of any of the real and personal property hereinbefore devised and bequeathed to them in trust as aforesaid, such sum or sums of money as may be required for the purpose of paying the said expenses, debts, and legacies, or any other purpose of this my will, together with the costs and expenses attending or

Power to mortgage for payment of debts, funeral and testamentary expenses, and legacies;

(*b*) See as to this, *post*, p. 992, note (*g*).

Conversion and Investment.

incident to the raising of the same, (and to secure the repayment of the monies so raised with interest at such rate as may be agreed upon by any such mortgage or mortgages to be made either in fee or for any term or terms of years, and either with or without a power of sale, and other usual or reasonable powers, clauses, and provisions), and to apply the money so to be raised in payment and satisfaction of such expenses, debts, legacies, and costs, as aforesaid, accordingly.

protection of mortgagees;

And I declare, that no person who shall advance any money upon the security of any such mortgage as aforesaid, shall be concerned to see to the application, or to be answerable for the misapplication or nonapplication of the same money, or of any part of the same, or to inquire whether any such mortgage is necessary or proper for the purposes aforesaid or any of them, or into the sufficiency or insufficiency of my personal estate for the purposes aforesaid.

application of surplus of money raised.

And I further declare that if my trustees or trustee shall raise more money by any such mortgage than shall be required for the purposes aforesaid, they or he shall hold the surplus upon the same trusts and with and subject to the same powers and provisions, as if such surplus were part of the proceeds of sale of my residuary real and personal estate.

Trust for investment of residue.

17. And I declare, that my trustees or trustee shall, [with the consent of my said wife during her life [*or*, widowhood], and afterwards], at their or his discretion, invest the residue of the monies to arise from the sale, calling in, and conversion of my residuary [real and] personal estate in their or his names or name, [or under their or his legal control (*c*)]. (*Insert investment clause, see forms* 18 *to* 22.)

Investment clause (*d*). (Statutory investments.)

18. In the purchase of, or at interest upon any stocks, funds, or securities, which may, for the time being, be authorised by

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(*c*) These words in brackets should be inserted where it is intended to authorise investment in securities passing by delivery, such as many foreign government securities which are incapable of being registered.

(*d*) As to the duties and liabilities of trustees as regards investment of trust funds, and as to Investment Clauses generally, see *ante*, Vol. VI. sub tit. "Settlements."

As to the securities in which cash under the control of the Court may be invested, see Rules of the Supreme Court (November, 1888), Ord. XXII., rule 17.

law for the investment of trust funds or of cash under the control of the Chancery Division, but not in any other form of investment. (*Power to vary investments, form* 23.)

Investment clause. (Investments authorised by Settled Land Act, 1882.)

19. In the purchase of, or at interest upon any stocks, funds, or securities, in or upon which capital money within the meaning of the Settled Land Act, 1882, is under that Act authorised to be invested, but not in any other form of investment. (*Power to vary investments, form* 23.)

Investment clause (*e*). (Restricted range.)

20. In the purchase of any parliamentary or government stocks or funds of the United Kingdom, or of any stock secured upon the revenues of British India, or of stock in the Bank of England or Ireland, or of the Metropolitan Board of Works, or in the purchase of the debenture stock, or preference stock or preference shares of any railway or other company in Great Britain or Ireland incorporated or established by charter or special Act of Parliament, and in actual work, and which shall during the ten preceding years have paid a dividend of not less than 2 per cent. per annum on its ordinary stock or shares; Or at interest upon any Government securities of the United Kingdom or British India, or upon the security of any freehold, copyhold, or long leasehold security in England or Wales, but not in Ireland, but so that every such long leasehold security shall be on property wherein a term of not less than sixty years shall be unexpired at the date of such security, or at interest upon the security of bonds, debentures, or mortgages of any such railway or other company as aforesaid, or in the purchase of, or at interest upon any stocks, funds, or securities which may for the time being be authorised for the investment of trust funds or of cash under the control of the Chancery Division, but not in any other mode of investment. (*Power to vary investments, form* 23.)

Investment clause. (Fair range.)

21. In the purchase of any parliamentary or government

(*e*) This and the two following forms are framed upon the lines of an MS. investment clause usually employed by that eminent conveyancer, the late John Young Kemp, Esq., of Lincoln's Inn, of whom the present Editor was a pupil. The investments thereby authorised fall under two distinct categories, viz., purchases of stocks, funds, and shares, and loans upon bonds, debentures, mortgages, and other securities. See for other clauses relating to investment of trust monies, Vol. VI. sub tit. "Settlements."

Conversion and Investment.

stock or funds of the United Kingdom, or of any stock secured upon the revenues of British India, or of any colony or dependency of the United Kingdom, or of stock of the Bank of England or Ireland, or of stock of the Metropolitan Board of Works, or of debenture stock of any county, municipal, or local authority in Great Britain, but not in Ireland, or in the purchase of the debenture stock, or preference stock, or preference shares of any railway or other company in the United Kingdom incorporated or established by charter or an Act of Parliament in actual work and paying a dividend upon its ordinary stock or shares, or of the stock or shares of any railway company in the United Kingdom or India on which a fixed or minimum rate of dividend is guaranteed by the same or any other company or by the government of British India or any colony or dependency of the United Kingdom, or guaranteed by means of a fixed rental payable by any other company; Or at interest upon securities of the government of the United Kingdom, or upon freehold, copyhold, leasehold or chattel real securities in England or Wales, but not in Ireland, or in or upon the bonds or securities of any of the British colonies or dependencies, including bonds or debentures secured upon or guaranteed by the revenues of British India, or any bonds or securities which or the interest upon which are or is guaranteed by parliament, or at interest upon the debentures or mortgages of any railway or other company in the United Kingdom incorporated by charter or Act of Parliament, and paying a dividend as aforesaid, but not being a company having the liability of its members limited by the Companies Act, 1862, or any other Act relating to joint-stock companies, or upon the bonds, debentures or securities of or issued by any such county, municipal, or local authority as aforesaid, or on the security of rates or tolls made or levied by any such authority. (*Power to vary investments, form* 23.)

Investment clause. (Comprehensive range.)

22. In the purchase of any parliamentary or government stock or funds of the United Kingdom, or of any stock or funds secured upon the revenues of British India, or of any colony or dependency of the United Kingdom or of any foreign government or state, or in the purchase of stock of the Bank of England or Ireland, or of stock of the Metropolitan Board of Works, or of debenture stock or guaranteed stock of any county, municipal, or other local or public

Conversion and Investment.

authority or body in the United Kingdom, or British India, or any colony or dependency of the United Kingdom or any foreign country, or in the purchase of debenture stock or preference stock, or preference shares, or ordinary stock or shares of any railway company in the United Kingdom or British India, or in any colony or dependency of the United Kingdom, or of any foreign country, in actual work and paying a dividend on its ordinary stock or shares, or of any stock or shares of any company in the United Kingdom having the liability of its members limited by the Companies Act, 1862, or some other Act of Parliament relating to joint stock companies; Or at interest upon securities of the government of the United Kingdom, or upon freehold, copyhold, leasehold, or chattel real securities in the United Kingdom, or at interest upon any securities of, or guaranteed by any government, or upon the security of any real or immoveable property either together with or without any moveable property, in British India, or any colony or dependency of the United Kingdom, or any foreign country, or at interest upon the debentures, mortgages or securities of any county, municipal, local public authority or body, or of any railway or other company in the United Kingdom or British India, or any colony or dependency of the United Kingdom or any foreign country, or on the securities of rates or tolls made or levied by any such authority or body as aforesaid, or at interest upon charges created under the Improvement of Land Act, 1864, or any mortgages thereof, or upon debentures issued under the Mortgage Debenture Act, 1865, or at interest upon the security of a life interest upon any such real or personal property as aforesaid, coupled with a policy of assurance on the life of the person on whose death such life interest will determine. (*Power to vary investments, form* 23.)

Power to vary investments.

23. And may from time to time with such consent, or at such discretion as aforesaid, vary, alter, and transpose all or any of the stocks, funds, shares, and securities into or for other stocks, funds, shares or securities of the same or a like nature.

Trustees to stand possessed of investments upon trust, &c.

24. And I further declare, that my trustees or trustee shall stand possessed of and interested in the said proceeds of the sale and conversion of my residuary real and personal estate, and the stocks, funds, [shares] and securities of which the same shall consist, or in or upon which the same shall

Conversion and Investment.

from time to time be invested (hereinafter called the "[residuary (*f*)] trust fund"), and the annual produce and income thereof, Upon the trusts, for the purposes, and with and subject to the powers and provisions hereinafter expressed concerning the same, (that is to say), [*Ulterior trusts*].

Authority to retain, make, and vary investments in India;

25. I AUTHORISE my trustees or trustee, in their, his, or her absolute discretion, to allow the sum of —— India Government rupee paper, which I now have in the hands of —— of —— in India at interest, to remain upon such investment for such time as they, he, or she shall think fit; AND ALSO to invest all or any part of the proceeds of sale of my residuary real and personal estates in India upon the like security, or upon any other public or government or real or railway securities in India; And from time to time to vary such investments for others of the like nature, or for any such investments as are hereinbefore authorised. I FURTHER AUTHORISE my trustees or trustee, in their, his, or her discretion, to employ [*names*] merchants and agents of Calcutta, or either of them, or such other persons or person as my trustees or trustee shall think fit, as their, his, or her agents or agent in India, for the purpose of realising, collecting, investing, managing, receiving, and transmitting my said residuary estate and effects in India, and the income and produce thereof, with the usual commission or allowance, and with such general, discretionary, or other powers and authorities, as to the choice of investments or otherwise, and subject to such restrictions, rules, and directions as my trustees or trustee may think fit, without being in any way responsible for the acts, defaults, or misconduct of such agents or agent, other than such acts as shall be done in obedience to the express direction of my trustees or trustee to do or commit some act or defanlt which, if done or committed personally by such trustees or trustee, would amount to a breach of trust, or any loss occasioned thereby or arising therefrom.

authority to employ agents and to delegate discretionary powers;

trustees not to be answerable for agents.

Power to trustees to invest trust-monies in the purchase of freeholds, copyholds, or leaseholds;

26. PROVIDED ALWAYS that [if at any time or times hereafter during the continuance of any of the trusts hereinbefore contained, it shall appear to my trustees or trustee to be expedient to invest any part of the said trust monies in

(*f*) Where there are several funds settled by the will, it may be convenient to distinguish them as "the first [secondly, &c.] mentioned settled legacy fund," "the residuary trust fund," or otherwise.

such purchase or purchases as is or are hereinafter mentioned], IT SHALL BE LAWFUL for my trustees or trustee, in their or his absolute discretion, at any time or times to sell and dispose of any stocks, funds, [shares,] and securities whereon the said trust monies shall for the time being be invested; And to invest the money to arise from the sale or disposition thereof in the purchase of any freehold, copyhold or customary or leasehold messuages, lands, tenements, or hereditaments, in England and Wales (so that the leaseholds be held for an absolute term, of which not less than [*sixty*] years shall be then unexpired, or by lease containing a covenant to renew for such term at least), with power to purchase, subject to any special stipulations, and to complete or accept any contract or title, though not strictly enforceable or marketable, and to waive any objections or requisitions; And to cause the same when so purchased to be conveyed and assured unto and to the use of my trustees or trustee, their or his heirs, executors, administrators, and assigns respectively, according to the nature and quality thereof respectively; To be held by them or him UPON TRUST, at such time or times as my trustees or trustee shall, in their or his discretion, think expedient, to sell all or any of the same messuages, lands, tenements, and hereditaments; And, at such discretion as aforesaid, to lay out the money so to be received in the names or name of my said trustees or trustee in or upon any such stocks or funds, [shares,] or securities, or in the purchase of any such hereditaments as are hereinbefore authorised to be purchased; With power to vary and transpose the same investments, or any of them, as often as shall be thought expedient. AND I HEREBY DECLARE that my trustees or trustee shall hold the said messuages, lands, tenements, and hereditaments so to be purchased, and the rents, issues, and profits thereof, in the meantime until the sale thereof, and the money to arise from such sale, and the stocks, funds, [shares] or securities whereon the same shall be invested, and the annual produce and income thereof, upon, with and subject to such of the several trusts, powers, provisoes, and directions herein expressed and contained concerning the said trust monies, stocks, funds, [shares,] and securities out of the proceeds or produce whereof such purchase or purchases shall be made as aforesaid, and the income thereof as shall be then subsisting or capable of taking effect. AND I FURTHER DECLARE that

**Conversion and Investment.**

to purchase, subject to special conditions, &c.;

power to sell again;

trustees to hold purchased lands upon trusts before declared;

purchased

**Conversion and Investment.**

the messuages, lands, tenements, and hereditaments to be so purchased as aforesaid shall, from and immediately after such purchase or purchases shall be made, be considered for all the purposes of my will as personal estate, and be transmitted accordingly, though no actual conversion thereof into money shall have taken place. PROVIDED ALSO that if any messuages, lands, tenements, or hereditaments to be purchased as aforesaid should be held by any lease or leases, my trustees or trustee shall be fully indemnified from all liability in respect of all rents, covenants, and conditions reserved by or contained in such lease or leases, And if the same premises shall be held by renewable lease or leases for lives or for years, the fines, fees, and expenses of any renewal of the same shall be defrayed out of the rents and income of the property comprised in such renewed lease or leases.

lands to be treated as personalty;

expenses of renewals.

Real estate not to be considered as converted until sold:

option to children to take as real or as personal estate.

27. I DECLARE, that my real estate, and such real estate as my trustees or trustee may hereafter purchase, shall be considered as real estate until the same be actually sold; And that it shall be in the option of my children, as they shall successively become entitled to receive their shares, to receive them out of the real or out of the personal estate of which my property shall then consist; for which purpose I authorise my trustees or trustee to value, or procure to be valued, my real estate, and to make such partition or allotment thereof as they or he shall think just; AND from the time when any child shall become entitled to receive his or her share, until the time when such child shall have declared such option, it shall not be lawful for my trustees or trustee to vary the nature and condition of my property without the consent of such child.

Power to partition among *cestuis que trust.*

28. PROVIDED ALWAYS, and I authorise my trustees or trustee, in their or his absolute discretion, to partition or allot my residuary estate, both real and personal, or any parts or part thereof, among or to the respective actual or presumptive objects of the trusts, or any of such objects, in satisfaction, wholly or in part, of their, his, or her shares or share in the same premises, in such manner, and charged or not with such sum or sums for equality of partition, as they or he shall think right; with power for my trustees or trustee to determine the value of the property so partitioned or allotted, by valuation or otherwise, as they or he shall think

fit: And I declare that any such determination shall be conclusive and binding on all persons interested in my residuary estate, or any part thereof, under the trusts herein contained.

Conversion and Investment.

29. Provided always, that my trustees or trustee may at their or his discretion, instead of selling or converting my residuary [real and] personal estate, or any part thereof, at any time or times after my death, appropriate and allot any part or parts of the same premises to answer any of the pecuniary legacies bequeathed by this my will, or any codicil hereto, or any of the shares in my residuary estate hereby given in trust for the benefit of my children and their respective issue, or of any other person, at such valuation or estimate as my trustees or trustee shall think fit (which valuation or estimate shall be final and binding on all persons interested under this my will, or any codicil hereto), and may execute and do all such assurances, transfers, and things as may be necessary or expedient for effectuating any such appropriation or allotment; And that every such appropriation or allotment shall take effect at such time or times, for such period or periods, for or in respect of such sum or sums, and either provisionally, conditionally, or otherwise, and generally in such manner as my trustees or trustee shall in their or his discretion think fit; And that any property so appropriated or allotted, or the proceeds thereof if sold or converted, shall, until the same shall be payable or transferable to some person or persons absolutely entitled thereto, be vested in and held by my trustees or trustee, and be and remain subject (so far as the nature of the property and circumstances will permit) to the trusts and powers for sale, conversion, investment, and variation of investment and postponement of sale and conversion, and of leasing and management till sale, and all other incidental or ancillary powers and provisions herein contained or implied by statute, in the same manner as if no such appropriation or allotment had taken place, [and so that any part or parts of my residuary real estate so appropriated or allotted, shall from the time of my death, for the purpose of transmission, be deemed to be of the nature of personal estate]; And that, subject as aforesaid, the property so appropriated or allotted, and the proceeds of sale and conversion thereof, and the stocks, funds, [shares,] and securities in or upon which the

Power for trustees to appropriate property in or towards satisfaction of legacies and shares of residue.

Conversion and Investment.

same shall be invested, or representing the same for the time being, shall be held upon the like trusts and with and subject to the like powers and provisions as are herein declared or contained concerning the legacy or share in respect of which such appropriation or allotment shall have been made.

Power for trustees to make advances to son out of trust funds.

30. I AUTHORISE my trustees or trustee, in their or his discretion, to advance and lend to my son [*name*], for the purposes of his business, any sum or sums not exceeding in the whole £——, out of the said trust funds, at such rate of interest, for such period, and on such personal or other security, as my trustees or trustee shall think fit (*f*).

Trust to invest in purchase of lands to be settled to uses of will;

31. I DECLARE that my trustees or trustee shall from time to time as and when they or he shall in their or his discretion think proper lay out and invest the clear proceeds arising from the sale, calling in, and conversion of my residuary personal estate in the purchase of freehold or copyhold lands or other hereditaments held for an estate of inheritance in fee simple, to be situate in England or Wales; AND I DIRECT, that the hereditaments so to be purchased as aforesaid, shall be conveyed and assured to my trustees or trustee upon the trusts and for the intents and purposes in this my will expressed concerning the real estates hereby devised, or upon and for such of the same trusts, intents, and purposes as shall be then subsisting or capable of taking effect; And

in the meantime to be invested;

in the meantime, until the said trust moneys shall be so laid out, I DECLARE that my trustees or trustee shall at their or his discretion invest the same in their or his names or name (*insert investment clause, ante, forms* 18 *et seq.; and power to vary investments, form* 23): AND I DIRECT AND DECLARE,

income from investments to be applied as rents.

that the dividends and annual income arising from the said investments shall go and be applied in such and the same manner in all respects as the rents and profits of the hereditaments to be purchased with the said trust moneys would have gone and been applicable, if the same had been actually purchased pursuant to the trusts aforesaid.

General direction for investment of trust monies.

32. I DIRECT that my trustees or trustee shall invest all monies which shall come into their or his hands, applicable

(*f*) If the son is a trustee, add a proviso, as at the end of Form 5, *ante*, p. 868, substituting "sum or sums" for "purchase-money."

Conversion and Investment.

under any of the trusts, powers, or provisions of this my will, as and when such monies shall be received by them or him and until the same shall be required to be paid or transferred to any person or persons absolutely entitled thereto, or be applied for any purpose under any such trust, power, or provision, in the names or name [or under the legal control] of my trustees or trustee, at their or his discretion, in or upon any of the stocks, funds, [shares,] or securities following, that is to say: (*investment clause, Forms* 18 *to* 22, *and power to vary investments, Form* 23, *ante*, pp. 874 *et seq.*)

General direction as to consents to sales and investments.

33. PROVIDED ALWAYS, and I declare that [during the lifetime of my said wife no sale, conversion, investment, or variation of investment of [any part of] my residuary [real or] personal estate [in which she shall for the time being be interested] shall be made without her previous consent in writing; And that after the death of my said wife] no sale, conversion, investment, or variation of investment of any part of my said residuary estate, which shall have been appropriated, to answer the whole or any part of the share hereinafter given to my trustees or trustee in trust for any of my children and his or her issue, shall be made during the life of the child entitled to the income of such share, if of full age, without his or her previous consent in writing.

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## GENERAL POWERS OF APPOINTMENT OVER PERSONALTY.

To one by deed or will.

1. UPON TRUST for such person or persons, for such purposes, and in such manner, as the said [*donee of power*] shall, at any time or times, by any deed or deeds revocable or irrevocable, or by will or codicil appoint: AND IN DEFAULT OF, and subject to any such appointment, IN TRUST, &c.

To a female by will, and, while discovert, by deed.

2. UPON TRUST for such persons or person, for such purposes, and in such manner, as the said [*donee of power*] shall, at any time or times, during coverture, by will or codicil, or, while not under any coverture, by any deed or by will or codicil appoint: AND IN DEFAULT OF, and subject to any such appointment, IN TRUST, &c.

General Powers of Appointment.

To two and the survivor.

3. Upon trust for such persons or person, for such purposes, and in such manner, as the said [*donees of power*] shall, at any time or times, by any deed or deeds, revocable or irrevocable, jointly appoint: And in default of, and subject to any such joint appointment, then as the survivor of them the said [*donees*] shall, after the death of such one of them as shall first die, at any time or times, by any deed or deeds, revocable or irrevocable, or by will or codicil appoint: And in default of, and subject to any appointment made under either of the powers hereinbefore contained, In trust, &c.

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## TRUSTS OF RESIDUARY FUNDS OF PERSONALTY.

Income to wife during her widowhood (*g*).

Request as to maintenance, &c., of children (*h*).

1*a*. Upon trust, that my trustees or trustee shall pay to my said wife, or permit her to receive, the income of the said trust fund, during her life, if she shall so long continue my widow: [And I request my said wife, out of such income, to maintain and educate such of my sons as shall, for the time being, be under the age of twenty-one years, and such of my daughters as shall, for the time being, be under that age, not having been married in a manner suitable to their station in life: But I declare, that such request shall not impose any

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(*g*) Gifts *till marriage* are valid: *Heath* v. *Lewis*, 3 De G. M. & G. 956; see *Evans* v. *Rosser*, 2 H. & M. 190.

Conditions in restraint of marriage.

Conditions *subsequent* in restraint of marriage are generally void, on grounds of public policy, if attached to a gift of personalty: *Morley* v. *Rennoldson*, 2 Hare, 570; or to a gift out of a mixed fund: *Bellairs* v. *Bellairs*, L. R. 19 Ex. 510; but, apparently, not so in the case of a gift of realty: *Jones* v. *Jones*, 1 Q. B. D. 279. But such a condition may be imposed upon a widow: *Lloyd* v. *Lloyd*, 2 Sim. N. S. 263; *Newton* v. *Marsden*, 2 J. & H. 356; or upon a widower: *Allen* v. *Jackson*, 1 Ch. D. 399.

(*h*) Where the residuary estate is given to the widow for her life, and there is no other fund applicable for the maintenance of the children, it is often thought advisable that the widow's life-interest should be expressed to be for the maintenance of herself and the maintenance and education of her children. As to what expression of the testator's intention that his widow shall maintain, &c., the children, amounts to a trust enforceable on the widow, see *Raikes* v. *Ward*, 1 Hare, 445; *Longmore* v. *Elcum*, 2 Y. & C. C. C. 369; *Gilbert* v. *Bennett*, 10 Sim. 371; *Carr* v. *Living*, 28 Beav. 644; *Bird* v. *Maybury*, 33 Beav. 351; see also Lewin on Trusts, 137, 138; and see as to precatory trusts, *ante*, pp. 516 *et seq.*

legal obligation on my said wife, and that she shall not be liable to account for, or in respect of any income so paid to or received by her :] AND (*i*) FROM AND AFTER her death, or future marriage, shall stand possessed of, and interested in the capital and income of the said trust fund,—

**Trusts of Residuary Personalty.**

After her death or re-marriage.

1*b*. IN TRUST for all or such one or more exclusively of the others or other of my children [or more remote issue, such issue to be born and take vested interests in the lifetime of my said wife, or within twenty-one years afterwards], at such age or time, or respective ages or times, and, if more than one, in such shares and proportions, and with and subject to such executory trusts, conditions, and limitations over (such trusts, conditions, and limitations over being for the benefit of some or one of my said children, or of the issue of such deceased child or children), and with such powers of advancement, either in the lifetime of my said wife or after her death, maintenance and education, at the discretion of my trustees or trustee, or of any other persons or person, and

Trust for children and remote issue as wife shall appoint (*j*).

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(*i*) The following clause may be here inserted, if desired :—

" AND if my said wife shall marry again my trustees or trustee shall out of the income of the trust fund pay to her during her life, without power of anticipation, an annuity of £——, by equal half yearly payments, the first of such payments to be made at the expiration of six calendar months after such future marriage, and shall pay and apply the residue of such income as if my said wife were actually dead : And from and after the death of my said wife, shall stand, &c."

Substitution of annuity for life interest in case of marriage.

(*j*) Where children take vested interests in a reversionary fund, of which the income is given to their parent for life, it is often expedient to reserve to the latter a power of varying the shares, as well for the purpose of securing to the donee parental influence as of enabling him to adjust the disposition to the exigencies of the respective objects, and introducing such modifications as circumstances may require ; and it has another advantage, not often considered, that it checks the children in the disposal of their reversionary interests ; for a vested share which is liable to be cut down or wholly defeated by an appointment, of course is not a marketable commodity.

As to giving to parents a power of selection.

In general, it is better that these powers should authorise an appointment to the issue of children living and dead. As to restricting the issue so as not to fall within the mischief of the rule against perpetuities, see *ante*, pp. 432 *et seq.* But a general power to a person *in esse* to appoint to issue without expressing at what time they are to be born is good, inasmuch as the power may be exercised so as not to infringe the rule : *Routledge* v. *Dorril*, 2 Ves. jun. 357 ; see *Thomas* v. *Thomas*, 14 Sim. 234.

**Trusts of Residuary Personalty.**

generally in such manner as my said wife [during widowhood] shall, by deed revocable or irrevocable, or by will or codicil appoint: [PROVIDED NEVERTHELESS, that, if my said wife shall marry after my death, the power of appointment lastly hereinbefore reserved to her, shall, from and after such her marriage, cease and determine, but without prejudice to any previous appointment by deed made in exercise of such power:] AND IN DEFAULT OF, and subject to any such appointment,—

Trust for children equally.

1*c*. IN TRUST for all and every my children or child, who, being sons or a son, shall attain the age of twenty-one years, or, being daughters or a daughter, shall attain that age or marry under that age, and if more than one in equal shares as tenants in common.

Hotchpot clause.

1*d*. PROVIDED ALWAYS, that no child who [or whose issue (*k*)] shall take any share, or shares, or interest in the trust fund, by virtue of any appointment or appointments, under the power hereinbefore contained, shall, in the absence of an express declaration to the contrary in any such appointment, take any share in the unappointed part of the said trust fund, without bringing such appointed share or shares, or interest, into hotchpot, and accounting for the same accordingly.

Trust for wife for life, without power of anticipation;

2*a*. UPON TRUST, to pay to my said wife, or permit her to receive, the income of the said trust fund during her life, but without power of anticipation; And from and after her death my trustees or trustee shall stand possessed of, and interested in, the capital and income of the said trust fund,—

for testator's children and issue as wife shall appoint (short form);

2*b*. IN TRUST for such one or more of my children or more remote issue (such more remote issue to be born in the lifetime of my said wife), in such shares, if more than one, subject to such provisoes and restrictions, and in such manner in all respects as she my said wife shall, by deed or will, or codicil, appoint: AND IN DEFAULT OF, and subject to any such appointment,—

in default of appointment;

for children and issue living at wife's death, per stirpes;

2*c*. IN TRUST for all and every the children and child of mine who shall survive me and be living at the death of my said wife, and who shall attain the age of twenty-one years or marry, if more than one, in equal shares; And also the issue then living, and who shall attain the age of twenty-one years

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(*k*) These words are necessary where there is power to appoint among remoter issue, and where the trusts in default of appointment are confined to children or extend to remoter issue.

**Trusts of Residuary Personalty.**

or marry, of any children or child of mine who shall have died in the lifetime of my said wife (whether in my lifetime or after my death), such issue, through all the degrees, to take *per stirpes*, and if more than one in equal shares, as between themselves, such share or respective shares only as his or their parent or respective parents would have been entitled to if living, absolutely.

Hotchpot clause.

2*d*. PROVIDED ALWAYS, that no child, or other issue (*l*), who or whose issue, &c. (*continue as in Form* 1*d*.)

Trust for wife for life, to be applied for maintenance of herself and children;

3*a*. UPON TRUST, to pay to my said wife, or permit her to receive, the income of the said trust fund, during her life, but so that she shall not have any power to anticipate the same during any future coverture; Subject nevertheless to the obligation of my said wife, suitably and adequately to maintain and educate all and every my children and child, until they, he, or she, shall attain the age of twenty-one years or marry under that age respectively, in such proportions and manner as she shall in her discretion think proper; And from and after the death of my said wife, UPON TRUST that my trustees or trustee shall stand possessed of and interested in the capital and income of the trust fund,—

after the death of wife.

Trust for children, sons at twenty-one, daughters at twenty-one or marriage;

3*b*. IN TRUST for all and every my children and child who shall be living at the time of my death, and who, being sons or a son, shall attain the age of twenty-one years, or, being daughters or a daughter, shall attain that age or marry under that age, if more than one, in equal shares; subject, nevertheless, as to the shares of such of my children as shall be daughters, to the trusts hereinafter declared concerning the same.

settlement of the shares of daughters;

3*c*. BUT I DECLARE, that if such children or child, or any of them, shall be daughters or a daughter, then my trustees or trustee shall stand possessed of and interested in [one moiety of] the trust fund, or [of] the share thereof, to which such daughter or each of such daughters shall become entitled, upon the trusts following, namely: [UPON TRUST, with the consent in writing of my daughter entitled thereto, and, after her death, in the discretion of my trustees or trustee, to convert the same into money, and invest the monies to arise therefrom in or upon any of the stocks, funds, shares, or securities hereinbefore mentioned and authorised for the in-

investment;

(*l*) These words are necessary where the trusts in default of appointment extend to remoter issue.

**Trusts of Residuary Personalty.**

vestment of the proceeds of sale and conversion of my residuary estate, with power from time to time, with the like consent or in the like discretion, to vary the investment or investments of the same monies for any other or others of the description contemplated by this trust (*m*) : ] And shall stand possessed of and interested in the share of such daughter or each of such daughters, and the investments representing the same (hereinafter called the said settled fund), and the dividends, interest, and income thereof,—

inalienable life interest ;

3*d*. Upon trust, to pay the income of the said settled fund unto such daughter, or each of such daughters, or permit her to receive the same during her life, but without power of anticipation, while under any coverture ; And from and after the death of my same daughter, shall stand possessed of and interested in the capital and the future income of the said settled fund,—

children and other issue of daughter, as she shall appoint ;

3*e*. In trust for all or such one or more of the children or remoter issue of my same daughter (such remoter issue being born in her lifetime or within twenty-one years after her death), in such proportions, for such interests, and generally in such manner as she shall by deed, revocable or irrevocable, or will or codicil, appoint : And in default of, and subject to any such appointment.

in default to children equally ;

3*f*. In trust for all and every the children and child of my same daughter, who, either before or after her death, shall, being sons or a son, attain the age of twenty-one years, or, being daughters or a daughter, attain that age or marry, such children, if more than one, in equal shares [*Hotchpot clause*, *ante*, p. 886, Form 1*d*, substituting "settled fund" for "trust fund"] ; But if no child of any such daughter of mine shall live to acquire a vested interest in such daughter's share, then,—

as daughter shall appoint ;

3*g*. In trust for such persons, for such interests, and generally in such manner in all respects as my same daughter shall, while not under any coverture, by deed revocable or irrevocable, or, whether covert or sole, by will appoint ; And in default of, and subject to any such appointment, In trust for the person or persons who, at the death of my same daughter, under the statutes for the distribution of intestate's effects, would be entitled to her personal estate if she had

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(*m*) The words in brackets may be omitted if the will contains general directions as to investment of trust monies ; and as to consents to such investments, see *ante*, p. 883, Form 33.

Trusts of Residuary Personalty.

died a spinster and intestate, such persons, if more than one, to take in the proportions prescribed by the same statutes.

daughter empowered to appoint a life interest to a husband.

3*h*. And I empower my same daughter, notwithstanding the trusts herein contained by deed, executed either after or in contemplation of her marriage, or by will or codicil, to appoint the whole or any part [*or*, any part not exceeding one moiety] of the annual income, to accrue due after her death, of the said settled fund, unto or for the benefit of any husband of the same daughter who shall survive her, during the remainder of his life or for any less period, and subject to such provisions and restrictions as she shall think fit. [And I further empower my same daughter, by deed so executed as aforesaid, to declare that the power hereinbefore given to her amongst her children and remoter issue, shall be exerciseable by herself and husband jointly by deed during their lives, and on the death of either of them, and in default of subject to any such appointment, then by the survivor of them by deed or will.]

Power for daughter to vary power of appointment to children.

Income of one moiety to wife during widowhood.

4*a*. Upon trust, as to one moiety of the said trust fund, to pay the income thereof unto my said wife, or permit her to receive the same during her widowhood (*n*).

Trust for children, sons at twenty-five, daughters at twenty-one or marriage, sons' shares being double those of daughters.

4*b*. And as to, as well the said moiety of the said trust fund (subject as aforesaid), as also the other moiety thereof, immediately after my death, In trust to pay or transfer or divide the same respectively to, between, or among all and every my children and child who shall survive me, and, being sons or a son, shall attain the age of twenty-five years, or, being daughters or a daughter, shall attain the age of twenty-one years, or marry under that age with the consent of her or their guardians for the time being (if any), for the absolute benefit of such children respectively, in such shares and proportions that the share of each son of mine shall be double the share of each daughter of mine.

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As to provisions for widow.

(*n*) This form, and two others which have preceded it, exhibit much variety in the mode of providing for the testator's widow. In Form 1, the widow takes the entire income for her own use during her widowhood; in Form 3, she takes the income for life, charged with the maintenance of the testator's children; and in the present instance, the widow takes an immediate life interest in a moiety during widowhood, the other moiety being given to the children, on failure of whom before the vesting age the widow also takes an interest for life (not during widowhood merely) in this moiety.

**Trusts of Residuary Personalty.**

Settlement of shares of daughters.

4*c*. And I hereby declare, that if such child or children, or any of them, being daughters or a daughter, shall attain the said age of twenty-one years, or marry with such consent as aforesaid, or shall marry with my consent in my lifetime (which shall for all the purposes of my will be considered as a marriage with consent (*nn*)), my trustees or trustee shall stand possessed of and interested in the said trust fund, or the share thereof to which such daughter, or each of such daughters, shall become entitled (subject, nevertheless, to the trust concerning the income of one moiety of the trust fund in favour of my said wife during her widowhood as aforesaid), upon the trusts hereinafter expressed (that is to say), whether such daughter shall marry before attaining the age of twenty-one years, or shall attain such age without having married, Upon trust to continue or invest the same respective share in the names or name of my trustees or trustee, in or upon such investments as are hereinbefore authorised for the investment of the proceeds of sale of my residuary estate, with power from time to time to vary the same as often as shall be deemed expedient; And to hold the said trust fund, or the share of such daughter, or of each of such daughters, and the investments representing the same (hereinafter called "the settled fund"), and the dividends, interest, and income thereof, upon the trusts following; (that is to say,)

Trusts for daughters during their lives.

4*d*. Upon trust, to pay the income of the settled fund to such daughter or each of such daughters, or permit her to receive the same during her life; And from and after the death of such my daughter, shall hold the capital and future income of the said settled fund.

Trust for the children equally.

Clause of accruer.

4*e*. In trust (*o*), for all and every the children or child of such daughter of mine absolutely, if more than one, in equal shares; And if any one or more of the said children, being a son or sons, should die under the age of twenty-one years, or, being a daughter or daughters, should die under that age without having been married, then as to as well the original share or shares of the trust fund, belonging to the child or

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(*nn*) These words are merely declaratory: *Tweedale* v. *Tweedale*, 7 Ch. D. 633.

(*o*) Here, it will be observed, the daughters have no power of selection, (as in form 3*g*). Such a power has a salutary tendency in increasing parental influence, and enabling the donee to adapt her disposition of the property to the circumstances existing at the time of its exercise.

Trusts of Residuary Personalty.

children respectively who shall so die as aforesaid, as also the share or shares thereof to which the same child or children respectively may become entitled under this present trust, IN TRUST for the other or others of the said children absolutely, in equal shares, and if more than one, or if there should be originally only one child of such my daughter as aforesaid (*p*), Then IN TRUST for such only child, absolutely.

Remainder in default of children of daughter, then upon the trusts declared of the remaining shares.

4*f*. PROVIDED ALWAYS, that, if there should be no child of such daughter of mine, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, Then, as to the part of the said trust fund, constituting the share or shares, as well original as accruing under this present proviso, of such daughter as aforesaid, I HEREBY DECLARE that my trustees or trustee shall stand possessed thereof, upon the trusts and for the purposes by this my will declared concerning the other or remaining shares of the trust fund, for the benefit of my other children respectively, or such their issue as aforesaid, so far as the same trusts and purposes shall then be subsisting and capable of taking effect. And in case none of the trusts declared by this my will concerning the other or remaining shares in favour of my other children or their issue should be then subsisting, or in case such trusts should afterwards fail, then the share or shares of such my daughter respectively who shall die without leaving any child who shall acquire an absolutely vested interest as aforesaid, shall be subject to the trusts of this my will, which are subsequent and ulterior to the trust hereinbefore declared in favour of my child and children, and the issue of any deceased child or children as aforesaid (*q*).

Power to daughters to bequeath life interests to surviving husbands.

4*g*. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that, notwithstanding the trusts hereinbefore contained concerning the shares of my said daughters respectively, it shall be lawful for any such daughter of mine as aforesaid, in case she

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As to limitations of personalty, with clauses of accruer.

(*p*) This form exemplifies what does not occur in any previous one, namely, a gift to the children as they come into existence of immediate vested interests, with a clause of accruer causing their interests to be divested on their dying before the age of distribution; the more usual and better course is to suspend the vesting until the latter period.

(*q*) A power of advancement as to the shares of daughters may be here inserted, if desired. For a form of such a power, see *post*, p. 916.

**Trusts of Residuary Personalty.**

should have no child who shall acquire an absolutely vested interest in the share of such daughter in the said trust fund, under the trusts hereinbefore contained, by will or codicil, to appoint UNTO OR IN TRUST for the husband of such daughter respectively, who may happen to survive her, for his own use and benefit, the income arising from the share of such daughter respectively in the said trust fund, for any term or period not exceeding the life of such husband respectively (*r*).

Clause substituting the issue of children dying before the vesting age;

4*h*. PROVIDED ALWAYS, that if any of my children should die before me, or before he, she, or they shall have acquired a vested interest or vested interests in the said trust premises under the trusts aforesaid, then such child or children of each child of mine so dying as shall attain the age of twenty-one years, or marry under that age, shall take the share in the said trust fund which his, her, or their parent would have taken under the trusts aforesaid, if he or they, being a son or sons, had attained the age of twenty-five years, or, being a daughter or daughters, had attained the age of twenty-one years or been married with such consent as aforesaid, and if more than one, in equal shares; But, in case no child of mine, being a son, should survive me, or attain the age of twenty-five years, or leave a child or children surviving me and attaining the age of twenty-one years, or marrying under that age, or no such child, being a daughter, shall live to attain the age of twenty-one years or to marry with such consent as aforesaid, or leave a child or children surviving me and attaining the age of twenty-one years or marrying under that age, then I DECLARE, that my trustees or trustee shall stand possessed of the moiety of the said trust fund, the income whereof is not hereinbefore bequeathed in trust for my said wife during her widowhood, or so much thereof as shall not have been applied and disposed of under the power of advancement hereinafter contained,—

on failure of children;

remaining moiety upon trust,

for wife for life and, subject thereto,

upon trusts for testator's niece and her children, by

4*i*. UPON TRUST, to pay the income of such last-mentioned moiety unto my said wife, or permit her to receive the same during her life; And after her death then as to the entirety of the said trust fund, in the events aforesaid, UPON SUCH AND THE LIKE TRUSTS, and to and for such and the like

(*r*) There would, in general, be but little hesitation to give daughters a power of this nature on failure of children; in which respect the present power differs from the one in the Form 3*h*, where it is made to take precedence of the trust in favour of the children.

Trusts of Residuary Personalty.

intents and purposes, and with, under, and subject to such and the like powers, provisoes, and declarations, for the benefit of my niece, [*name*], and her children, or her surviving husband (being an appointee), as are hereinbefore expressed and declared concerning the share of each of my daughters in the said trust fund; And if my said niece should die without leaving any child who shall acquire a vested interest under the trust lastly hereinbefore contained, then as to the whole of the trust fund, after the death of my said niece, and after the determination of the interest of any surviving husband of her my said niece (being an appointee), IN TRUST, &c. (*s*).

reference to trusts for testator's daughters.

Trust for son for life.

5*a*. UPON TRUST, that my trustees or trustee shall pay the income of the trust fund to my son, [*name*], or permit him to receive the same during his life, subject to the proviso hereinafter contained: PROVIDED ALWAYS, AND I HEREBY DECLARE, that if the said [*son*] should at the time of my death have alienated, charged, or disposed of, or if he shall, at any time or times thereafter, alienate, charge, or dispose of the said income or any part thereof or interest therein, or if, by reason of his bankruptcy or other event happening either before or after my death, the said income shall, wholly or in part, fail or cease to be personally enjoyed by the said [*son*], but the same or any part thereof shall, or, but for this present proviso, would belong to, or become vested in some other person or persons, then the trust hereinbefore expressed concerning the said income shall immediately thereupon cease and determine, and the same income shall be held by my trustees or trustee during all the then residue of the life of the said [*son*] in the manner following, (that is to say):

Proviso for cesser of life interest on bankruptcy, &c.

Discretionary trusts of income after bankruptcy, &c., of son.

5*b*. UPON TRUST during the residue of the life of the said [*son*], or during such shorter period, continuous or discontinuous, as my trustees or trustee shall in their or his absolute discretion think fit, to pay and apply the said income, or any part thereof, to and for the personal support and maintenance,

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(*s*) As the shares of sons do not vest before they attain the age of twenty-five years, sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), does not apply, and accordingly an express power of maintenance should be added in this place, followed by an advancement clause, if desired. For forms of maintenance and advancement clauses, see *post*, pp. 910 *et seq.*

(*t*) For other forms of trusts for life determinable on bankruptcy, &c., see *ante*, Form 6, p. 827, and *post*, Form 6, p. 895.

Trusts of Residuary Personalty.

or otherwise for the benefit, of the said [*son* (*u*)] or his wife, child, or children, or remoter issue, for the time being, if any, whether infants or of full age, of the said [*son*], or such one or more, exclusively of the others or other of such persons, and in such manner as my trustees or trustee, in their or his absolute discretion, shall think fit.

Trust to accumulate unapplied income for 21 years.

[*5c.* And subject to the discretionary trust lastly hereinbefore contained, Upon trust, for the period of twenty-one years after my death, to accumulate and invest the income of the trust fund, or so much thereof as shall from time to time not be paid or applied as aforesaid by my trustees or trustee, in augmentation of the principal or capital of the trust fund, in the nature of compound interest: And from and after the failure or determination of the trust of income hereinbefore contained in favour of the said [*son*] during his life, and after the expiration of twenty-one years after my death my trustees or trustee shall hold the capital of the trust fund, and the accumulations (if any) thereof, but subject to the discretionary trust aforesaid,—]

On failure of trust,—

Income to be applied as if son were dead.

*5d.* Upon trust to pay and apply the income thereof, or so much as shall not from time to time be applied under the same discretionary trust to the person or persons, and in like manner as the same would be payable or applicable under the ulterior trusts concerning the same hereinafter contained, as if the said [*son*] were then actually dead,—

Trusts, on death of son, for his wife and children.

*5e.* And from and after the death of the said [*son*], my trustees or trustee shall hold the trust fund [and the accumulations, if any, thereof], and the future income of the same, Upon trust to pay the income of the trust fund unto the present or any future wife of the said [*son*], who may happen to survive him, during the life of such wife, without power of anticipation; And, after her death, Upon trust to transfer the capital of the said trust fund unto or among such child or children of the said [*son*], whether born before or after the determination of his said life interest, as shall attain the age of twenty-one years or die under that age leaving issue, for his, her, or their absolute use and benefit, and if more than one in equal shares.

Trust, in default of children of A.,

*5f.* And, in case the said [*son*] should have no child who shall acquire a vested interest in the trust fund under the

(*u*) But see as to this, *ante*, p. 840, note (*r*).

**Trusts of Residuary Personalty.**

trusts aforesaid, then I DIRECT that my trustees or trustee shall stand possessed thereof, and of the income thereof, after the death of the said [*son*] and of any wife who may happen to survive him as aforesaid, UPON TRUST for my son, [*other son*], for his absolute use and benefit, and, if he shall die in my lifetime whether leaving issue or not, Upon trust for his executors or administrators, as part of his personal estate [*or*, UPON the trusts and purposes, and with, under, and subject to the powers, authorities, provisoes, and declarations herein expressed and contained of and concerning the fourth part or share of my said residuary estate and the proceeds thereof hereinbefore limited in trust for my said son, [*other son*], or his children or issue.]

for B. absolutely, [*or*, trusts by reference].

Trust for son for life determinable on bankruptcy, &c. (short form).

6*a*. UPON TRUST, that my trustees or trustee shall pay the income of the trust fund to my son [*name*], unless and until he shall have done, committed, or suffered, or shall at any time or times after my death do, commit, or suffer any act, default, or thing, which would have the effect of vesting the right to receive such income, if absolutely belonging to my said son, in any other person or persons whomsoever.

Discretionary trust of income after bankruptcy, &c., of son.

6*b*. AND in the event of the failure or determination during the life of my said son of the trust of income hereinbefore expressed in his favour, I HEREBY AUTHORISE my trustees or trustee in their or his absolute discretion to pay or apply the income to the trust fund, or any part thereof, to or for the personal support and maintenance or otherwise for the benefit of my said son, or his wife, or children, or remoter issue (if any) for the time being, and the persons or person interested in the trust fund under the ulterior trusts hereinafter contained, or such one or more exclusively of the others or other of such persons and in such manner as my trustees or trustee shall, in their or his absolute discretion, think fit: And subject to such discretionary power shall hold the income of the trust fund during the residue of the life of the said [*son*] upon the trusts upon which the same would for the time being be held if the said [*son*] were then actually dead: And from and after the death of the said son, &c. [*ulterior trusts as in form 5e, supra*].

Life interest absolutely determinable on bankruptcy.

7. UPON TRUST, &c. [*ut ante, Form 6a*]: AND from and after the failure or determination during the life of the said [*son*] of the trust of income hereinbefore expressed in his favour, my trustees or trustee shall hold the trust fund and the

**Trusts of Residuary Personalty.**

future income thereof upon the trusts and for the purposes upon and for which the same would be applicable respectively under this my will if the said [*son*] were then actually dead: And from and after the death of the said son, &c. [*ulterior trusts*].

Trusts for several legatees successively for their lives.

8. Upon trust that my trustees or trustee shall pay to [*legatee*], of, &c., or permit him to receive the income of the trust fund during his life: And from and after his death shall pay to [*second legatee*], of, &c., or permit her to receive the income of the trust fund during her life, but so that she shall not have power to anticipate the same during her present [*or*, any] coverture: And from and after her death shall hold the capital and future income of the trust funds upon the trusts following, that is to say, Upon trust, &c. [*or*, In trust for [*third legatee*], of, &c., absolutely].

General proviso in restraint of anticipation.

9. Provided always, that no female taking an interest for life [or absolute, and whether in possession, reversion, remainder, or expectancy] under the foregoing trusts shall have power to anticipate the same during any coverture (*v*).

General proviso for cesser of life interests on bankruptcy or alienation.

10. Provided always, that if any person in whose favour any trust of income during his or her life is hereinbefore declared shall at the time of my death have alienated, charged, or disposed of, or if he or she shall at any time or times thereafter alienate or dispose of the income to which he or she shall be, or, but for this proviso, would be entitled, or any part thereof, or interest therein, or if by reason of his or her bankruptcy or any other event happening either before or after my death, such income shall, or, but for this proviso, would, wholly or in part, fail or cease to be personally enjoyed by such person as aforesaid, but the same income, or any part thereof, shall, or, but for this proviso, would be or become vested in some other person or persons, then the trust of income hereinbefore declared in favour of the person whose life interest or any part thereof shall so fail or cease to be personally enjoyed by him or her, and shall be or become vested in some other person or persons as aforesaid, shall immediately thereupon cease and determine: And from and after the failure or determination of such trust of income my trustees or trustee

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(*v*) As to restraints on anticipation by a woman in respect of bequests of the capital of a fund, see *ante*, p. 800: see also Vol. VI. sub tit. Settlements.

Trusts of Residuary Personalty.

shall, during the residue of the life of the person, the trust in whose favour shall have so failed or determined, pay or apply the income, the trust whereof shall have so failed or determined, to or for the benefit of the person or persons who would be entitled thereto under the ulterior trusts hereinafter declared, if such person as aforesaid were dead [*or*, to or for the benefit of the wife or husband and children of such person as aforesaid during the remainder of his or her life, in such proportions, at such times, and in such manner as my trustees or trustee shall in their or his absolute discretion think fit].

General proviso for forfeiture of reversionary interests on bankruptcy or alienation (*w*).

11. PROVIDED ALWAYS, that if any person who shall at my death be, or at any time thereafter shall become, entitled to any reversionary interest in the said trust fund, shall at any time before the vesting in possession of such interest, and whether before or after my death have alienated, charged, or disposed of such interest or any part thereof (otherwise than by way of settlement made in contemplation of, or, with the consent of my trustees or trustee after the marriage of any person so entitled as aforesaid), or if by reason of his or her bankruptcy or any other event happening such interest should, or, but for this proviso, would on falling into possession not be personally enjoyed by the person so originally entitled as aforesaid, but the same or some part thereof should or, but for this present proviso, would become vested in some other person or persons, then the trusts thereinbefore declared in favour of the person whose reversionary interest or any part thereof shall so fail or cease to be personally enjoyed by him or her, and shall be or become vested in some other person or persons as aforesaid, shall immediately thereupon cease and determine, and from and after the failure or determination of such trusts my trustees or trustee shall pay or apply the capital and income of the share in the trust fund, the trust whereof shall have so failed or determined, to or for the benefit of the person or persons who would be entitled thereto under the trusts herein declared if the person so forfeiting his or her interest had died in my lifetime without leaving issue.

Trust to pay income of fund to three

12*a*. UPON TRUST to pay the income of the trust fund [*or*

(*w*) An executory gift over of real or personal property on alienation of an absolute *possessory* interest is void: see *Re Dugdale*, 38 Ch. D. 176, and the cases there cited.

**Trusts of Residuary Personalty.**

the said sum of £——] among and between [A.], [B.], and [C.], and the survivors of them, in equal shares, during their joint lives and unto the survivor of them during his life.

persons and the survivors and survivor.

12*b*. And from and after the death of such survivor: Upon trust to hold the capital and income of the said trust fund, As to one equal third part thereof, subject nevertheless to the trusts of the income thereof hereinbefore declared for such person or persons as the said [A.] shall by will or codicil appoint; and as to one other equal third part of the said trust fund for such person or persons as the said [B.] shall in like manner appoint; And as to the remaining one equal third part of the said trust fund for such person or persons as the said [C.] shall in like manner appoint; such respective parts to be paid in such shares and at such times and subject to such powers, provisoes, conditions, and restrictions, and generally for such purposes and in such manner as the said [A.], [B.], and [C.] shall respectively, by will or codicil, appoint: And in default of and subject to any such appointment.

General testamentary power of appointment as to capital of each third part.

Trust for survivor.

12*c*. Upon trust for the ultimate survivor of them the said [A.], [B.], and [C.], absolutely.

Trust for testator's younger children at twenty-one or marriage.

13. Upon trust that my trustees or trustee shall stand possessed of and interested in the trust fund and the dividends, interest, and annual produce thereof, In trust for and to be equally divided between or among all my children other than my eldest or only son or daughter for the time being entitled as tenant for life to the freehold estates hereby devised who, being a son or sons, shall attain the age of twenty-one, or being a daughter or daughters shall attain that age or marry under that age, with the consent of their or her guardian or guardians for the time being; And if there shall be but one such child other than as aforesaid who being a son shall live to attain the age of twenty-one years, or being a daughter shall live to attain that age, or marry under that age with such consent as aforesaid, then the whole shall be in trust for that one or only child other than as aforesaid; And if there shall be no child of mine other than as aforesaid, who being a son shall attain the age of twenty-one years, or being a daughter shall attain that age or marry under that age, with such consent as aforesaid, then the trust fund shall be in trust for my eldest or only son or daughter so for the time

Trusts of Residuary Personalty.

being entitled as aforesaid, and shall be a vested interest in such son on his attaining the age of twenty-one years, or in such daughter attaining that age or marrying under that age with such consent as aforesaid.

Trust for the children of testator or another person attaining twenty-one or marriage, and the children of deceased children (*x*).

14. In trust for such child or children of mine [*or* of [*name*]] living at my death [*or* at the death of the said [*name*]], and such child or children of any child or children of mine [*or*, of the said [*name*],] dying before me [*or* before the said [*name*]], as being a male or males, shall attain the age of twenty-one years, or being a female or females shall attain that age or marry under that age, if more than one, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of a deceased child of mine [*or* of the said [*name*]] shall take only the share which such deceased child would have taken if he or she had survived me [*or* the said [*name*]] and acquired a vested interest.

Trust for children, unequal shares (*y*).

Power for trustees to allot investments of shares instead of paying them in cash.

15. Upon trust that my trustees or trustee shall out of the trust fund pay to my daughter [A.] the sum of £——, and to my daughter [B.] the sum of £——, and shall pay or transfer to my son [C.] the ultimate residue of the trust fund, after raising thereout and paying the said sums of £——, and £—— respectively, as aforesaid: Provided always that my trustees or trustee may, at their or his discretion, in lieu of raising and paying the said sums of £—— and £—— as aforesaid, appropriate competent amounts of the stocks, funds, [shares,] or securities in or upon which the trust fund may for the time being be invested, and transfer to the said [A.] and [B.], or either of them, stocks, funds, [shares,] or securities of a value equal to the sum hereinbefore directed to be raised and paid to them or her, but

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(*x*) This clause may easily be adapted to the case of a trust for children, &c., living at the death of the testator and his wife; or particular children may be named, which would have the effect of excluding not only living children not named, but also children born after the date of the will. See also pp. 792 *et seq.*, which are also applicable, with slight alteration, to gifts of residuary personalty.

(*y*) The effect of this clause is that if the residue should be insufficient to pay in full the sums given to the daughters, such gifts will abate as between themselves, without affecting the payment in full of any pecuniary legacies given in the earlier part of the will, and the son will take nothing under the gift of residue.

**Trusts of Residuary Personalty.**

so that the appropriation of such stocks, funds, [shares,] or securities, and the mode or means in or by which their value shall be ascertained, shall not be disputed or questioned by the said [A.] or [B.] or either of them.

Trust for children unequally. Another form (*z*).

16. Upon trust that my trustees or trustee shall pay or transfer one equal third part or share of the trust fund to my daughter [A.], and one other equal third part or share thereof to my daughter [B.], and the remaining equal third part or share thereof to my son [C.]: Provided always that if the amount or value of the trust fund shall at the period of distribution exceed the sum of £——, then each of my said daughters shall be entitled to and receive the sum of £——, being one equal third part or share of such sum of £——, and the surplus of the said trust fund, after raising and paying thereout the sum of £—— to each of my said daughters, shall be paid to my said son for his absolute use and benefit in addition to his one equal third part or share of the trust fund.

Trust for children at twenty-five; substitution of the children of any child dying under twenty-five.

17. Upon trust to pay, transfer, or divide the trust fund, unto, between, or among such child or children of mine as shall survive me and attain the age of twenty-five years, and the child or children living at or after my death of any child or children of mine who shall be dead at my death (*a*) or shall die under the age of twenty-five years, and if more than one in equal shares as between brothers and sisters, but so that the child or the children collectively of any child of mine dead at my death, or dying under the age of twenty-five years, shall take only such share as his, her, or their parent would have taken if living.

Proviso postponing vesting of grandsons' shares to the age of twenty-five, if not too remote.

18. Provided always, that if any grandson or grandsons of mine should attain the age of twenty-one years before the expiration of twenty-one years computed from the time of the death of the survivor of my children and more remote issue (if any) living at my death, then the vesting of the

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(*z*) The effect of this clause is that if the residue does not exceed the amount specified, the daughters and son will take in equal shares, otherwise the surplus will go to the son.

(*a*) See *Viner* v. *Francis*, 2 Br. C. C. 658; *Lee* v. *Pain*, 4 Hare, 250; *Dimond* v. *Bostock*, L. R. 10 Ch. 358: see also *ante*, pp. 463, 464, 616 *et seq.*

share of each such grandson in the trust fund shall be postponed to the expiration of such term of twenty-one years, or until the attainment by such respective grandson to the age of twenty-five years, which shall first happen.

Trusts of Residuary Personalty.

19. PROVIDED ALWAYS, that if any grandchild of mine, entitled to a share of the trust fund under the foregoing limitation (*see Form* 17), and who shall be living at my death or shall be of the age of four years or upwards at the time of the death of the survivor of my children (*b*), should die under the age of twenty-five years leaving issue surviving him or her, or in case any grandchild of mine, entitled to a share of the trust fund under the foregoing trusts, and who shall be born after my death and shall be under the age of four years at the time of the death of the survivor of my children, should die under the age of twenty-one years leaving issue surviving him or her, Then, and in every such case, the share or shares hereinbefore limited to such grandchild shall be held in trust for his or her child or children living at the death of such grandchild, and the child or children then living of any such child or children then dead, and if more than one in equal shares *per stirpes*.

Trust for issue of grandchildren.

20. PROVIDED ALWAYS, that in case any child or children of mine [*or*, of the said [*name*]] should die in my lifetime, [*or*, in the lifetime of the said [*name*]] leaving any child or grandchild who shall survive me [and the said [*name*]], my trustees or trustee shall stand possessed of the share or shares of the child or children so dying, of and in the trust fund, IN TRUST for such child and children of the child or children so dying as shall survive me [and the said [*name*]] and attain the age of twenty-one years or die under that age leaving issue, and such child or children of any child of the child or children so dying as aforesaid as shall attain the age of twenty-one years or die under that age leaving issue, and if more than one, in equal shares as between brothers and sisters, for the absolute use and benefit of such child or children, grandchild or grandchildren respectively; but so

Clause substituting the children of legatees in the event of their dying in the testator's lifetime.

(*b*) The above qualification is necessary in order to avoid infringing the rule against perpetuities, and it is so expressed as to take in as many objects as possible.

Trusts of Residuary Personalty.

that the child or the children collectively of any deceased child of my child or children [*or*, the child or children of the said [*name*]] so dying as aforesaid shall take only such share as his, her, or their parent would have taken if living.

Trust in default of children living to acquire a vested interest, for testator's wife if living and unmarried, and if not, then in trust for testator's sister.

21. PROVIDED ALWAYS, that if I should have no child or more remote issue who under the trusts herein contained shall live to acquire a vested interest in my said residuary personal estate and effects, and my said wife, [*name*], should be living and unmarried at the time of the default or failure of such children or issue, or should be living at the time of my death, which shall last happen, then the whole of my said residuary personal estate and effects, or so much thereof as shall not have been applied under any of the powers herein contained, shall be IN TRUST for my said wife, her executors, administrators, and assigns; But, if my said wife should be then dead or married, then the whole of my said residuary personal estate and effects, or the unapplied part thereof, shall be IN TRUST for my sister, [*name*], of, &c., her executors, administrators, and assigns.

Trust for brothers and sisters of testator living at his death and children of deceased brothers and sisters.

22. IN TRUST for all or any of my brothers and sisters living at my death and the children or child then living of any such brother or sister of mine as shall be then dead, who being males or a male shall attain the age of twenty-one years, or being females or a female shall attain that age or marry under that age in equal shares as tenants in common as between brothers and sisters, but so that the children collectively of any deceased brother or sister, if more than one, shall take equally between them only the share which their parent would have taken if he or she had survived me and acquired a vested interest under the trust lastly hereinbefore contained.

Trust for surviving brothers and sisters or their issue for life, per stirpes; and then to their children or other issue at twenty-one, &c., per stirpes.

23*a*. UPON TRUST to pay the income of the trust fund unto, between, or among such of my brothers and sisters as shall survive me, and the issue living at my death of any of my brothers and sisters who shall then be dead (other than the issue of a child or grandchild then living), during their respective lives, in equal shares as between or among children of the same parent; And so that the issue of any deceased brother or sister, or of any deceased brother's or sister's child or grandchild, shall collectively take only the share which such

Trusts of Residuary Personalty.

deceased brother or sister or brother's or sister's child or grandchild, would have taken if living; And after the death of each such brother or sister or brother's or sister's issue, as to the share whereof the income is so given to him or her for life, Upon such trusts for the benefit of any one or more of his or her issue (born in his or her lifetime), as he or she shall by deed or will appoint; And, subject thereto, In trust for such his or her children or child being males or a male as shall attain the age of twenty-one years or leave issue, or, being females or a female, shall attain that age or marry, and if more than one in equal shares.

Cross limitations between or among the several families.

23*b*. And, on failure of the trusts aforesaid as to such share, upon the trusts herein declared concerning the other shares or share (including this present limitation); And on failure of all the trusts aforesaid as to all the shares, then as to each share, Upon trust for the person to whom the income thereof is hereinbefore made payable, his or her executors, administrators, and assigns absolutely.

Hotchpot clause.

23*c*. Provided always, that no child or other issue of any of my said brothers and sisters, who or whose issue, &c. [*continue as on page* 886, *Form* 1*d*.].

Trust out of residue to pay annuities to two sisters.

24*a*. Upon trust that my trustees or trustee shall, out of the income of the trust fund, pay an annuity of £—— to my sister [A.] during her life, and another annuity of £—— to my sister [B.] during her life, but without power of anticipation by my said sisters respectively: And I direct that such annuities respectively shall be paid, clear of legacy duty [and succession duty] and all other deductions, by equal quarterly payments, &c. [*ut ante*, p. 825]: And subject to the said annuities respectively, my trustees or trustee shall hold the trust fund,

Trust to apply residue of income subject to annuities for maintenance, &c., of their children.

24*b*. Upon trust to pay or apply the residue of the income of the trust fund during the lives of my said sisters, and the life of the survivor, in or towards the maintenance and education or otherwise for the benefit of all and every the children and child of my said sisters respectively; And from and after the death of the survivor of my said sisters shall pay, transfer, or divide the whole of the trust fund to, between, or among every and all the child and children of my said sisters respectively, or of one or other of them, who shall attain the age of twenty-five years or die under that age

Trust after death of sisters for their children equally, per capita.

**Trusts of Residuary Personalty.**

leaving issue, be living, and, if more than one, in equal shares as tenants in common *per capita:* And I authorise my trustees or trustee, during the period of twenty-one years from my death (*c*), in their or his discretion, to apply only a part of the residue of the income of the trust fund, for or towards the maintenance, education, or benefit of each of the children of my said sisters during the said period of twenty-one years from the day of my death, and to accumulate the surplus income during such time, and to be possessed of such accumulations upon the trusts herein declared concerning the capital of the trust fund; And I declare, that if at any time or times after the expiration of twenty-one years from my death, there should be no child of either of my said sisters, then my trustees or trustee shall pay the whole income of the trust fund, until there shall be such child, to my said sisters during their joint lives in equal shares, and to the survivor of them during her life.

Power for trustees to accumulate income not required for maintenance, &c.

After expiration of 21 years from testator's death trustees to pay income, in default of issue, to sisters.

Ultimate gift over on default of issue of sisters.

24*c*. And if no child of either of my said sisters should be born or live to take an absolute interest in the capital of the trust fund, then I give the same to such of the issue of [*name*] (other than the issue of a child or grandchild then living) as shall be living at my death or at the time when such issue of my said sisters respectively shall fail (whichever shall last happen), in equal shares, *per capita*.

Trust for brothers and sisters for their respective lives;

25*a*. Upon trust to pay to all and every my brothers and sisters, during his or her life, the income arising from the share of the trust fund hereinafter limited in trust for his or her child or children, so that each brother or sister of mine

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(*c*) This provision, if not restricted as it is, might infringe to some extent against the Thellusson Act (*ante*, p. 450). The enactment prohibiting accumulation of income beyond a certain period, unlike the rule against perpetuities, does not make entirely void a provision for accumulation which transgresses the limits which that act prescribes; but only invalidates the direction for accumulation during that part of the period which exceeds the limits. An express restriction is, therefore, not absolutely necessary; but is useful for the purpose of informing the trustees and parties interested as to their duties and rights, and of preventing questions as to the destination of the income after the period has elapsed. Of course, a direction to accumulate, which would, prior to the passing of the Thellusson Act, have been wholly void for remoteness, is not set up by the operation of that Act, so as to be valid for the period of twenty-one years: see *ante*, p. 451.

Trusts of Residuary Personalty.

shall from time to time be entitled to the income from such share of the said trust fund as his or her child or children shall, or in the case of an unmarried or childless brother or sister would, if he or she had any child or children, be presumptively entitled to for the time being under the trusts and limitations hereinafter contained; And as to each sister of mine, without power of anticipation; And, subject to the life-interests of my said [wife and] brothers and sisters respectively in the income from the whole or any share or shares of the said trust fund.

and subject thereto.

25*b*. Upon trust to pay, transfer, or divide the said trust fund to, between, or among such children or child of my brothers and sisters (including brothers and sisters already dead, or who shall be dead at my death), and such children or child of any nephew or niece of mine dying before me as, being males or a male, shall attain the age of twenty-one years or leave issue, or, being females or a female, shall attain that age or marry, in equal shares as between or among the children of the same parent, and also in equal shares as between or among the different families, so that the child or the children or issue collectively of one brother or sister of mine shall take an equal share with the child or the children or issue collectively of any other brother or sister, and so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living.

Trust for children of brothers and sisters attaining twenty-one years, &c.

26*a*. Upon trust, as to one equal moiety of the trust fund, that my trustees or trustee shall from time to time pay or apply all or any part or parts of the capital thereof and income therefrom, unto such person or persons, in such manner, upon such trusts, for the benefit of my brother, [*name*], and subject to such (if any) personal superintendence on the part of my said trustees or trustee, as they or he shall think fit; And, after the death of my said brother, shall dispose of the residue (if any) of such moiety of the trust fund in such manner as if the same were part of my said brother's personal estate, and he had died intestate (*d*).

Trust as to a moiety of residue to apply income or capital for benefit of lunatic brother;

after his death to divide any surplus among his next of kin.

26*b*. And upon trust, as to the other one equal moiety of

Trust as to

(*d*) The concluding words of this clause will exclude any question as to the legatee's capacity, in case it should be alleged that he had left a will.

**Trusts of Residuary Personalty.**

the trust fund, that my trustees or trustee shall pay the income thereof, or permit the same to be received by my sister, [*name*], during her life, but without power of anticipation, during any coverture; And from and after the death of my said sister:

other moiety for sister for life;

then for sister's husband for life;

26*c*. Upon trust to pay the said income to any surviving husband of my said sister during his life; And, after the death of my said sister, and of her surviving husband (if any), then as to the said moiety of the said trust fund, and the income thereof.

then for surviving issue of sister, as she shall appoint;

26*d*. In trust for such child or children or other issue of my said sister, born during her lifetime, at such age or time, or respective ages or times, and if more than one, in such shares and proportions, and with such future or executory or other trusts for the benefit of the said issue, or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of my trustees or trustee or of any other person or persons, and upon such conditions, with such restrictions, and in such manner as my said sister shall by deed or will appoint. And in default of such appointment, and so far as any such appointment shall not extend:

for children of sister surviving her and her husband at twenty-one, and surviving children of deceased children;

26*e*. In trust for such children or child of my said sister, [*name*], already born or to be born, as shall be living at the death of the survivor of my said sister and her said husband, and shall attain the age of twenty-one years, and such child or children of any child or children of my said sister dying in the lifetime of my said sister or of her said husband (*e*), or under the age of twenty-one years, as shall be living at the death of the survivor of them my said sister and her said husband, and if more than one, in equal shares as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of my said sister shall take only the share which his, her, or their parent would have taken if living. [*Hotchpot clause, ut ante*, p. 886, *mutatis mutandis*.]

and on failure of all the foregoing trusts, as sister shall

26*f*. And, subject to the trusts hereinbefore contained, and to any appointment hereinbefore authorised, and in case there should be no child or children or other issue of my said sister,

(*e*) Not *any* surviving husband, because that would be too remote, as there is a possibility that the sister may marry a person not born until after the testator's death.

Trusts of Residuary Personalty.

who shall live to take a vested and absolute interest in the whole of the said moiety of the said trust fund under the trusts, powers, or authorities hereinbefore contained, then upon such trusts and for such purposes as my said sister shall at any time or times, while not under any coverture, by deed revocable or irrevocable, or by will or codicil, or while under any coverture by will or codicil appoint; And in default of and subject to any such appointment, In trust for my said sister [her executors, administrators and assigns] absolutely.

appoint; and in default of appointment, for her absolutely;

27*a*. Upon trust, as to one moiety of the said trust fund, that my trustees or trustee shall pay the income thereof to my brother [*name*], during his life, and after his death to his widow during her life; And, after her death, shall transfer the capital of such moiety to or for the benefit of any child or children of my said brother [*name*], in such manner and (if more than one) in such proportions as he shall by deed or will appoint; And, subject thereto, shall transfer such moiety unto such child or children of my said brother, and such child or children living at my death of any child or children of my said brother who shall be dead at my decease, as shall attain the age of twenty-one years or marry, if more than one in equal shares as between brothers and sisters; Provided that the child or children of any deceased child shall take only such share as his, her, or their parent would have taken if living. [*Hotchpot clause.*] And on failure of the trusts aforesaid shall be possessed of such moiety upon the trusts herein declared concerning the other moiety of the said trust fund.

as to one moiety for brother for life; then to his children as he shall appoint; and in default, equally;

on failure of such trusts, upon trusts declared of the other moiety.

27*b*. And, as to the other moiety of the said trust fund, shall pay one equal sixth part of the income thereof unto each of the four children of my deceased brother [*name*], during his or her life, and, while any such my niece shall be married, without power of anticipation; And, after his or her death, shall transfer one equal sixth part of the capital of such moiety of the said trust fund to such child or children of each such my nephew or niece as shall attain the age of twenty-one years or marry, if more than one in equal shares; And shall transfer one other equal sixth part of such moiety of the said trust fund to such child or children of my deceased nephew [*name*], as shall attain the age of twenty-one years or marry, if more than one in equal shares; And shall transfer the remaining sixth part of such moiety of the said trust

As to four-sixths of another moiety for children of deceased brother, for life, and then for the grandchildren:

as to other two-sixths, for children of deceased nieces;

**Trusts of Residuary Personalty.**

cross limitations over.

fund to such child or children of my deceased niece [*name*], as shall attain the age of twenty-one years or marry, if more than one in equal shares; And shall be possessed of every such sixth part of the said moiety of the said trust fund estate whereof all the trusts hereinbefore declared shall fail, upon such of the trusts herein declared concerning the other parts of such moiety as shall be subsisting; And, on failure of all the trusts hereinbefore declared concerning such last-mentioned moiety of the said trust fund, shall be possessed thereof upon the trusts herein declared concerning the other shares of the said trust fund.

Trust for brothers and sisters by names, in shares for their lives, and then for their children, with cross limitations;

as to one —th, for brother and his children;

on failure of children, on the trusts of the other shares;

28*a*. In trust, as to one ——th part thereof for my brother, [*name*], during his life; and, after his death, In trust for such child or children of my said brother, [*name*], as shall attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, and such child or children of any child or children of my said brother dying before me as, being a male or males, shall attain the age of twenty-one years or leave issue, or, being a female or females, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of my said brother shall take only the share which such deceased child would have taken if living; And if there should be no such child or grandchild, then Upon the trusts herein declared concerning the other ——ths of the said trust monies and premises; And if all such trusts should fail of effect, then In trust for my said brother, [*name*], absolutely.

as to another —th for children of deceased brother at twenty-one, &c.;

if no such child, over;

28*b*. And, as to another ——th part of the said trust monies and premises, In trust for such child or children of my deceased brother, [*name*], as shall survive me and attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, and such child or children of any child or children of my said brother, [*name*], dead at my death, as shall survive me and attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of my said brother shall take only such share as such deceased child would have taken if living; And if there should be no such child or grandchild

Trusts of Residuary Personalty.

of my said deceased brother, then upon the trusts herein declared concerning the other —— ——ths of the said trust monies and premises.

as to the remaining —ths for other brothers and sisters by reference.

28*c*. And, as to each of the remaining ——th parts of the said trust monies and premises, Upon trusts in favour of each of my other brothers and sisters, [*names*], respectively, and their respective children or grandchildren, similar to the trusts above declared concerning the ——th share limited in favour of my said brother, [*name*], and with the like limitations over of each such share on failure of the original limitation thereof, and with the like ultimate limitation thereof on failure of such limitations over [*Insert a general proviso in restraint of anticipation of shares of females, ante*, p. 896, *Form* 9].

Trust for two cousins for life, then for their children at twenty-one, &c., with cross limitation.

29. Upon trust to pay one-half of the income of the trust fund to my two cousins [*names and descriptions*], for their respective lives, in equal shares, and after the death of each of them my said cousins, to pay, transfer, or divide one moiety or half share of the capital to, between, or among such his [*or* her] child or children as shall live to attain the age of twenty-one years or leave issue, and, if more than one, in equal shares; And if either of my said cousins should die without having any child who shall live to attain the age of twenty-one years or leave issue, then as to the moiety or share of him [*or her*] so dying, In trust for the other of them my said cousins during his [*or* her] life, and after his [*or* her] death, for her child or children, in the same manner in all respects as his [*or* her] original share; And if there should be no such child of either of my said cousins, then, as to the whole of the trust fund, In trust for the survivor of them my said cousins absolutely.

Trust for three nieces for life, then for their children and issue at twenty-one, &c., with cross-limitations.

30. Upon trust to pay one-third of the income of the trust fund to each of my three nieces [*names*], during her life, but without power of anticipation; And, after her death, to transfer one-third of the capital thereof to such her child or children living at my death, and such child or children then living of any her child or children then dead as shall attain the age of twenty-one years or marry (if more than one in equal shares) and his, her, or their executors, administrators, and assigns; But so that the child or the children collectively of any deceased child shall take only the

Trusts of Residuary Personalty.

share which his, her, or their parent would have taken if living; And if there be no such issue, then to be possessed of such third part of the last mentioned trust premises and the income therefrom, upon the trusts herein declared concerning the other two third parts thereof and the income therefrom; And, if there be no such child of any of my said nieces, then to transfer the whole of the last-mentioned trust premises in such manner as the survivor of my said nieces shall by will, or, being sole, by deed appoint; And, subject thereto, in such manner as if the same were part of her personal estate, and she had died without leaving a husband.

General proviso as to vesting of shares.

31. PROVIDED ALSO that no person being a member of any class to or among whom any interest in the trust fund is given under any of the trusts hereinbefore contained, shall take a vested share or interest in the same trust fund, unless and until such person being a male shall have attained or shall attain the age of twenty-one years, or, being a female, shall have attained or shall attain that age, or shall have married or shall marry under that age.

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## POWERS AND PROVISIONS RELATING TO REAL AND PERSONAL PROPERTY LIABLE TO CONVERSION.

Maintenance clause (*f*) (general form).

1. PROVIDED ALWAYS, and I hereby declare, that my trustees or trustee may, at any time after the death of my said wife [*or*, after the determination of all prior life interests hereby created or to be created by any appointment in exercise of any power

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(*f*) It is now unnecessary to insert an express maintenance and accumulation clause except in cases where sect. 43 of the Conveyancing Act, 1881, has no application, *e. g.*, where the period of vesting is postponed beyond the age of twenty-one years (see *Re Judkin's Trusts*, 25 Ch. D. 743); or where maintenance is to be provided for out of capital; or where recourse may be had to the income of all the shares as a common fund for the maintenance of a class.

herein contained (*g*)], apply the whole, or such part as they or he shall think fit, of the income of the expectant or presumptive share of any child [grandchild or otherwise] of mine [*or*, of the said [*name*]], under the trusts hereinbefore contained, for or towards the maintenance and education [or otherwise for the benefit] of such child [or grandchild or other issue], whether or not there is any other fund applicable to the same purpose, or any person bound by law to provide for the maintenance or education of such child [grandchild, or other issue]: And may, at their or his absolute discretion, either themselves so apply the same income, or any part thereof, or may pay the same to the parent or guardian or guardians of such child [grandchild, or issue], for the purposes aforesaid, without seeing to the application thereof. Powers, &c.

2. PROVIDED ALWAYS, that as to all or any part of the trust fund [*or*, any trust monies] whereof the income shall not for the time being be payable to some person or persons for life, or otherwise, under any of the trusts hereinbefore contained, and under some appointment in exercise of some power hereby given, and to which trust fund [*or* trust monies], or some part thereof, some person under the age prescribed for the vesting of share or interests in the trust fund [*or* said trust monies] (hereinafter called a minor) shall for the time being be presumptively or expectantly or actually entitled under the trusts of this my will, or under some such appointment as aforesaid, my trustees or trustee shall apply the whole, or such part as they or he shall think fit, of the income thereof for or towards the maintenance or education, or otherwise for the benefit of such minor, until he or she shall attain the age aforesaid [*or* shall acquire a vested interest therein under any of the trusts, powers, and provisions hereinbefore contained]; And that my trustees or trustee either may themselves or himself so pay or apply the same, or may pay the same to the parent or guardian or guardians of such minor [*or* to any other person or persons], Proviso for maintenance of minors (*h*); trustees may pay maintenance-money to guardians.

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(*g*) Add here, if required:—

"Subject, nevertheless, and without prejudice to the payment of the several annuities hereinbefore bequeathed."

(*h*) This form applies to trusts under which [as in form 20, *ante*, p. 798] interests are to vest after twenty-one years of age.

Powers, &c.

for the purposes aforesaid, without seeing to the application thereof or being bound to inquire whether the maintenance of such minor is or ought to be otherwise provided for.

Power for trustees to provide for maintenance, &c., out of capital.

3. PROVIDED ALWAYS, and I declare that it shall be lawful for my trustees or trustee, in addition to the powers for maintenance and education by law vested in my trustees or trustee, to apply not only the income but also any part of the capital of the said trust fund, or so much thereof as my trustees or trustee shall deem sufficient, in, for, or towards the maintenance, education, and advancement, or otherwise for the benefit of any of my said children during their respective minorities, in such manner as my trustees or trustee shall think fit; And the surplus or residue thereof unapplied to the purposes aforesaid shall, from time to time, be invested by my trustees or trustee in augmentation of the capital of the said trust fund, and shall follow the destination thereof (*i*).

Maintenance of infant children as a class irrespective of their shares.

4. PROVIDED ALWAYS, and I hereby authorise my trustees or trustee, in addition to the powers for maintenance and education by law vested in them or him, so long as there are two or more members of the same family who are infants, not having received any part of their respective shares by way of advancement, under the power in that behalf hereinafter contained, or in the case of daughters not having been married, and who are absolutely or contingently entitled to shares in the trust fund under the trusts hereinbefore contained, to pay or apply the whole or any part of the income of the trust fund (but without prejudice to any share which has become payable to any member of such family (*j*)) for or towards the

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As to provision for maintenance and advancement.

(*i*) Here it will be observed, the provisions for maintenance and advancement are united, the whole of the capital as well as the income of the fund being made applicable to either purpose. The usual authority to apply accumulations for future maintenance is therefore not needed. A provision of this kind is often very useful where the fund is small and the child will have to earn his living.

(*j*) If so desired, the following words may be substituted for the words in parentheses in the text:—

"And for this purpose, with power to suspend payment of the capital and income of any share which has become payable to any member of such family."

But such an arrangement seems open to objection on grounds both of fairness and convenience.

common maintenance, education, or benefit of such infants, without regard to the shares in which such infants are respectively so entitled. Powers, &c.

5. And I declare that my trustees or trustee shall, during the suspense of absolute vesting of any such principal fund or shares as aforesaid, accumulate all the residue (if any) of the same income by way of compound interest, by investing the same and all the resulting income thereof from time to time in or upon any such stocks, funds, shares, or securities as are hereinbefore authorised for investments, for the benefit of the person or persons who, under the trusts, powers, and provisions herein contained, shall become entitled to the principal fund or share from which the same respectively shall have proceeded; With power for my trustees or trustee to resort to the accumulation of any preceding year or years, and to apply the same for or towards the maintenance or education of the person or persons for the time being presumptively or expectantly or actually entitled to the same, in the same manner as such accumulations might have been applied in case they had been income arising from the original trust fund in the year in which the same shall be so applied. Proviso as to accumulation of surplus income.

6. Provided always and I hereby direct that my trustees or trustee in the case of any person who is entitled in possession to a life interest under the trusts hereinbefore contained, and who is an infant under the age of twenty-one Proviso that accumulations of infant tenants for life shall go to them absolutely (*k*).

(*k*) It would seem advisable that a proviso as in the text should be inserted where infants take life interests under a will. In the case of *Re Buckley's Estate*, 22 Ch. D. 583, a fund was bequeathed to trustees in trust for an infant, with a gift over in case of his death before attaining twenty-one years of age; it was held by *Fry*, J., that under sect. 26 of the stat. 23 & 24 Vict. c. 145 (the language of which is similar to that of sect. 43 of the Conveyancing and Law of Property Act, 1881, except that the former Act does not apply to life interests), accumulations of surplus income not required for maintenance belonged to the infant who died under twenty-one, and not to the persons who ultimately became entitled to the property from which the accumulations arose. It is, perhaps, somewhat difficult to reconcile this decision with a strict construction of the terms of the section, but in any case it does not seem that the decision extends to the

Powers, &c.

years, shall hold so much of the surplus income as shall not have been paid or applied for his or her maintenance, education or benefit under the powers by law vested in my trustees or trustee and the accumulations thereof in trust for such infant absolutely, and to be paid to such infant on attaining the age of twenty-one years, or, being a daughter, on her marriage under that age; AND I DECLARE that to this extent and no further I intend to exclude the provisions contained in the 43rd section of the statute intituled the Conveyancing and Law of Property Act, 1881.

General power to accumulate surplus income.

7. I DECLARE that my trustees or trustee shall accumulate any income from trust moneys or trust property not immediately applicable under any of the trusts, powers, or provisions herein contained, by way of compound interest, by investing the same and all the resulting income thereof from time to time in or upon any such stocks, funds, [shares], or securities as are hereinbefore authorised for investments, in increase of the capital of such moneys or property, or, if such income be actually vested in a legatee or devisee for life, for the benefit of such legatee or devisee.

Power of advancement.

8. PROVIDED ALWAYS, AND I DECLARE, that (*l*) my trustees or trustee may, with the consent in writing of my said wife

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case of an infant taking only a life interest. See on this point Lewin on Trusts, p. 584, and Wolst. and Turn. Conv. Acts, p. 100.

(*l*) It is still necessary to insert in wills express powers of advancement, where desired, as no such powers are conferred upon trustees by any statute.

Where the statutory powers for maintenance and education given by the Conveyancing Act, 1881, are relied on, the following words may be here inserted:—

"In addition to the powers for maintenance and education by law vested in my trustees or trustee."

These words are not essential, but may usefully be inserted as a guide to the trustees, both in the previous power of advancement to children and as here where the power is by reference.

In framing such powers by reference it must be remembered that, although the statutory powers for maintenance and education may properly be relied on in the case of the ordinary trust for children at twenty-one or marriage under that age, they may not apply to the interests taken by all other beneficiaries, and, when this is the case, express powers in a general form should be inserted (see *supra*, Form 2, p. 911) applicable to children and all other beneficiaries.

Powers, &c.

[*or*, of the said [*name*] ], during her life [*or*, widowhood], and after her death [*or*, remarriage, *or*, after his death], then in the discretion of my trustees or trustee, apply any part, not exceeding one-half, of the capital of the vested or contingent presumptive or expectant share or respective shares of any child [or other issue] of mine [*or*, of the said [*name*] ] in the trust fund, in or towards the advancement, or otherwise for the benefit, of such child [or other issue], in such manner as my trustees or trustee shall think proper, whether such child [or other issue] shall be under the age of twenty-one years or not (*m*).

Power to advance shares of testator's issue, where life-interests are to cease on alienation; (*general form*).

9. Provided always, and I hereby declare, that my trustees or trustee, at any time or times after the determination or failure of any prior life-interest or life-interests (if any) hereby created or to be created by any appointment in exercise of any power herein contained, at their or his absolute discretion, or, previously to such determination, with the consent in writing of the person or persons entitled to such prior life-interest or life-interests, may raise and apply any part or parts not exceeding in the whole one-half of the then vested, expectant, contingent, or presumptive legacy, share, or portion of any person under any of the trusts or limitations contained herein, or in any codicil hereto, for the advancement or benefit of such person, as my trustees or trustee shall think fit.

Power of advancement by majority of trustees.

10. Provided always, and I hereby further direct, that it shall be lawful for my trustees or trustee for the time being, or the majority (if more than two), with the consent of the guardians or guardian for the time being (if any), of my said children or issue respectively, or the majority (if more than two), or, if there should not be any guardian or guardians, and after my children shall have attained the age of twenty-one years, then at the absolute discretion of my trustees or trustee, to advance and apply any part or parts of the respective expectant or presumptive portion or share,

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(*m*) The power of advancement should not be confined to minority, where the vesting of the legatee's interest depends on survivorship, or may otherwise be deferred beyond the period of majority.

Powers. &c.

portions or shares, of such child or issue respectively of and in the said trust premises (not exceeding the sum of £—— for each such child or issue), for the putting or placing him or her as a clerk or apprentice in or to any profession, trade, or business, or otherwise for his, her, or their benefit or advancement in the world, and also to advance to such of my said children or issue as shall settle in business with the consent or approbation of my trustees or trustee, and shall have attained the age of twenty-one years, the whole or any part or parts of such expectant or presumptive portion or share, portions or shares, although such child or children or issue respectively should not, at the time or respective times of advancing or applying the same for any or either of the purposes aforesaid, have acquired a vested interest or vested interests therein.

Power of advancement out of settled shares of daughters.

11. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my trustees or trustee, during the life of any such daughter of mine as aforesaid, with her consent in writing, and after her death then in the discretion of my trustees or trustee (but without prejudice to the aforesaid trust for the benefit of my said wife), to apply any part not exceeding one-half of the principal or value of the presumptive or vested share of each or any of the children or issue of each daughter of mine as aforesaid under the trusts hereinbefore contained [or under any appointment to be made as aforesaid], in or towards the advancement or preferment in the world, or otherwise for the benefit, of the child to whom such share shall actually or presumptively belong; [But no such application as last aforesaid shall be made after her death to the prejudice of the life interest of any husband in whose favour an appointment shall have been made by her, under the power for that purpose hereinbefore contained, without his consent].

Power of advancement out of a mixed fund, (*general form*).

12. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my trustees or trustee, at any time or times hereafter, to raise by sale, mortgage, or otherwise, any part or parts, not exceeding in the whole one-half of the value, or estimated value (to be ascertained for that purpose in such manner as my trustees or trustee shall in their absolute and uncontrolled discretion think fit), of the then expectant or

Powers, &c.

presumptive or vested legacy, portion, or share of any person, under any of the trusts, powers, or authorities herein contained, and pay or apply the same for his or her advancement or benefit, as they or he, the said trustees or trustee, shall think fit; PROVIDED ALWAYS, that no such advancement shall be made of the capital of any trust moneys, funds, or securities whereof the income shall for the time being be payable to any person for her or his life under any of the trusts, powers, or authorities aforesaid, without her or his consent in writing.

Authority to trustees to raise £—— for advancement of son by first wife.

13. AND I AUTHORISE my trustees or trustee for the time being, other than my said wife [*second wife*], and notwithstanding her dissent, at any time or times after my death, to raise and apply not more than £—— for the advancement in life of [*name*], my son by my first wife [*name*]; [And I exclude my said wife from a voice in this matter, not from any want of confidence in her, but in order to relieve her from any imputation which the exercise of such a discretion could possibly subject her to].

Powers for maintenance, education, and advancement, by reference to similar powers for children.

14. PROVIDED ALWAYS AND I HEREBY DECLARE that [all or any of (*n*)] the power[s] or provision[s] for [maintenance, education, and accumulation and application of surplus income during minorities, and] advancement hereinbefore contained for the benefit of my said child or children shall extend and be applicable for the benefit of all or any of the persons taking any share or interest under this my will as if the same power[s] or provision[s] were here repeated, with such alterations as the circumstances of the case may require, subject, nevertheless, and without prejudice to any trusts, powers, or provisions herein contained, to take effect in priority to the shares or interests of such persons respectively.

Appointment of trustees of will to be trustees for purposes of sect. 42 of the

15. PROVIDED ALWAYS and I hereby appoint the trustees or trustee for the time being of this my will to be the trustees or trustee for the purpose of exercising the powers of management of my real estate hereinbefore directed to be sold until sale thereof, and receipt and application of the income thereof,

(*n*) Where the statutory powers for maintenance and education given by the Conveyancing Act, 1881, are relied on all the words and letters in brackets in this form should be omitted.

**Powers, &c.**

Conveyancing &c., Act, 1881 (*o*).

Incorporation by reference of the provisions of the section.

Direction as to accumulations of surplus income.

and other the powers conferred by the 42nd section of the Conveyancing and Law of Property Act, 1881; And I declare that my trustees or trustee shall exercise all such or similar powers, subject to the same or the like provisions and in the same or the like manner as are or is contained and expressed in the same section; PROVIDED ALSO that all accumulations of surplus income not otherwise applied, and subject to the provisions so far as they are not inconsistent with the present proviso of the 42nd and 43rd sections of the Conveyancing and Law of Property Act, 1881, shall be held and applied by my trustees or trustee for the benefit of the person or persons who if he, she, or they had not attained the age of twenty-one years, or in the case of a female married under that age, would have been entitled to the receipt of such income, and if

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(*o*) It is not, perhaps, quite clear whether, in the case of a mixed fund of realty and personalty held upon trust for conversion (to which the preceding and following clauses under the headings of "Powers and Provisoes" are intended to be applicable), so much as consists of real estate pending conversion comes within the operation of the 42nd section of the Conveyancing Act, 1881. Where the shares of infants in the proceeds of sale of realty directed to be sold are vested in possession, it would seem that as every well drawn trust for sale is followed by a power to postpone sale, and by trusts of the rents and profits until sale, the doctrine of conversion would hardly be sufficient to exclude real estate pending conversion from the meaning of the word "land" in that section. But there is no express decision on the point, and the opinion of conveyancers is not unanimously in favour of this construction: see Key & Elph. Conv. Prec., Vol. II., p. 742, note; Greenwood R. P. Stats. p. 294. Where the shares are reversionary or contingent the 42nd section has no application: see *Re Horne's Settled Estate*, W. N. 1888, pp. 111, 126.

So far as regards powers of management, where the 42nd section does not apply, either the powers of management conferred by the section must be incorporated by reference or express powers of management must be inserted. It should be borne in mind that the powers of management vested in the trustees by sect. 42 only apply to land or shares in land of infants during their minorities; it will, therefore, often be necessary where lands are devised on trust for sale, to give express powers of management, &c., exercisable at any time until the sales are completed. So far as regards powers of maintenance the 43rd section is expressed to apply to every kind of property, but, as its provisions with respect to the destination of accumulations of surplus income differ from those in the 42nd section, it seems prudent, where both apply or are likely to apply, that an express accumulation clause, such as is given in the text should be inserted.

there should be no such person, then for the benefit of the person or persons who shall ultimately become entitled to the property from which such income shall arise. Powers, &c.

16*a*. I DECLARE that my trustees or trustee may, until sale of all the freehold and leasehold messuages, lands, and premises hereinbefore devised and bequeathed in trust for sale, receive the rents and profits, and cultivate, drain, manage and improve such premises, and make allowances and arrangements and settle accounts to or with tenants, and cut timber for repairs or sale, and insure against damage by fire, and pay all or any charges either of annual or gross sums, ground or other rents, and all other outgoings, and apply all or any part of the clear surplus income arising from such hereditaments for or towards the maintenance and education during minorities [*or*, suspense in vesting], and generally for the benefit of the person or persons beneficially entitled thereto [*or*, of the said [*name*] ], and to invest the remainder (if any) of such income in any of the investments hereinbefore mentioned and hereby authorised with the like power to vary such investments, and may resort to such accumulations for the maintenance or education or benefit of the person or persons for the time being actually or presumptively entitled thereto [*or*, of the said [*name*] ]; And, subject as aforesaid, I DIRECT that such accumulations shall follow the destination of the hereditaments or premises from which the same shall arise. Power to trustees to manage and receive rents until sale of lands.

16*b*. PROVIDED, nevertheless, that my trustees or trustee may, from time to time, authorise and empower, by writing under their or his hands or hand, or permit and suffer any person beneficially entitled under this my will to the rents and profits of the said trust premises or any part thereof if of full age, or any parent or guardian of any person so entitled who shall be for the time being under the age of twenty-one years, under this my will, to receive such rents and profits, and to exercise all the powers of management hereinbefore given to my trustees or trustee, and to apply all or any part of the clear surplus income from such trust premises, towards the maintenance and education or benefit of such person; the remainder (if any) of such income to be invested in the names or name of my trustees or trustee, and to be applicable as aforesaid. Trustees may depute their powers of management to guardians.

16*c*. PROVIDED ALSO, AND I EMPOWER my trustees or trustee, from time to time during the continuance of the trusts hereby Power to trustees to appoint bailiffs, &c.

Powers, &c.

created, in their absolute discretion, to appoint, retain, employ and dismiss such agents, bailiffs, stewards, receivers, clerks, accountants, or other persons to aid and assist them in the care and management of my said real estates, and in receiving and paying the rents, income, and produce thereof, or any part thereof, or otherwise in the performance and execution of the several trusts and purposes hereinbefore declared concerning my real or personal estate, as to my trustees or trustee may seem best, and also to pay or allow to all such agents, bailiffs, stewards, receivers, clerks, accountants, and other persons so appointed, retained, and employed from time to time, such salary or salaries, allowances, or other compensation, as may or shall have been usually paid or allowed by me, or otherwise as my trustees or trustee shall in their or his discretion think fit.

Power to manage (*short form*);

17*a*. And I declare, that, while my said freehold, copyhold, or customary and leasehold hereditaments, or any of them, shall remain unsold under the trust for sale hereinbefore contained, my trustees or trustee may receive the rents and profits thereof, and may, in their or his absolute discretion, at the cost of the said trust premises, repair, drain, improve, insure from fire, and manage the same, or such parts thereof as for the time being shall remain unsold; And also may adjust and determine in what proportions the expense of draining or other improvements shall be borne by the capital and income of the said trust premises respectively; And also may adjust, compound, and settle all accounts and claims respecting the same, and make such allowances to tenants and others in relation thereto as they or he shall think just; And also may exercise all or any of the powers of management lastly hereinbefore contained, either in person or by salaried agents, bailiffs, or deputies.

power to delegate.

Application of rents until sale.

17*b*. And I declare, that the rents and profits arising from the said freehold, copyhold, or customary and leasehold hereditaments and premises, from the time of my death until the sale thereof, shall from time to time (after payment thereout of the costs of fire insurance, repairs, management, ground rents, and other outgoings), be paid and applied in the same or the like manner in all respects as the annual income arising from the monies to be produced by the sale of such hereditaments would have been payable and applicable, by

virtue of the trusts hereinbefore contained, if such sale had been made. Powers, &c.

18. I HEREBY EMPOWER my trustees or trustee, with the consent of my said wife during her life [*or*, widowhood], and after her death or second marriage, at their or his discretion, to demise at the best rent obtainable without fine or premium, for any term not exceeding twenty-one years in possession, any part of my freehold, copyhold, or leasehold hereditaments and premises, which for the time being shall remain unsold under the trust aforesaid. Short power to lease lands for 21 years.

19. I DECLARE, that it shall be lawful for my trustees or trustee, from time to time, to let my said freehold, copyhold, or customary and leasehold hereditaments and premises, or such of them as for the time being shall not be sold under the trust for sale hereinbefore contained, or any part or parts thereof, for building, repairing, or improving purposes, for any term or terms not exceeding ninety-nine years, or for mining purposes for any term or terms not exceeding forty years, and for any consideration or considerations, either by way of fine, premium, rent, royalty, or otherwise, which they or he shall consider fair and adequate, or for cultivation, use, or occupation, at the best rent for the time being obtainable, without taking any premium or fine, either from year to year or for any term not exceeding twenty-one years from the time of letting, and with, under, and subject to such covenants and conditions as my said trustees or trustee shall think proper. Power to grant building and improving leases; mining leases, and husbandry leases (*short form*).

20. AND I DECLARE, that, while my said freehold, copyhold, or customary and leasehold hereditaments and premises, or any of them, shall remain unsold under the trust for sale hereinbefore contained, it shall be lawful for my trustees or trustee from time to time to let the same, or so much or such parts thereof as for the time being shall remain unsold, or any part of the same, at the best yearly rent for the time being obtainable, without taking any premium or fine, either from year to year, or for any term of years [in possession] (*p*) not exceeding twenty-one years from the time of letting, and with, and Power to lease for twenty-one years.

(*p*) These words are usual, but not always advisable. It is often convenient to grant a lease to commence in possession a few months after the time of execution.

Powers, &c.

subject to such covenants and conditions as my said trustees or trustee shall think proper, but so that there be contained therein a condition of re-entry for non-payment of the rent thereby to be reserved, and so that the lessee execute a counterpart thereof, and thereby covenant for the payment of the rent.

Power to grant mining leases.

21. PROVIDED ALSO that it shall be lawful for my trustees or trustee, with the consent in writing of the persons for the time being beneficially entitled to the rents and profits of the lands and hereditaments and premises hereinbefore devised and bequeathed in trust as aforesaid, or such of the persons so entitled as shall be of the age of twenty-one years, and, if there shall be no such person, at the discretion of my trustees or trustee, to demise and lease all or any mines, quarries, minerals, stones, gravel, clay, or other substances, whether the same shall have been previously opened or worked or not, in, under, or upon the said lands or any part thereof, which shall for the time being remain unsold, with or without the surface of the same lands, or any part thereof, and with or without any messuages, buildings, or lands convenient to be held therewith, for any term or terms not exceeding sixty years, to take effect in possession or within —— calendar months from the date of the lease, with such easements, rights, privileges, and powers for or with respect to sinking, searching for, winning, working, making merchantable, smelting, or otherwise converting or otherwise working for the purpose of any manufacture, carrying away of and disposing of any mines, minerals, or other substances, and erecting buildings, engines, and machinery, and executing engineering and other works, and with any other easements, rights, privileges, and powers for or incident to or connected with mining purposes in relation to the premises comprised in any lease granted under this present power; And to insert in any such lease powers of instroke and outstroke, and an average clause for enabling short workings in any one year to be made up in the following year or years without paying any royalty for the minerals or other substances gotten and raised, as shall be required to make up the deficiency, and a proviso for referring disputes to arbitration, and generally such powers, clauses, and provisions usual in mining leases as my trustees or trustee shall think proper or expedient, but so

Powers, &c.

that there be reserved in every such lease the best rent or rents, royalties, renders, and reservations, by the acre, ton, or otherwise, and either fixed in amount or variable according to the average worked, or the quantity or value of the minerals or substances gotten and raised, or made merchantable and sold, or otherwise as for the time being, and having regard to the circumstances of the case can be reasonably obtained without taking any fine or premium (*q*), and so that there be inserted in every lease granted under this present power a condition of re-entry for non-payment or non-delivery of the rent or rents, royalties, renders, and reservations thereby reserved, and so that the lessee or lessees execute a counterpart thereof, and thereby covenant for the payment or delivery of the rent or rents, royalties, renders, and reservations thereby reserved.

Power to grant building leases for ninety-nine years.

22. PROVIDED ALSO, that it shall be lawful for my trustees or trustee, with the consent in writing of the person or persons for the time being beneficially entitled to the rents and profits of the hereditaments hereinbefore devised and bequeathed in trust as aforesaid, being of the age of twenty-one years, and if there shall be no such person, then, at the discretion of my trustees or trustee to let or demise and lease any part of the said trust premises to any person who shall improve or covenant or agree to improve the same by erecting or building thereupon any new house or new erection, or to rebuild or repair any of the messuages, erections, and buildings whatsoever, which now are or which hereafter shall be upon the said hereditaments or any part thereof, or who shall expend or covenant to expend any sum of money in the improvement or amelioration thereof respectively, which the person or persons making such lease shall think adequate, having regard to the interest to be demised or other circumstances, for any

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(*q*) Or, if desired, the following words may be substituted for those in the text—

"Having regard to any fine or premium which shall be taken, and so that any such fine or premium shall be paid to my trustees or trustee and be held and applied by them or him as if the same formed part of the proceeds of sale of the lands and hereditaments so devised in trust as aforesaid."

Powers, &c.

term of years not exceeding ninety-nine years, at such rent or upon such terms and conditions as shall be thought reasonable, and without taking any fine or foregift for the making thereof beyond such covenants or agreements as aforesaid, but so that the lessee execute a counterpart of the lease so to be made to him as aforesaid, and thereby covenant for payment of the rent, and be not thereby exempted from liability for committing waste farther than shall be necessary for making or effecting the buildings or improvements thereby covenanted and agreed to be made.

Power to lease furnished house until sold.

23. PROVIDED ALWAYS, that until my said house in —— and my said house in —— shall be sold, it shall be lawful for my trustees or trustee to demise and lease the same; And, if they or he shall think fit, together with my said house, to demise or lease the furniture and other articles in or upon the same for such number of years, upon such terms, and in such manner as they or he shall consider to be for the benefit of the person or persons entitled to the same, under or by virtue of the trusts of my will; And the rent and annual income reserved or produced thereby shall be applied in the same manner as if the same were income arising from the investment of the proceeds of the sale of the said house or houses respectively, under the power and trusts herein contained.

Power to grant licences to copyhold tenants to demise.

24. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that it shall be lawful for my trustees or trustee, at any time or times, and from time to time, so long as my said manor of —— shall remain unsold, to grant to any customary or copyhold tenant or tenants of my said manor such licence or licences to demise or lease for any term not exceeding —— years in possession, all or any part of the messuages, lands, tenements, and hereditaments holden by such tenant or tenants respectively as my trustees or trustee shall think proper; but so that they or he accept and take the customary fines only for granting such licence or licences, and in all other respects conform to the custom of the said manor in relation thereto.

Power to sell lands in consideration of fee farm rents, &c.

25. PROVIDED ALWAYS AND I HEREBY DECLARE, that my trustees or trustee may sell, either by way of conveyance in fee or by way of demise for a term of years of any duration,

Powers, &c.

all or any part of the hereditaments hereinbefore devised on trust for sale in consideration of fee farm rents or perpetual rentcharges, or of the best yearly rents which can for the time being be reasonably obtained, such fee farm rents, rentcharges, and other rents respectively to be issuing or reserved out of and secured upon the hereditaments sold, or any part thereof, either alone or together with other hereditaments, or partly in consideration of such fee farm rents, rentcharges, or other rents and partly in consideration of a gross sum of money; And I declare that any such conveyances or demises may, at the discretion of my trustees or trustee, be made subject or not subject to any covenants or conditions for building upon or improving the lands sold or demised, and with or without power for the purchasers or lessees respectively to redeem any fee farm rent or rentcharge, or to purchase the reversion of and in any lands demised, and with and subject to any other covenants, conditions, or provisions, and that the said fee farm rents, rentcharges, and other rents to be payable, reserved, and secured in such manner as my trustees or trustee shall think proper; Provided also that any trustee shall, as soon as conveniently may be after any such sale or demise, sell and convert into money every such fee farm rent or rentcharge as aforesaid, and the rents and reversion of and in all hereditaments so sold or demised as last aforesaid, and shall hold the net proceeds of any such sale upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained of and concerning my residuary estate, and shall hold the said fee farm rents, rentcharges, and other rents, until sale, upon the trusts, and with and subject to the powers and provisions hereinbefore declared of and concerning the income of the same estate.

Power to apportion fee farm rents, &c., on sales.

26. I EMPOWER my trustees or trustee, upon any sale of a part or parts of any such hereditaments hereinbefore devised in trust for sale as are subject to a fee farm rent or perpetual rentcharge, or comprised in any lease at a yearly rent, to apportion any such fee farm rent, rentcharge, or yearly rent, and to make such arrangements and provisions for securing the payment by the purchaser or purchasers of the apportioned part or parts thereof, and for the performance and observance of the covenants and conditions of the grant or lease affecting the several parts of such hereditaments as

Powers, &c.

aforesaid, and for giving and receiving such indemnities as may seem proper or expedient with regard to the payment of and liabilities in respect of such fee farm rents, rentcharges, and yearly rents.

Power to partition;

27*a*. I EMPOWER my trustees or trustee to join in any partition of any of the hereditaments hereinbefore devised in trust for sale, and in any such partition to consent to any arrangement for the payment or receipt or securing of any money for equality of partition:

power to exchange;

27*b*. AND to exchange any of such hereditaments for other freehold or copyhold hereditaments in England or Wales, in fee-simple or held upon renewable lease for lives or years, or for an absolute unexpired term of not less than ninety-nine years, to be conveyed, as nearly as may be, to the uses and upon the trusts affecting the hereditaments so given in exchange immediately before such exchange (subject, as to any renewable leaseholds, to the payment of the expenses), incident to each renewal out of the income thereof:

power to enfranchise.

27*c*. AND to enfranchise or grant licenses to demise any copyhold or customary hereditaments held of any manor, which shall be subject to the trust aforesaid.

Discretionary power to trustees to relinquish or complete contracts.

28. PROVIDED ALWAYS AND I HEREBY EMPOWER my trustees or trustee either to complete any contract for sale or purchase of lands or hereditaments of any tenure which may have been entered into by me and remain uncompleted at the time of my death, or to rescind or relinquish the same, as circumstances may require, and as they or he, in their or his discretion (if it should be a matter of choice), shall judge most expedient: AND I AUTHORISE my trustees or trustee to accept any such title (whether strictly marketable or not) as they or he, in their or his discretion, shall deem it prudent or advisable to accept, and, if they or he think fit, to waive or dispense with any objections, requisitions, inquiries, or evidence, which they or he may be strictly entitled to insist on, make, or require, or which but for this authority they or he would be bound to make or require; And to make any arrangements for giving or receiving compensation for misdescriptions or mis-statements in the particulars or conditions of contract for any such sale or purchase, or any other matter or thing relating to the same, and to give in-

demnities to purchasers for any defect in title, and to pay or charge the same out of or upon my estate or any part thereof, and generally to act in relation to any such sale or purchase, as if they were acting as persons beneficially interested and not in any fiduciary capacity, without being responsible for any loss caused or occasioned thereby: AND I DECLARE, that all purchase and compensation monies payable in respect of any such purchase, and all costs of and incident to the completion, rescission, or relinquishment of any such sale or purchase, shall be paid out of, and all purchase or compensation monies and other monies receivable in respect of any such sale or purchase shall form part of my residuary estate, and that all lands and hereditaments so purchased shall be conveyed to and be held by my trustees or trustee upon the trusts and with and subject to the powers and provisions hereinbefore contained of and concerning the same estate. Powers, &c.

29. AND WHEREAS I have begun to make considerable alterations and improvements in my mansion-house at ——, which may not be completed at my death (*r*). Now in such case I HEREBY EMPOWER my trustees or trustee to carry on and complete the said alterations and improvements, or such part thereof as they shall think proper, out of the proceeds of my personal estate, or any other monies which shall come to their or his hands by virtue of my will. AND I FURTHER EMPOWER my trustees or trustee from time to time to expend such sum or sums of money as they shall deem expedient in the repair and improvement of any of the messuages and other buildings, lands, and hereditaments hereby devised, [and also of the messuages, buildings, lands, and hereditaments to be purchased by virtue of the trusts and powers aforesaid,] and also in the erection of any new and additional messuages and other buildings on any such lands and hereditaments devised [or to be purchased] as aforesaid, and generally to make such expenditure and outlay Authority to trustees to complete alterations in testator's mansion-house, and generally to improve his estate.

(*r*) This clause confers on the trustees a discretion in an event in which there would be an obvious inconvenience from their want of it. It often happens that trustees are obliged to resort to the Court, in consequence of the testator having neglected to arm them with discretionary powers adapted to all possible circumstances.

Powers, &c.

in the improvement and amelioration of the trust estate during the continuance of the trusts hereby created, as my trustees or trustee shall think proper and expedient (*s*).

Power to lay out streets, &c.

30. I EMPOWER my trustees or trustee to lay out all or any part of the hereditaments hereinbefore devised on trust for sale, for building purposes, and to appropriate and lay out any parts thereof, as they or he shall think fit, for streets, roads, ways, squares, gardens, or other open spaces, and to build, erect, lay down, make and execute upon, in, or under any parts of the same hereditaments, messuages, buildings, sewers, drains, gas pipes, water pipes, water courses, fences and other works necessary to or in connection with building purposes.

Power to take and keep up a dwelling-house and establishment for infant children;

31. I EMPOWER my trustees or trustee, at their or his discretion, to apply the whole or any part of the income applicable under or by virtue of this my will, for the maintenance and education of my child or children, during his, her, or their minority or respective minorities, in or towards providing a suitable residence for such child or children, until he, she, or they shall, respectively, attain the age of twenty-one years, or marry, and keeping up an establishment there [upon the same scale, and in the same manner, as far as may be, as my establishment shall have been ordinarily kept up previously to my death]; and for that purpose to take either from year to year, or for any term of years, or the residue of any unexpired term, a proper and convenient dwelling-house, with or without garden, pleasure grounds, and other appurtenances, and to pay all taxes, rates, assessments, costs of repairs and insurance, and other outgoings payable in respect of the dwelling-house and premises for the time being so taken, and also all expenses of keeping up such establishment as aforesaid; PROVIDED ALWAYS that my trustees or trustee may, at their or his discretion, allow any child or children of

Proviso that adult children may be

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(*s*) This clause gives great latitude of discretion; but, where the vesting is long protracted, it is of course important that the trustees should have ample powers of management. The words in brackets are applicable where there is a power to invest proceeds of sale and conversion of the residue in the purchase of land: see *ante*, p. 878, Form 26.

mine, who shall have attained the age of twenty-one years or married, to reside in and occupy any such dwelling-house and premises so taken as aforesaid, jointly with any child or children of mine who shall for the time being be under the age of twenty-one years and unmarried, and that either without contributing to the expenses of such dwelling-house and premises, and the establishment to be kept up therein, or upon such terms as to contribution towards such expenses, and generally upon such conditions and subject to such restrictions as my trustees or trustee shall think fit.

Powers, &c. allowed to share in the benefit of house and establishment.

32. PROVIDED ALWAYS AND I HEREBY DECLARE that my trustees or trustee may at any time, at the request in writing of my said wife during her life, and, after her death, at the discretion of my trustees or trustee, lay out any sum not exceeding £—— out of the trust fund in the purchase of some freehold, copyhold, or leasehold messuage or dwelling-house, situate in England or Wales (but so that any leaseholds be held for an absolute term, of which not less than —— years shall be then unexpired), and such furniture, plate, linen, china, and household effects as my trustees or trustee shall consider suitable to the same, and either with or without stables, gardens, or other pleasure grounds, and other appurtenances, and in payment of the expenses of and incidental to such purchase, and also (if my trustees or trustee shall in their or his discretion think fit) of the expenses of and incidental to repairing the said messuage so to be purchased, and of making the same and the gardens and pleasure grounds thereof (if any) fit for convenient habitation and occupation; and shall cause the same messuage, furniture, and premises, when so purchased, to be conveyed and assured unto and to the use of my trustees or trustee and their or his heirs, executors, administrators, and assigns respectively, according to the nature or quality thereof respectively to be held by them or him, In trust to permit my said wife to have the personal use and occupation of the same messuage, furniture, and premises as a residence for her and her younger children so long as she shall live and think fit to reside in the same messuage, she keeping the messuage, furniture, and premises insured against fire to the full value thereof in the names of my trustees or trustee, and also keeping the same messuage in tenantable repair, and paying the taxes and other outgoings affecting the same; And after the death of my said wife, In

Power for trustees to purchase a house, &c., for residence of wife and unmarried daughters.

Powers, &c.

trust to permit any daughters or daughter of my said wife who shall be spinsters or a spinster to have the personal use and occupation of the same messuage, furniture, and premises as their or her residence so long as they or she shall live and continue unmarried, and think fit to reside in the same messuage, they or she keeping the same so insured and in such tenantable repair and paying such taxes and other outgoings as aforesaid; And subject and without prejudice to the trusts aforesaid, In trust that my trustees or trustee shall, in their or his discretion, sell the said messuage, furniture, household effects, and premises; And I HEREBY DECLARE, that the net proceeds which shall arise from any such sale as aforesaid shall, subject to the payment thereout of the expenses incurred in or about such sale, or otherwise in or about the execution of any of the trusts aforesaid, fall into and constitute part of my residuary personal estate; And that the rents and profits of the said messuage and premises, or of the unsold part thereof, shall as well during any suspension as after the determination of any such occupation by way of residence as aforesaid, be considered as income arising from my said residuary personal estate, and be paid and applied accordingly; PROVIDED ALWAYS, &c. [*indemnity clause, ante*, p. 880, *Form* 26]; PROVIDED ALWAYS AND I HEREBY DECLARE, that if I shall during my life provide a messuage or dwelling-house or any of the other premises hereinbefore directed or authorised to be purchased for residence or use of my said wife, her younger children and unmarried daughters, and by devise or otherwise settle or appropriate the same for that purpose accordingly, then and in such case the same settlement or appropriation shall, to the extent to which the same respectively shall supply the purposes of the trusts hereinbefore declared of the said sum or sums not exceeding £—— raisable under the power in that behalf hereinbefore contained (but no further), be taken as a revocation and satisfaction of the said power and trusts.

Proviso for satisfaction of bequest of residence.

Authority to trustees to permit testator's widow to reside in his mansion-house;

33. PROVIDED ALWAYS, that if and so long as my trustees or trustee should find it impracticable or shall deem it inexpedient to sell or let my messuage or mansion-house at ——, and the garden and pleasure-grounds thereto belonging, it shall be lawful for such trustees or trustee, if they or he should think proper, to permit my said wife to reside in and occupy the said mansion-house, garden, grounds and premises, without paying any rent or other compensation for the

same; my said wife nevertheless, during her residence as aforesaid, keeping the said premises in good order, repair, and condition, and paying all taxes, rates, assessments, and other outgoings in respect thereof, including the expense of keeping on foot a policy of insurance in the sum of £——, to be effected in the names or name of my trustees or trustee. Powers, &c. widow to repair and insure.

34. Provided always, and I hereby declare, that, notwithstanding the trusts hereinbefore contained, it shall be lawful for my said son [*name*], either before or after marriage, by deed or will, to appoint the income of the trust fund, or any part thereof, unto or in favour of any wife or widow for the time being of my said son [*name*], during her life, either absolutely, or subject to such conditions and restrictions, and in such manner in all respects, as my said son shall think proper (*t*). Power to son to appoint income to wife for life.

35. Provided always, and I hereby declare, that it shall be lawful for any and every daughter of mine, notwithstanding the trusts hereinbefore contained, by will or codicil, to appoint to any husband who may survive her, during his life, any part not exceeding one moiety of the income of the share or fund, the income whereof is hereby made payable to such daughter; And also, subject to the trust hereinbefore declared in favour of the children of such daughter, and without prejudice thereto (*u*), to appoint to such husband during his life as aforesaid, the other or remaining moiety of such income. Power to daughters to appoint life-interests to husbands.

36. Provided always, and I hereby declare, that, if any daughter or daughters of mine shall marry before she or they Power to trustees to settle shares

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(*t*) This power would enable the son to make a settlement on an intended wife out of the trust fund.

A power of creating a provision for a wife is often a proper and convenient appendage to a life interest given to a male person, though such powers have certainly not obtained so general adoption, in reference to personalty, as the power of jointuring, which is ordinarily given to a tenant for life of real estate. The power in the text is made to extend over the whole fund, and to take effect, in derogation as well of the trusts in favour of the children of the donee, as of the ulterior objects. Sometimes, however, it is restricted to a definite share as against the children, and extended to the entirety as against the persons to whom the property is limited in default of children. As to authorising tenant for life of personalty to appoint a life interest to his widow.

(*u*) The effect of this power, it will be observed, is to enable the daughters by will to bequeath a *moiety* of the income to any husband as against the children, and the *entirety* as against all other objects of the trusts. For other provisions of a similar character, see *ante*, p. 836, Form 2; p. 889, Form 3*h*, and p. 891, Form 4*g*.

Powers, &c.

of daughters marrying under age.

respectively shall have attained the age of twenty-one years, my trustees or trustee may, if they or he should in their or his absolute discretion think fit, at any time or times, either in contemplation or after such marriage or marriages, to settle the whole or any part of the share of each such daughter respectively, in the trust fund, upon such trusts, for the benefit of such daughter so marrying and her intended husband, [and any future husband,] and children or more remote issue, [either by her then intended or any future husband,] or for the benefit of one or more exclusively of the other or others of those several objects, and in such manner and form in all respects, and upon such ulterior trusts, for the benefit of some issue of mine, or the husbands, wives, or intended husbands or wives, or all or any of the statutory next of kin of such issue, and with such powers, provisions, and declarations as my said trustees or trustee in their or his uncontrolled discretion shall think fit. And I direct, that my trustees or trustee may either themselves act, or may appoint any other persons or person to act, either solely or jointly with them or either of them, as trustees or trustee of any share or respective shares of any daughter or daughters of mine which may be for the time being subject to any settlement to be made under the power in that behalf lastly hereinbefore contained, and may apply or transfer such share or shares pursuant to such settlement; And further that the expense attending any and every settlement or transfer hereby directed or authorised to be made, shall be paid out of the capital of the share to which the same shall or (but for this present clause) would relate.

Power to raise and pay £—— to daughter's husband.

37. Provided always, and I declare that, notwithstanding the trusts hereinbefore contained, my trustees or trustee may, with the consent in writing of my said daughter [*name*], raise, by sale of a competent part of the trust fund, any sum or sums of money, not exceeding in the whole the sum of £——, and pay and apply the money so to be raised for the benefit of the present or any future husband of her the said [*daughter*], for his own absolute use and benefit; But so, nevertheless, that if the said [*daughter*] should survive her present husband, and should marry again, my trustees or trustee shall have power to raise for the benefit of such future husband, so much only of the said sum of £—— as shall not have been raised for and paid to her deceased husband or husbands.

## DEVISES IN STRICT SETTLEMENT AND PROVISIONS ANCILLARY THERETO (*x*).

Devise of freeholds (*y*).

1. I GIVE AND DEVISE [*parcels*], and all other the freehold messuages, lands, tenements, and hereditaments whatsoever, whether in possession, reversion, remainder, or expectancy, of or to which I shall be seised or entitled at my death, or over which I shall then have a general power of appointment or disposition by will, except what I may otherwise dispose of by this my will or any codicil hereto, with all rights, &c. [*ut ante*, p. 848, *Form* 1], To THE USES (*z*) [*or* UNTO AND TO THE USE of the said [*trustees*], their heirs and assigns], upon the trusts and with and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same (that is to say),—

General power of appointment to one person.

2. To THE USE of, or in trust for such person or persons, for such estate or estates, and interest or interests, in such shares (if more than one), and with and subject to powers, provisoes, limitations, and restrictions as the said [*name*] shall

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(*x*) See also specific devises, *ante*, pp. 848 *et seq.* Other clauses relating to limitations in strict settlement of realty will be found amongst the Precedents of "SETTLEMENTS" in Vol. VI., and may be readily adapted to devises. See also the Precedents of WILLS, *post*, pp. 1032 *et seq.*

(*y*) Where the estates to be devised in strict settlement comprise copyholds or leaseholds as well as freeholds, the most convenient mode of arrangement is to limit the uses, &c., in strict settlement fully as regards the freeholds alone, and in a subsequent part of the will to devise the copyholds and bequeath the leaseholds, upon uses and trusts respectively corresponding to the uses of the freeholds, see Forms 46 and 47, *post*, pp. 963, 964.

Suggestion as to the mode of devising to uses.

(*z*) Where lands are intended to be limited by will to uses in strict settlement or any other series of uses, it is better to devise them directly to the intended *cestuis que use* than through the medium of a devisee to uses. If the testator has a power of appointment, and the devise operates as an execution of such power, the effect of a devise so framed is to transfer the use to the first nominee of the testator; in other words, to vest the legal estate in the devisee to uses (who is really intended to take nothing), and confer on the intended *cestuis que use* equitable interests only. The words in brackets will be used where it is intended that the trustees shall take the legal estate, and that the beneficial interests shall be merely equitable.

Strict Settlement.

[while not under any coverture (*a*)] by any deed or deeds, revocable or irrevocable, or [whether under coverture or not (*a*)] by will or codicil, from time to time, appoint: AND IN DEFAULT of, and subject to any such appointment,—

General power of appointment to two persons jointly, and the survivor.

3. To SUCH USES upon such trusts, and with and subject to such powers, provisoes, limitations, and restrictions as [A.] and [B.] shall by any deed or deeds, revocable or irrevocable, from time to time jointly appoint; AND, in default of and subject to any such appointment, as the survivor of them shall by any deed or deeds, revocable or irrevocable, or by will or codicil, from time to time appoint: AND in default of, and subject to any such appointment,—

Limitation of a rent-charge.

4. To THE USE that my said wife [*name*] [*or*, [*name*] the wife of the said [*tenant for life*]] and her assigns shall receive during her life [*or* widowhood] a yearly rent-charge of £——, to be charged upon and issuing out of the hereditaments hereinbefore devised, and to be paid by equal quarterly payments, on the —— day of ——, the —— day of——, the —— day of ——, and the —— day of ——, in every year, without any deduction whatsoever except for succession duty; the first quarterly payment of the said yearly rent-charge to be made on such of the said days of payment as shall happen next after my death [*or* after the death of the said [*tenant for life*]]: AND subject and charged as aforesaid,—

Limitation of a term of years (*b*).

5. To THE USE of the said [*trustees*], their executors, administrators, and assigns, for the term of —— years, to commence from the day of my death, without impeachment of waste, upon the trusts and with and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same; And from and after the expiration or determination of the said term of —— years, and in the meantime subject thereto and to the trusts thereof,—

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(*a*) The words in brackets may be used where the donee of the power is a female and it is desired to restrain her from making an appointment by deed during coverture.

(*b*) For a form of proviso declaring the trusts of a term for raising portions, see *post*, Form 22, p. 944; and for trusts of a term for raising money for payment of debts, *post*, Precedent XXII. p. 1032.

Strict Settlement.

Limitation of a life estate.

6. To THE USE of [*or* IN TRUST for (*c*)] [*name*] and his assigns, during his life, [without impeachment of waste]: WITH remainder,—

The same, to a woman with restraint on anticipation.

7. To THE USE of [*or* IN TRUST for (*c*)] [*name*] the wife of [*husband*] during her life [without impeachment of waste], but so that she shall not, during her present, or any future coverture, have power to alien, charge, or otherwise dispose of the rents and profits of the said hereditaments by way of anticipation: WITH remainder, &c.

Limitation of a life interest terminable on bankruptcy, &c.;

8. To THE USE of the said [*trustees*], their heirs, and assigns, during the life of [*name*], [without impeachment of waste,] UPON TRUST that, if at the time of my death the said [*name*] shall not be an undischarged bankrupt, or have done, executed, suffered, or concurred in any act, deed, matter, or thing whereby, or by reason whereof, the life interest hereby given to him in the hereditaments hereby devised in settlement would, if the same were absolutely given to him, wholly or partially vest in, or belong to, or be charged in favour of some other person or persons, then the said [*trustees*], or the survivors or survivor of them, or other the trustees or trustee for the time being of this my will shall allow the said [*name*] to enter into, and retain possession, and receive the rents and profits of the same hereditaments, [without impeachment of waste,] during his life, or until he shall become a bankrupt, or do, execute, suffer, or concur in some act, deed, matter, or thing (other than some act, deed, matter, or thing in exercise of any power hereby conferred on him for or incident to the raising of money for any purpose authorised by, or by virtue of, this my will) whereby, or by reason whereof his said life interest would, if absolutely given to him, vest in, belong to, or be charged in favour of some other person or persons: AND in the event of the failure or determination during the life of the said [*name*] of the trust hereinbefore declared in his favour, I DECLARE that the said trustees or trustee shall

on failure or determination of life interest trustees to enter;

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(*c*) The words in brackets will be used where the legal estate is in the trustees.

(*d*) As to gifts of life interests, terminable on bankruptcy, &c., see *ante*, p. 832, note (*k*).

Strict Settlement.

immediately upon, and from, and after such failure or determination, enter into and during the remainder of the life of the said [*name*] retain possession of the said hereditaments, manage the same as they or he shall think proper, in like manner as if they or he were the absolute owners thereof [*or* in like manner as if they or he were the trustees or trustee appointed to manage, and superintend the management of land to the possession of which an infant is beneficially entitled under section 42 of the Conveyancing and Law of Property Act, 1881]: AND [I HEREBY AUTHORISE the said trustees or trustee, in their or his absolute discretion, to pay or apply the rents and profits of the said hereditaments, or any part thereof, during the remainder of the life of the said [*name*], or for any shorter period or periods, continuous or discontinuous, to or for the personal support and maintenance of the said [*name*] or his wife or children or remoter issue (if any) for the time being, or the person or persons to become entitled presumptively, contingently, or in expectancy under any of the limitations hereinafter contained, or such one or more, exclusively of the others or other of such persons, and in such manner as the said trustees or trustee shall think fit: AND subject to such discretionary power,] I DECLARE that the said trustees or trustee, during the remainder of the life of the said [*name*], shall pay or apply the rents and profits of the said hereditaments to or for the benefit of the persons or person who under the limitations hereinafter contained would be, for the time being, next entitled in remainder to the same rents and profits if the said [*name*] were then actually dead: or may allow such person or persons to enter into and retain possession of, occupy, manage, and enjoy the said hereditaments, and receive the rents and profits thereof during the remainder of the life of the said [*name*]: AND from and after the death of the said [*name*],—

discretionary power to apply rents for benefit of bankrupt, &c.;

destination of income during remainder of life of bankrupt tenant for life.

Limitation to sons or daughters of tenant for life successively in tail.

9. To THE USE of the first and every other son [*or* daughter] of the said [*name*] successively, and in remainder one after another, according to their respective seniorities, and the heirs [male] of their respective bodies [*or*, in tail [male]]: WITH remainder—

Limitations in tail general by reference.

10. To THE USE that all and every the persons or person to whom estates, or an estate in tail male are, or is herein-

Strict Settlement.

before limited, may severally, in remainder one after another, take estates in tail general in the same order and succession as they respectively take estates in tail male: WITH remainder—

Clause reducing estates tail of persons born in testator's lifetime to estates for life.

11. PROVIDED ALWAYS, that if any person to whom an estate tail is hereinbefore devised should be born in my lifetime, or in due time after my decease, then, and in every such case, I HEREBY REVOKE the limitation in tail hereby made to such person, and in lieu thereof I DEVISE the hereditaments comprised in the limitations so revoked, TO THE USE of the person so hereby made tenant in tail for and during the term of his or her life; And after the death of such person, TO THE USE of the first and every other son of such person successively, in remainder one after another according to their respective seniorities in tail: And in default of such issue, TO THE USE of his or her first and every other daughter successively, in remainder one after another, according to their respective seniorities in tail.

Clause reducing estates in tail male and in tail of persons born in testator's lifetime to estates for life;

12. PROVIDED ALWAYS, that if any person to whom estates in tail male and in tail general by purchase respectively are hereinbefore limited should be born in my lifetime, then, and in every such case, I HEREBY REVOKE the limitations hereby made in favour of such person, and in lieu thereof I DEVISE the hereditaments comprised in the limitations so revoked, TO THE USE of such person and his or her assigns during his or her life; And after the death of such person, TO THE USE of the first and every other son of such person successively, in remainder one after another, according to their respective seniorities, in tail male; And in default of such issue, TO THE USE of the same first and every other son, successively, in remainder one after another, according to their respective seniorities, in tail general; And in default of such issue, TO THE USE of the first and every other daughter of such person successively, in remainder one after another, according to their respective seniorities, in tail male; And in default of such issue, TO THE USE of his or her first and every other daughter, and successively, in remainder one after another, according to their respective seniorities, in tail general: AND I DECLARE that no person not actually born at the time of any death shall be deemed to be born in my lifetime for the purpose of the proviso and substituted limitations lastly hereinbefore contained.

reduction not to apply to children *en ventre sa mère.*

**Strict Settlement.**

Series of limitations in strict settlement (*e*); to testator's eldest son for his life; remainder, to first and other sons of the said son in tail male; remainder, to each of testator's other sons for life, and to their sons successively in tail male; to sons of testator's first son successively in tail general; remainder, to daughters of testator's first son successively in tail general; remainder, to sons and daughters in tail general of testator's second and other sons;

13. To THE USE of my eldest son, [*name*], and his assigns, during his life, without impeachment of waste; with remainder To THE USE of the first and every other son of my said son, [*name*], successively, and in remainder one after another in tail male; With remainder To THE USE of each of my other sons during his life, without impeachment of waste; With remainder, To THE USE of the first and every son successively of each such other son, in remainder one after another in tail male, so that the elder of my said other sons and his first and other sons and the heirs male of their respective bodies successively may be preferred to and take before the younger of my said other sons and his and their first and other sons and the heirs male of their respective bodies; And after the determination or failure of the several estates hereinbefore limited as aforesaid, To THE USE of the first and every other son of my said son, [*eldest son*], successively, and in remainder one after another in tail; with remainder, To THE USE of the first and every other daughter of the said, [*eldest son*], successively, in remainder one after another in tail; with remainder, To THE USE of the first and every other son successively of my second and every other subsequently born son in tail; with remainder, To THE USE of the first and every daughter successively of my second and every other subsequently born son in tail, so that the first and every other son, and the first and every other daughter of the elder of my said second and other subsequently born sons, as tenants in tail as aforesaid, may take before and be preferred to the first and other sons in tail and the first and other daughters in tail of the younger of my said second and other subsequently born sons; And

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As to the order in which the several stocks or classes of issue are admitted.

(*e*) The limitations in the above form admit the several stocks and classes of issue in the following order, namely, the testator's eldest son and his first and other sons, the latter taking estates in tail *male*; next, the younger sons and their sons, the latter also taking estates in tail *male*; next, the sons and daughters in succession of the testator's eldest son takes estates tail *general*; next, the sons and daughters also in succession of the testator's younger sons take estates tail *general*; next are admitted the eldest and other daughters of the testator and their first and other sons, the latter taking estates in tail *male* and tail *general*; and, lastly, the first and other daughters of testator's *daughters* take estates in tail *general*. These limitations embrace the whole line of the testator's descendants.

Strict Settlement.

after the determination or failure of the several estates hereinbefore limited as aforesaid, To THE USE of my daughter, [*name*], and her assigns during her life, but without power to dispose of the rents and profits thereof or any part thereof by way of anticipation; And from and after the death of my said daughter, To THE USE of the first and every other son of my said daughter successively in tail male; with remainder, To THE USE of the first and every other son of my said daughter successively in tail; with remainder, To THE USE of the first and every other daughter of my said daughter successively in tail; With remainder TO THE USE of each of my other daughters and her assigns during her life, but without power to dispose of the rents and profits, or any part thereof by way of anticipation (*f*); And from and after the death of each such daughter respectively, To THE USE of the first and every other son successively of each such daughter in tail male; with remainder To THE USE of the first and every other son successively in tail; with remainder To THE USE of her first and every other daughter successively in tail; so that the estate for life hereinbefore limited to the elder of my second and other subsequently born daughters, and to her first and other sons successively in tail male, and to her first and other sons successively in tail, and to her first and other daughters successively in tail, shall have precedence to and take effect before the estates for life limited to the younger of my second and other subsequently born daughters, and her and their first and other sons successively in tail male, and her and their first and other sons successively in tail, and her and their first and other daughters successively in tail; And from and after the determination or failure of the several estates hereinbefore limited as aforesaid To THE USE of my own right heirs.

in default of such issue, to testator's daughter for life for her inalienable use; after her death, to her first and other sons in tail male; remainder, to her first and other sons in tail general; remainder, to her first and other daughters in tail general; remainder, to each of testator's other daughters successively for life for their inalienable use; and after the death of each such daughter to her first and other sons in tail male; remainder, to her first and other sons in tail general; remainder, to her first and other daughters in tail general; remainder.

14. To THE USE of my eldest son, [*name*], and his assigns, for his life without impeachment of waste; And, after his death, To THE USE of his sons successively, according to their respective seniorities, in tail male; And, for default of such issue, To THE USE of my son, [*second son*], and his assigns, for his life, without impeachment of waste; And, after his

Limitations in strict settlement

(*f*) This will not prevent a daughter while married from barring the entail: *Cooper* v. *Macdonald*, 7 Ch. D. 288.

**Strict Settlement.**

death, To THE USE of his sons successively, according to their respective seniorities, in tail male; And, for default of such issue, To THE USE of my son, [*third son*], and his assigns, for his life, without impeachment of waste; And after his death, To THE USE of his sons successively, according to their respective seniorities, in tail male; And, for default of such issue, To THE USE of my daughters, [*names*], and their respective assigns, during their respective lives, in equal shares as tenants in common, without impeachment of waste. And as to the respective shares therein of each of them my said daughters after her death, To THE USE of her sons successively, according to their respective seniorities, in tail male; And on failure of the issue male of any one or more of my said daughters, then and so often as the same shall happen, as to as well the share or respective shares originally limited to the daughter or daughters whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in her or them or her or their issue male, To THE USE of the other or others of my said daughters, and her or their respective assigns, during her or their life or respective lives, in equal shares as tenants in common, without impeachment of waste; And after the death of any such last-mentioned daughter, then as to the share or shares lastly hereinbefore limited to her, To THE USE of her sons successively, according to their respective seniorities, in tail male; And if there should be a failure of such issue male of all my said daughters but one, then, as to the entirety of all the said estates, To THE USE of such only daughter and her assigns during her life, without impeachment of waste; And, after her death, To THE USE of her sons successively, according to their respective seniorities, in tail male; And, for default of such issue, To THE USE of my said several sons and daughters as tenants in common in tail general, with cross remainders between and among them in tail general; And if all my said children except one should die without issue, To THE USE of such only remaining child in tail general; And for default of such issue, To THE USE of my own right heirs for ever.

to testator's sons successively and their issue in tail male;

to testator's daughters concurrently and their issue in tail male;

cross remainders among the daughters and their issue. On failure of issue of all the daughters,

to testator's children concurrently in tail general, with cross remainders;

ultimate remainder to testator's heirs.

15. To THE USE of my elder daughter, [*name*], and her assigns, during her life; WITH remainder, To THE USE of the first and every other son of the said [*elder daughter*],

Limitations to testator's elder daughter for life; remainder,

successively, and in remainder, one after another, in tail male; With remainder, To the use of the first and every other son of the said, [*elder daughter*], successively, and in remainder, one after another, in tail; With remainder, To the use of the first and every other daughter of the said [*elder daughter*], successively, and in remainder, one after another, in tail male; With remainder, To the use of the first and every other daughter of the said [*elder daughter*], successively, and in remainder, one after another, in tail; With remainder, To the use of my younger daughter, [*name*], and her assigns, during her life; With remainder, To the use of the first and every other son of the said [*younger daughter*], and in remainder, one after another, successively, in tail male; With remainder, To the use of the first and every other son of the said [*younger daughter*], successively, and in remainder, one after another, in tail; With remainder, To the use of the first and every other daughter of the said [*younger daughter*], successively, and in remainder, in tail male; With remainder, To the use of the first and every other daughter of the said [*younger daughter*], successively, and in remainder, one after another, in tail; And in default of such issue, To the use of my own right heirs for ever.

**Strict Settlement.**

to sons of elder daughter successively, in tail male; remainder,

to sons in tail general; remainder,

to daughters in tail male; remainder,

to daughters in tail general; remainder,

to younger daughter of testator for life; remainder,

to sons of younger daughter in tail male: remainder,

to her sons in tail general; remainder,

to her daughters in tail male; remainder,

to her daughters in tail general.

16. To the use of all and every the daughters and daughter of the said [*name*], if more than one, in equal shares, as tenants in common in tail [male] (*g*); And if, and so often as there should be a failure of issue [male], of any such daughter, then as to both her original share, and also such other share or shares in the said hereditaments as by virtue of this present clause shall have accrued to her or her issue [male]; To the use of the others or other of such daughters, if more than one, in equal shares, as tenants in common in tail [male]; and if there should be a failure of issue [male] of all such daughters but one, or if there should be only one such daughter, then, as to the entirety of the said hereditaments, To the use of such one or only daughter in tail [male]; And

Limitation to tenant for life's daughters in tail, as tenants in common;

cross remainders in tail.

(*g*) Limitations, in remainder to estates tail, given to the sons of the testator's sons successively, giving estates tail to the son's daughters concurrently instead of successively, are not uncommon in marriage settlements.

Strict Settlement.

in default or on failure of such issue, To THE USE [*other limitations*].

The same (*short form*).

17. To THE USE of all the daughters of [*name*], as tenants in common in tail [male], with cross remainders between and among them as to both their original and accruing shares as tenants in common in tail [male]; AND if there should be but one such daughter, then To THE USE of such one or only daughter in tail [male]; WITH remainder, &c.

Proviso substituting for daughters dying in testator's lifetime, their respective issue.

18. PROVIDED ALWAYS AND I HEREBY DECLARE that, if any of the daughters of the said [*name*] shall have died in my lifetime leaving issue [male] who shall survive me, the heirs [male] of the body or bodies of such daughter or daughters shall take the like share or shares, estate or interest, as well original as accruing in the hereditaments hereby devised in settlement which such daughter or daughters respectively would have taken if she or they had died immediately after my death, and with the like remainders over on the failure of issue [male] of such daughter or respective daughters.

General proviso as to waste and anticipation (*h*).

19. I DECLARE that every life estate or interest hereby limited in the hereditaments hereinbefore devised in settlement shall be without impeachment of waste, and, as to any female tenant for life, without power to dispose of the rents and profits of the same hereditaments or any part thereof by way of anticipation during any coverture.

Proviso as to repairs of mansion-house (*h*).

20. I DIRECT that every tenant for life or in tail [male or in tail] who shall become entitled in possession to the hereditaments hereinbefore devised in settlement under the limitations herein contained, shall keep my said mansion-house and the buildings, gardens and pleasure grounds belonging thereto, in good and tenantable repair and condition.

Direction to devisees to assume tes-

21. PROVIDED ALWAYS, AND I HEREBY DIRECT, that every person (not being a peer or peeress) who for the time being shall be entitled, by virtue of the limitations [*or*, trusts] hereinbefore contained, as [equitable] tenant for life or in tail [male or in tail] in possession, in the said hereditaments devised in

(*h*) See as to this, *Woodhouse* v. *Walker*, 5 Q. B. D. 404

**Strict Settlement.**

settlement by this my will, and not previously having the surname and arms hereinafter required to be used, shall, within twelve calendar months after he or she shall become so entitled, or being an infant within twelve calendar months after he or she shall attain the age of twenty-one years, and also the husband (not being a peer) of any female who shall become so entitled, shall, within twelve calendar months after his wife shall become so entitled, or after his marriage to her, whichever of these events shall last happen (unless prevented by death), take and use upon all occasions the surname of —— [*testator's surname*] (*i*), either alone or in addition to his or her own surname (but so nevertheless that the name of —— shall be the last or principal name), and also bear my family arms quartered with his or her own family arms, and shall, within the twelve calendar months aforesaid (unless prevented by death), take such proceedings or steps as may be necessary to authorise him or her to take, use, and wear such surname and arms; And in case such person should refuse, neglect, or fail to comply with this proviso or direction in any respect within the twelve calendar months aforesaid, and also in case any such person, who shall previously have the surname and arms aforesaid, or who shall have assumed the surname and arms aforesaid in compliance with this present proviso, should at any time thereafter discontinue to use the same, Then and in either of the cases aforesaid, and immediately after the expiration of the twelve calendar months aforesaid, or immediately upon such discontinuance as aforesaid (as the case may be), the [equitable] estate for life or estate tail or respective estates tail of every person, or the wife of every person (as the case may be), so refusing, neglecting, failing, or discontinuing as aforesaid, in the hereditaments hereby devised in settlement, shall absolutely cease and determine, and the same hereditaments shall in that case go and devolve to the person or persons next in remainder or reversion under the limitations hereinbefore contained, in the same manner as if the person who, or whose husband, shall so refuse, neglect,

tator's name and arms (*i*);

in case of neglect or failure, the estate of such person to cease;

(*i*) As to these clauses, see Vol. VI., sub tit. "SETTLEMENTS," and see Vaizey on Settlements, vol. ii., pp. 1262 *et seq.*, where this subject is very fully and ably discussed. The words in leaded brackets throughout this clause are applicable to cases where the legal estate is vested in the trustees.

Strict Settlement.

fail, or discontinue, being a tenant for life, were then dead, or being a tenant in tail [male or in tail] were then dead without having had heritable issue. [PROVIDED ALWAYS, that from and after the determination under the proviso lastly hereinbefore contained of the estate hereinbefore limited to any person who, or whose husband, shall so refuse, neglect, fail, or discontinue as aforesaid, and who shall be a tenant for life under the trusts hereinbefore contained, the hereditaments in respect of which such event shall have happened shall, remain and be To THE USE of the said [*trustees*], their heirs and assigns, during the life of such person, UPON TRUST, from time to time to pay the rents and profits thereof, or permit the same to be received by the person or persons for the time being next entitled in remainder, under or by virtue of such of the ulterior trusts affecting the said hereditaments as shall have actually become vested and taken effect.] AND I HEREBY DECLARE, that, in the event of the cesser or determination of the estates or estate of any person under the proviso in that behalf hereinbefore contained, by reason of the neglect or failure of her or their husband or respective husbands to comply with the proviso and direction aforesaid, any appointment or appointments which such may have made in favour of his, her, or their wife or wives, or husband or husbands, or children respectively, by virtue of any the powers hereinbefore contained shall be absolutely null and void [*or*, shall not be prejudiced or affected].

proviso as to appointment made by persons neglecting, &c.

Declaration of trusts of a term to raise portions for daughters of testator;

22. AND I HEREBY DECLARE, that the said hereditaments hereby limited to the said [*trustees*] for the said term of —— years, are so limited to them UPON TRUST that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, shall, by mortgage or sale of the said estates, or a competent part thereof, or by the felling and sale of timber growing thereon, or by and out of the rents and yearly profits of the premises, or by all or any of those ways and means, or by such other ways and means as the said trustees shall think expedient, raise and levy the sum of £—— and to invest the same in any of the stocks, funds, or securities, and in manner hereby authorised, with power to vary such invest-

Strict Settlement.

ments from time to time, as occasion shall require, or as shall be deemed expedient: And I direct that the said trustees or trustee shall stand possessed of the said sum of £—— and the investments thereof, upon the trusts hereinafter declared concerning the same, or such of them as shall for the time being subsist or be capable of taking effect (that is to say), Upon trust to pay the dividends, interest, and yearly income of one fourth part of such trust moneys, and investments to each of my four daughters [*names*] during her life; And, after the death of each such daughter, Upon trust to pay or transfer the one fourth part of the said trust moneys and investments, to the income whereof she is hereby declared to be entitled, unto all and every her child and children, who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, equally to be divided between or amongst such children, if more than one; Provided always, that the said trustees or trustee may, at any time or times, in their or his discretion, by all or any of the means aforesaid, raise any sum or sums of money not exceeding in the whole one half of the then presumptive or expectant share of any child for the time being entitled in expectancy to a portion under the trusts aforesaid, and pay or apply the money so to be raised for or towards the advancement or benefit of such child as they or he shall think proper: And, if there shall be a failure of children of any one or more of my daughters entitled to take under the trusts aforesaid, then, and in every such case, as well the original fourth share hereby settled upon such daughter and her child or children, as also every accruing or other share of and in the said trust moneys and investments to which such daughter or her children may become presumptively or otherwise entitled under this my will, shall be subdivided into equal shares, according to the number of my daughters for the time being, of whom there shall have been no such failure of children, and one of such subdivided shares shall henceforth be held upon the same trusts for the benefit of each of my last mentioned

advancement clause (*j*);

clause of accruer;

(*j*) An express maintenance clause may be dispensed with, in reliance on the provisions contained in sect. 43 of the Conveyancing and Law of Property Act, 1881.

Strict Settlement.

daughters and her children, as are hereinbefore declared concerning her original fourth share: AND if there shall be but one of my daughters of whom such failure of children shall not have taken place, the whole of such last mentioned trust fund subject to the power of advancement hereinbefore contained, and all accumulations of the yearly income thereof, shall ultimately be held upon the trusts hereinbefore declared in favour of such daughter and her children concerning her original fourth share: AND, if there shall be an entire failure or determination of the trusts hereinbefore declared in favour of my said four daughters and their children, the said sum of £—— if not raised shall sink into my estate, and cease to be a charge thereon; but if the same or any part thereof shall have been raised, the same, or the proceeds of the investments thereof, and all accumulations of the yearly income thereof, shall or may be applied in discharge of any gross incumbrance upon my estates, or otherwise invested in the purchase of real estates in the county of ——, to be settled to the uses subsisting in relation to my real estates hereinbefore devised.

Destination of sum raised on failure of issue of daughters.

Power to testator's son to appoint pin-money to and to jointure any wife (*k*).

23. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my said son, by deed revocable or irrevocable, or by will or codicil, to appoint to any and every woman whom he may marry (and that either before or after such marriage), for her life, or for any less period, by way of pin-money and jointure respectively, and either in bar of dower and freebench or otherwise, any yearly rent-charge or rent-charges, not exceeding £—— in the whole by the year, free from all deductions, to be charged upon all or any part or parts of the said hereditaments hereby devised in settlement, and to be payable at such times and in such manner as he shall direct.

Power to testator's son to charge estates with portions for younger children.

24. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said son, by deed revocable or irrevocable, or by will or codicil, to charge all or any of the said

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(*k*) There is now no necessity to give expressly to the donee of a power to create a rent-charge any authority to confer powers of distress on entry, or to limit a term for securing the rent-charge: see sect. 44 of the Conveyancing and Law of Property Act, 1881.

Strict Settlement.

hereditaments hereby devised in settlement with the payment of such sum or sums of money as he shall think fit, not exceeding in the whole in the several events hereinafter specified the several sums hereinafter mentioned, as and for the portion or portions of every or any of the daughter or daughters and younger son or younger sons of my said son who shall not be entitled or presumptively entitled to the said hereditaments in remainder immediately expectant on the death of my said son, that is to say, if there shall be only one such child the sum of £——, and if there shall be only two such children the sum of £——, and if there shall be only three such children the sum of £——, and if there shall be more than three such children the sum of £——, such portion or portions to be an interest or interests vested in and to be paid to or shared and divided between or among such child or children or any one or more of them, at such age or time, or respective ages or times, and with such provisions for maintenance and advancement in the meantime, and if more than one in such shares and proportions and with such annual sum or sums of money, conditions, restrictions, and limitations over (such annual sum or sums of money and limitations over being for the benefit of one or more such child or children respectively) as my said son shall in manner aforesaid direct: And also to charge the hereditaments charged with such portion or portions respectively with the payment of such yearly sum or sums of money as he shall think fit, for or towards the maintenance and education of the daughter or daughters and younger son or younger sons for the time being of my said son until her, his or their portion or respective portions shall become vested and payable, so as the same do not exceed the interest of such his, her, or their portion or respective portions or presumptive or expectant portion or respective portions after the rate of 4 per centum per annum, And by deed, will or codicil, to appoint for any term or terms of years, to any person or persons with or without impeachment of waste, the said hereditaments so to be charged as aforesaid upon the usual trusts, for securing, raising, and paying such portion or respective portions, and the costs of and incident to raising the same and the execution of the trusts thereof.

Power to

25. PROVIDED ALWAYS, AND I DECLARE, that it shall be

**Strict Settlement.**

male tenants for life (who shall become entitled in possession) to jointure.

lawful for any and every male person, who by virtue of this my will shall become entitled to the actual possession or to the actual receipt of the rents and profits of the said real estates hereinbefore devised, either before or after he shall become so entitled, but subject and without prejudice to the uses, trusts, limitations, and powers preceding or overriding the estate of the person exercising this present power, at any time either before or after marriage, by deed revocable or irrevocable, or by will or codicil, to appoint to any woman whom he may marry a rent-charge or rent-charges, not exceeding the annual sum of £——, to be issuing out of, and charged upon the hereditaments hereby devised in strict settlement, for her life, to be payable by way of jointure at such times and in such manner as the person exercising the present power shall direct, without any deduction except for legacy duty; And also to charge the last-mentioned hereditaments, or any part or parts thereof, with any sum of money not exceeding in the whole the sum of £——, for the portion or portions of any of their respective children other than and besides an eldest or only son for the time being entitled to the said estates for an estate in tail [male] in possession, or in remainder expectant upon the death of his parent exercising the said power, and to appoint the hereditaments so to be charged to any person or persons for a term of years, In trust to raise the portion or portions so to be charged.

Power to charge portions.

Power to female tenants for life to appoint rent-charges to husbands, and portions.

26. Provided always, and I hereby declare, that it shall be lawful for each and every female person hereby made tenant for life of the hereditaments hereinbefore devised in strict settlement, either before or after she shall become actually entitled, under the limitations hereinbefore contained, to the possession or receipt of the rents and profits of the same hereditaments (but subject and without prejudice to the estates and limitations (if any) prior to the estate for life of the person exercising this present power), at any time either before or after marriage, by deed with or without power of revocation, or by will or codicil, to appoint to or in favour of any husband who shall survive her a rent-charge or rent-charges, not exceeding in the whole the annual sum of £——, to be issuing out of and charged upon all or any the hereditaments hereby devised in strict settlement for the life

of such husband, or for any less period, and to be paid at such times and in such manner as the person exercising this present power shall direct, without any deduction except for legacy duty; And also, &c. [*as in form* 25].

Power to appoint rent-charges to husbands by reference.

27. Provided always, and I declare, that any and every person hereby made tenant for life, being a female, shall have the same or the like power of appointing one or more yearly rent-charge or rent-charges unto or in favour of any husband surviving her, as is and are hereinbefore reserved to the several persons hereby made tenants for life, being males, of appointing rent-charges unto and in favour of their surviving wives as aforesaid.

Proviso limiting the aggregate amount of rent-charges affecting the lands at one time.

28. Provided, nevertheless, and I hereby declare, that the hereditaments hereinbefore devised shall not, nor shall any part thereof, by virtue of the power lastly hereinbefore contained, be at any one time subject or liable to the payment of any annual sum or sums exceeding in the whole the sum of £——; And if by virtue thereof the same shall or would, in case this present proviso were not inserted, be charged with a greater annual sum in the whole than £——, the payment of the annual sum occasioning such excess, or such part thereof as occasions the same, shall, during the time of such excess, be suspended.

Proviso limiting the amount of portions in the whole to a given sum.

29. Provided also, and I hereby declare, that the said hereditaments shall not, under or by virtue of the power hereinbefore in that behalf contained, be liable to the payment of any larger sum or sums of money for portions than the sum of £—— in the whole.

Power to charge a gross sum by will.

30. Provided always, and I hereby declare, that it shall be lawful for the said [*name*], if there shall be an entire failure of his issue at the time of his death, by his will or any codicil thereto, to charge all the hereditaments hereby devised in settlement, or any part or parts thereof, with any sum or sums of money not exceeding in the whole the sum of £——, with interest thereon at any rate not exceeding —— per cent. per annum, for the benefit of such persons or person, or for such purposes or purpose whatsoever as he shall think fit: And in manner aforesaid to appoint for any

Strict Settlement.

term or terms of years to any person or persons, with or without impeachment of waste, the said hereditaments so to be charged as aforesaid for securing, raising, and paying such sum or sums respectively, with interest at the rate aforesaid.

Shifting clauses in strict settlement in will, with provisoes to meet the case of a previous exercise of the powers of jointuring or charging portions.

31. PROVIDED ALWAYS, AND I HEREBY DECLARE that, if at any time or times hereafter the family estates of Lord A. in the county of X., or any of them, or any part or parts thereof (the same being at the least equal in value to the said manors, hereditaments, and premises in the said county of Y., after allowing for such incumbrances as may affect the same premises respectively), should, by any means whatsoever, come to or devolve upon either of them the said [B.] and [C.] for an estate for his life, or any other estate of freehold, or inheritance in possession, or to or upon the first or any other son of either of them, the said [B.] and [C.], or any issue male of any such son, for an estate in tail male, or any other estate of inheritance in possession, so that the person acquiring any such estate as aforesaid shall be entitled in respect thereof to the actual possession or the receipt of the rents and profits of the premises therein comprised, THEN, and so often as the same shall happen, the uses or estates for life or in tail male (as the case may be) hereinbefore limited or appointed of or in the said manors, hereditaments, and premises in the said county of Y. to or for the benefit of the person acquiring any such estate as aforesaid in the said family estate or estates, or such part or parts thereof as aforesaid, and all powers annexed to the same uses and estates respectively (but not any uses, estates, and charges which shall have been limited, or created in exercise of such powers, or any of them, except as hereinafter is provided) shall absolutely cease and determine: AND I HEREBY FURTHER DECLARE that after the cesser or determination of any uses or estates for life of or in the said manors, hereditaments, and premises in the said county of Y., or any of them, under the proviso lastly hereinbefore contained, and during the residue of the life of the person who shall have been entitled as tenant for life to the same uses or estates respectively, the said [*trustees*], and their heirs (but subject and without prejudice to the uses and estates preceding the uses or estates so ceasing or determining as aforesaid, and to the powers annexed to such preceding uses and estates respectively, and all uses, estates, and

Strict Settlement.

charges which shall be limited or created in exercise of such powers or any of them), shall receive the rents and profits of the same manors, hereditaments, and premises respectively, and pay and apply the same to or for the benefit of the person or persons (other than and except the eldest, or only son, or other issue male of the said tenant for life for the time being) entitled by virtue of this my will in remainder, immediately expectant upon the death of the said tenant for life, to the same manors, hereditaments, and premises, to whom, or for whose benefit, the same rents and profits would be payable or applicable by virtue of this my will, in case the said tenant for life were then actually dead, so that immediately from and after such cesser or determination as aforesaid, and during the residue of the life of the person who shall have been entitled as such tenant for life as aforesaid, the issue male (if any) of the said tenant for life (other than and except his eldest, or only son, or other issue male for the time being entitled in remainder, immediately expectant upon his death as aforesaid) may be entitled to the rents and profits of the last-mentioned manors, hereditaments, and premises respectively, in such and the same manner as if the said tenant for life were then actually dead, without issue male; And so that, in default of any issue male whatsoever of the said tenant for life, or of any such issue male, other than and except his eldest or only son or other issue male for the time being entitled in remainder, immediately expectant upon his death as aforesaid, then, during the vacancy, or contingency of any such issue male, other than and except the said eldest, or only son, or male issue for the time being entitled as aforesaid, the person or persons for the time being entitled by virtue of this my will, to the first vested estate in remainder in the same manors, hereditaments, and premises, expectant upon the death of the said tenant for life, and the failure of issue male of his body, may be entitled to the said rents and profits in such and the same manner as if the said tenant for life were then actually dead without issue male, but without any exclusion of, or prejudice to, the estate, interest, or right of any issue male of the said tenant for life, other than and except his eldest, or only son, or other issue male for the time being entitled as aforesaid, who shall afterwards come into existence, and only until the birth of such issue male respectively: And I HEREBY FURTHER DECLARE that after the cesser

Strict Settlement.

or determination of any uses or estates in tail male in the said manors, hereditaments, and premises in the said county of Y., or any of them, under the proviso lastly hereinbefore contained, the same manors, hereditaments, and premises (but subject and without prejudice to the uses and estates preceding the uses or estates so ceasing or determining as aforesaid, and to the powers annexed to such preceding uses and estates respectively, and all uses, estates, and charges which shall be limited or created in exercise of such powers, or any of them), shall go and remain to the use of such person or persons as by virtue of this my will would then be entitled to the same respectively as the person or persons next in remainder, in case the person, who shall have been entitled as tenant in tail male to the uses or estates so ceasing or determining as aforesaid, were then actually dead without issue male: PROVIDED ALWAYS AND I HEREBY FURTHER DECLARE that, if at the time when the said family estates or estate of the said Lord A., or such part or parts thereof as aforesaid, shall come or devolve upon either of them the said [B.] and [C.] as aforesaid, the power of jointuring hereinbefore contained, shall have been exercised by him in favour of any then existing wife, and the estate acquired by him in the said family estate or estates, or such part or parts thereof as aforesaid, shall either be an estate of inheritance, or, being only an estate of freehold, shall be accompanied with a power of jointuring exerciseable in favour of the said then existing wife, to the full extent to which the said power of jointuring hereinbefore contained shall have been exercised in her favour, and so that she might derive the same benefit from an exercise of the power so acquired as from the grant, limitation, or appointment then already made under the said power of jointuring hereinbefore contained, then, and in every such case, the annual sum or rentcharge, or annual sums or rentcharges, which shall have been granted, limited, or appointed under the said power of jointuring hereinbefore contained, and all powers and remedies, and terms of years, which shall have been granted, limited, or appointed for securing the payment of the same, shall absolutely cease and determine; But, if the power of jointuring accompanying any such estate of freehold as aforesaid, shall not be exercisable in favour of the then existing wife to the full extent to which the said power of jointuring hereinbefore contained shall have been

Strict Settlement.

already exercised in her favour, and so that she might derive the same benefit from an exercise of the power so acquired from the grant, limitation, or appointment then already made in her favour under the said power of jointuring hereinbefore contained, then, and in such case, the annual sum or rentcharge, or annual sums or rentcharges, which shall have been so granted, limited, or appointed in her favour as aforesaid, or the powers or remedies, or terms of years, which may have been granted, limited, or appointed, for securing the payment of the same, shall not cease or determine, but so much only of the same shall from time to time be raisable, or payable, for the benefit of the then existing wife, as, in addition to any annual sum or rentcharge, or annual sums or rentcharges, which may or might be granted, limited, or appointed in her favour, under the power of jointuring so acquired as aforesaid (if exercised to its full extent), would be sufficient to make up the full amount of the said annual sum or rentcharge, or annual sums or rentcharges, which shall have been so limited, granted, or appointed as aforesaid, under the said power of jointuring hereinbefore contained, and the residue thereof shall from time to time absolutely sink for the benefit of the person or persons for the time being entitled under the limitations hereinbefore contained to the possession or the receipt of the rents and profits of the said manors, hereditaments, and premises, in the said county of Y.; PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that if at the time when the said family estates or estate of the said Lord A., or such part or parts thereof as aforesaid, shall come to, or devolve on either of them, the said [B.] and [C.], as aforesaid, the power of charging with portions hereinbefore contained shall have been exercised by him in favour of any child or children whether born or unborn, and the estate acquired by him in the said family estates or estate, or such part or parts thereof as aforesaid, shall either be an estate of inheritance, or being only an estate of freehold, shall be accompanied with a power of charging with portions, exercisable in favour of the said child or children, to the full extent to which the said power of charging hereinbefore contained shall have been exercised in his, her, or their favour, and so that he, she, or they might derive the same benefit from an exercise of the power so acquired as from the charge or charges then already made

Strict Settlement.

under the said power of charging hereinbefore contained, then, and in every such case, the charge or charges which shall have been so made under the said power of charging hereinbefore contained (except as to any sum or sums of money, or interest which shall have been actually raised and paid), and all powers and remedies, and terms of years, which shall have limited or created for securing the payment thereof (but subject and without prejudice to any disposition or dispositions which shall have been actually made under the trusts of such term or terms), shall absolutely cease and determine: But, if the power of charging, accompanying any such estate of freehold as aforesaid, shall not be exercisable in favour of the said child or children to the extent to which the said power of charging hereinbefore contained shall have been already exercised in his, her, or their favour, and so that he, she, or they respectively might derive the same benefit from an exercise of the power so acquired as under the charge already made in his, her, or their favour, under the said power of charging hereinbefore contained, then and in such case, the charge or charges which shall have been so made, or the powers or remedies, or terms of years, which shall have been limited or created for securing the payment thereof, shall not cease or determine, but so much only of the same charge or charges shall from time to time be raisable or payable for the benefit of such child or children respectively, as in addition to the charge or charges which may or might be charged in his, her, or their favour, under the power of charging so acquired as aforesaid (if exercisable to its full extent), would be sufficient to make up the full amount of the charge or charges which shall have been so made as aforesaid under the said power of charging hereinbefore contained, and the residue of the same charge or charges shall absolutely sink for the benefit of the person or persons for the time being entitled, under the limitations hereinbefore contained, to the said manors, hereditaments, and premises, in the said county of Y.

Power to trustees during minorities to apply part of the rents for maintenance, and to

32. Provided always, and I hereby declare, that during the minority of any person, being a male, and during the minority and discoverture of any person, being a female, who, under the limitations hereinbefore contained, shall come into the actual possession of or be entitled to the receipt of the

Strict Settlement.

rents and profits of the hereditaments hereinbefore devised in settlement, the said trustees or trustee for the time being shall (subject and without prejudice to the several rentcharges hereinbefore limited, or such of them as shall be subsisting), during every such minority, or minority and discoverture, as the case may be, take possession of and hold, or receive the rents and profits of the said hereditaments, or of such part thereof as such minor or minors may happen to be entitled to therein, and manage the same as they or he shall think proper, in like manner as if they or he were the absolute owners or owner thereof, and shall apply the whole or any part of such rents and profits, in their or his discretion, for or towards the maintenance, education, or advancement of such minor or minors, or, in the discretion of the said trustees or trustee, to pay the same to the guardian or guardians for the time being of the said minor or minors respectively, to be applied for such maintenance, education, and advancement as aforesaid, without any obligation on the part of my said trustees or trustee to see to the application thereof; And shall from time to time accumulate and invest the surplus or residue of the said rents and profits and apply the same and the income thereof, as if such surplus or residue and the investments thereof were proceeds of sale of the said hereditaments, with power to resort to such accumulations and the investments thereof of the said minor or minors respectively in any subsequent year or years.

accumulate residue (*l*).

33. Provided always, and I hereby declare, that the said [*trustees*], and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will shall be the trustees and trustee of the settlement hereby created, for the purposes of the Settled Land Acts, 1882 and 1884, and for the purposes of section 42 of the Conveyancing and Law of Property Act, 1881.

Appointment of trustees of settlement for the purposes of the Settled Land Acts, and of sect. 42 of the Conveyancing, &c., Act, 1881.

(*l*) This power may be generally omitted, in reliance on the provisions of sect. 42 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41); and see next form. The trustees of the settlement may exercise the statutory powers of a tenant for life over the settled lands to which an infant is entitled in possession: see sects. 59, 60, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

**Strict Settlement.**

Proviso as to destination of accumulations of rents and profits (*m*).

34. I DECLARE, that if any person who would, if of full age, be entitled to the possession or receipt of the rents and profits of the hereditaments hereby devised in settlement shall die, being a male, under the age of twenty-one years, or, being a female, under that age, and without having been married, then the trustees or trustee for the time being of this my will shall stand possessed of the rents and profits of the same hereditaments received by them during the minority of the person so dying and all accumulations and investments thereof, or so much thereof as shall not have been applied under any statutory power, and invest and apply the same as if the same were capital monies arising under the Settled Land Act, 1882, from the same hereditaments.

Extension of powers under the Settled Land Acts.

Introductory clause (*n*).

35. PROVIDED ALWAYS, AND I HEREBY DECLARE, that, notwithstanding anything contained in the Settled Land Acts, 1882 and 1884, or in any Act or Acts for the time being in force relating to settled lands respectively, the following powers in addition to, or extension of the powers conferred by such Acts shall (so far as not forbidden by any Act or Acts for the time being in force) be hereby conferred on, and vested in, and exercisable by every tenant for life, or person having under those Acts the powers of a tenant for life, of or over the hereditaments hereinbefore devised and hereby settled, and on, in, and by the trustees or trustee of the settlement thereof hereby created.

Notices to trustees of

36. ANY [*or*, PROVIDED ALWAYS, AND I HEREBY DECLARE, that any] tenant for life of, or person having the powers of a tenant

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(*m*) See as to the advisability of inserting such a clause, *ante*, p. 913, note (*k*).

(*n*) Where it is desired to confer on tenants for life and trustees a series of powers in addition to or extension of the statutory powers it may be convenient to group them together, preceded by an introductory clause, and consecutively numbered. In a long and complicated will they would thus at once catch the eye and at once inform the parties concerned as to matters connected with dealings with the settled property. If the modifications of the statutory powers and provisions are not numerous they may be inserted in the usual manner by separate clauses, each introduced by the words "Provided always," &c.

If an introductory clause is inserted the words within leaded brackets in the following Forms (36 to 44) will be omitted.

Strict Settlement.

for life over the hereditaments hereby settled (*p*), may make a [sale, exchange, partition,] lease, [mortgage, or charge], in exercise of any of the powers conferred on him by any of the Acts aforesaid, [*or*, by the Settled Land Act, 1882, or which may be conferred on him by any Act for the time being in force, relating to settled lands], without previous notice of his intention to exercise any such power to any trustee, or to the solicitor of any trustee, and without the leave of the Court.

settlement, &c., dispensed with (*o*).

37. Under [*or*, Provided always, &c., that under] a mining lease of any mines or minerals subject to this my will made in exercise of the power in this behalf in the Settled Land Act, 1882, whether the mines or minerals leased are already opened and in work or not, no part of the rent shall at any time be set aside as capital money arising under the last-mentioned Act, but the whole of such rent shall go as rents and profits.

Mining rents not to be capitalised (*q*).

38. Any [*or*, Provided always, &c., that notwithstanding anything contained in the Settled Land Act, 1882, any] lease of the land hereby settled or any part thereof or of any easement, right, or privilege of any kind over or in relation to the same may be made for any purpose whatever, whether involving waste or not, for any term not exceeding, in case of a building lease [999], in case of a mining lease [100] years, and in case of any other lease [42] years, And grants may be made of the said lands or any part thereof in consideration of rents in perpetuity, either by way of rentcharge, or secured by a condition of re-entry on non-payment thereof or otherwise as the person or persons for the time being exercising the powers of making leases and

Power to make long leases, and fee farm grants (*r*).

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(*o*) See as to notice of intention to exercise the statutory powers sect. 45 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), and sect. 5 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18). See generally as to these powers, Vol. VI., sub tit. Settlements.

(*p*) For an enumeration of limited owners having the powers of a tenant for life see sect. 58 of the Act of 1882, set out *ante*, sub tit. Leases, Vol. III., p. 30, note.

(*q*) See as to the capitalisation of mining rents, sect. 11 of the Act of 1882. The statutory restriction in this respect is often found to be inconvenient.

(*r*) As to the terms for which leases may be granted under the statutory powers, see sect. 6 of the Act of 1882.

Strict Settlement.

grants lastly hereinbefore contained shall think proper or expedient.

Power for tenants for life to sell or lease principal mansion-house, park, &c. (*s*).

39. The [*or*, Provided always, &c., that notwithstanding anything contained in the Settled Land Act, 1882, the] principal mansion-house on the land hereby settled [*or*, my mansion-house called —— Hall] and the demesnes thereof, and other lands usually occupied therewith may be sold or leased by any tenant for life, or person having the powers of a tenant for life, under the trusts and provisions herein contained without the consent of the trustees of the settlement hereby created or an order of the Court.

Extension of powers to exchange and purchase lands (*t*).

40. Any [*or*, Provided always, &c., that any] part or parts of my lands hereby settled, situate in England or Wales, may be given in exchange for land in Scotland or Ireland; And [that] capital money arising under the Settled Land Act, 1882, from the premises hereby settled may be applied in the purchase of lands and hereditaments in such last mentioned countries, or either of them.

Extension of powers of investment and application of capital moneys.

41. Capital [*or*, Provided always, &c., that capital] money arising under the Settled Land Act, 1882, or by virtue of the exercise of any power herein contained, or other capital money for the time being requiring or capable of being invested, subject to the payment of claims properly payable thereout and to the application thereof for any special object for which the same shall have been raised, may as and when received be, with the consent in writing of the tenant for life for the time being if of full age and competent to act, but otherwise at the discretion of the trustees or trustee for the time being of the settlement hereby created, invested, or otherwise applied in any of the following modes, namely:— (*u*).

Power to raise money on mortgage for purposes

42. Any [*or*, Provided always, &c., that any] tenant for life or person having under any of the Acts aforesaid [*or*, under the Settled Land Act, 1882, or any other Acts or Act for the time

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(*s*) As to the restrictions with regard to sales and leases of the principal mansion-house, &c., see sect. 15 of the Act of 1882.

(*t*) See as to these powers, sects. 4 (8) and 23 of the Act of 1882.

(*u*) For forms of investment clauses see *ante*, pp. 874 *et seq.*

Strict Settlement.

being in force relating to settled lands] the powers of a tenant for life of, or over the hereditaments hereby settled may raise any sum or sums of money not exceeding in the whole the sum of £——, to be secured by mortgage of or charge upon all or any of the hereditaments hereby settled, with interest for the same at any rate not exceeding 5 per cent. per annum for the purpose of, &c. [*e. g.*, making any improvements authorised by section 25 of the Settled Land Act, 1882] ; And [that] for the purpose last hereinbefore mentioned such tenant for life or other person as aforesaid shall have the same powers in all respects as he would have if the money to be raised in exercise of the powers last hereinbefore contained were required for one of the purposes for which a tenant for life is by section 18 of the Settled Land Act, 1882, empowered to raise money on mortgage : PROVIDED ALWAYS that no person lending money purporting to be borrowed in exercise of this power shall be concerned to inquire as to the purpose for which it shall be alleged to be borrowed, or bound to see to the application thereof, or as to the propriety, regularity, or extent of any exercise of this present power ; and no such mortgage or charge purporting to be made in exercise of this present power shall be in any way invalidated or affected by any impropriety or irregularity to the prejudice of the person or persons taking any such mortgage or charge or any persons claiming under him or them ; And that the money which shall be borrowed in exercise of this power may and shall be applied in or towards payment for, &c. [*e.g.*, such an improvement as aforesaid] and subject thereto shall be deemed to be capital money arising under the Settled Land Act, 1882, or any other Acts or Act in force relating to settled lands, and be applicable accordingly.

not specified in Settled Land Acts.

Protection of mortgagees.

43. ANY [*or*, PROVIDED ALWAYS, &c., that any] capital money arising under the Settled Land Act, 1882, or any other Act or Acts for the time being relating to settled lands may be applied in payment for any improvement authorised by the same Acts or any of them according to a scheme for the execution thereof to be prepared by or on behalf of the trustees or trustee for the time being of the hereditaments hereby settled, or submitted by the tenant for life or person having the power of a tenant for life of or over the same hereditaments for approval, and approved by such trustees or trustee without any

Power to effect improvements without any Certificate or order of Court.

Strict Settlement.

such certificate or order as is mentioned in section 26 of the Settled Land Act, 1882.

Power for a sole trustee to act.

44. If [*or*, Provided always, &c., that if] at any time, and so long as there shall be only one trustee of the settlement hereby created, such only trustee may exercise all or any of the powers conferred on trustees of a settlement by the Acts aforesaid or any of them, and may receive and give effectual receipts for capital monies arising thereunder or otherwise receivable under any of the trusts, powers, and provisions of this my will relating to the hereditaments hereby settled; And [that] all notices under any of the same Acts given to such sole trustee shall be to all intents and purposes as valid and effectual as if given to two or more trustees of the settlement hereby created.

Proviso enabling a tenant for life to purchase or take in exchange or on lease any settled lands (*x*).

45. Provided always and I hereby declare that, notwithstanding any rule of equity to the contrary, upon any sale, exchange, or lease (*y*), of any lands and hereditaments hereby devised in settlement, or any easements or other rights or privileges appurtenant thereto or in connection therewith (*z*), made in exercise of any of the powers con-

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(*x*) The insertion of a power of this nature seems to be generally advisable, where lands are devised in strict settlement. Formerly express powers of sale and exchange over the settled lands were given to the trustees so that the tenant for life was as competent as any stranger to purchase, &c., any part of the settled lands which the trustees might consent to sell to him. But now, by sect. 53 of the Settled Land Act, 1882, a tenant for life in exercising any of the statutory powers under the Act, is to be in the position and to have the duties and liabilities of a trustee for all parties interested under the settlement. This fiduciary position involves, according to the rules of equity, the incapacity to purchase trust property, or acquire any benefit for himself in relation thereto: see sub tit. Purchases, Vol. V., pp. 95 *et seq.*; see also Vaizey on Settlements, 724, and Robbins' Settled Land Statutes, 105. The effect of the first clause of this proviso is to put tenants for life as far as possible on their former footing as regards purchases, &c., of settled lands.

(*y*) It seems convenient to extend this proviso to *leases*, especially in a mining district, as it may prove to be advisable for the tenant for life, to take mining leases of settled lands, rather than to grant such leases to others in exercise of his ordinary powers of leasing under the Act of 1882.

(*z*) The term "land" is defined by the Act of 1882, sect. 2 (10), to include incorporeal hereditaments, &c.; but this definition is

Strict Settlement.

ferred by the Settled Land Acts, any person being a tenant for life within the meaning of the same Acts, for the time being exercising such power, shall be fully competent with the consent in writing of the persons who shall be for the time being the trustees of the settlement hereby created for the purposes of the said Acts to purchase or take in exchange, or on lease (as the case may be) any part of such settled lands, hereditaments and premises at a price, or with or subject to the receipt or payment by him of such sum for equality of exchange, or at such rent or rents (as the case may be) as may be agreed upon by the person exercising the power of the one part, and such trustees of the settlement as aforesaid of the other part, or to be ascertained and determined by two valuers to be appointed by such respective parties, and the umpire of such valuers, in the usual manner: AND shall also be fully competent to direct that any sum or sums being capital money arising under the Settled Land Acts in respect of any of the said lands and

And to direct the application of capital monies in purchase of his own lands (*a*).

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only for the purposes of these Acts, and does not apply to private instruments. Easements may be created *de novo* under the Settled Land Act, 1882, on a sale or lease, sect. 3 (1), sect. 6 (1); but it is not quite clear how far this can be done on an exchange: see sect. 20 (1), and the note thereon in Wolst. & Turn. Conv. Acts, p. 33.

As to empowering a tenant for life to sell his own lands to the trust.

(*a*) It is submitted that the power given by the latter part of this proviso may occasionally be of great convenience. It often happens that small holdings convenient to be held with settled estates fall into the market unexpectedly, or perhaps when there are no capital monies in hand applicable to the purchase. In such cases, the tenant for life may have to decide to purchase at once without communicating with the trustees as to purchasing, and may have to find the price out of his own monies or by borrowing from his bankers. Formerly there would have been no difficulty whatever as to reselling to the trustees, but now the trustees might not improbably object to carry out the purchase or pay the purchase-money out of capital monies in their hands without the sanction of the Court, having regard to their not having been consulted as to the original purchase, and to the special need of proof of value where a person in a fiduciary position causes property of his own to be purchased on behalf of the trust. It is of course desirable as far as possible to obviate the necessity for such applications to the Courts, which cause expense and often much annoyance and friction in families.

In the case of an ordinary purchase the tenant for life is the proper person to contract: sect. 31 (vi.) of the Act of 1882; and by sect. 42 of the same Act the trustees of the settlement in the case of purchases, &c., of land with capital money arising under

Strict Settlement.

hereditaments hereby devised in settlement, or any easements, or other rights or privileges appurtenant thereto, or connected therewith, shall be invested and applied in the purchase, at a price to be determined in manner hereinbefore mentioned, of any lands and hereditaments, and easements or other rights or privileges appurtenant thereto or connected therewith, convenient to be held or enjoyed with the lands and hereditaments hereby devised in settlement or any part thereof, notwithstanding that the person giving such direction may be possessed of or entitled to the lands, hereditaments, or other premises directed to be purchased, for an absolute or any less beneficial estate or interest, and either solely, or jointly with some other person or persons, or in payment of any equality money so to be agreed on determined as aforesaid to be paid to the person giving such direction upon any such exchange as is hereinbefore provided: But so that any lands, hereditaments, easements, rights or privileges acquired by any such purchase or exchange shall be conveyed or assured to the uses, upon the trusts, and with and subject to the powers and provisions hereinbefore limited, declared, and contained respectively concerning the lands and hereditaments hereby devised in settlement, or such of the same uses, trusts, powers and provisions as shall for the time being be subsisting and capable of taking effect: And I further declare that no such trustee of the settlement created by this my will shall be in any way liable for adopting in good faith any such purchase or exchange as last aforesaid, or concerned to inquire as to the propriety thereof.

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the Act, "are not liable for adopting any *contract* made by the tenant for life," nor "in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life" on the purchase or exchange. But this protection evidently applies to cases where the tenant for life has contracted to purchase land to be made subject to the settlement from a stranger, and it cannot be safely assumed that it would apply to purchases of the tenant for life's own lands, where of course there is no question of contract.

It may be noticed that no facilities are given in this clause as regards leaseholds; the acquisition of such property to be made subject to a settlement is somewhat questionable, except under special circumstances.

**Strict Settlement.**

Devise of copyholds to the uses declared of the freeholds.

46. I GIVE AND DEVISE all my copyhold and customary messuages, tenements, lands, and hereditaments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, except estates vested in me as mortgagee or trustee (*b*), and also except what I may otherwise dispose of by this my will or any codicil hereto, To THE USE of the said [*trustees*], their heirs and assigns, according to the customs of the several manors of which the same hereditaments are holden respectively, upon such trusts, and with, under, and subject to such powers, provisoes, and declarations as shall correspond with the uses, trusts, powers, provisoes, and declarations hereinbefore limited and expressed concerning my freehold hereditaments hereby devised, except the clauses declaring or rendering the estates of tenants for life unimpeachable for waste, or as near thereto as the tenure of the property and other circumstances will permit, but not so as to increase or multiply charges or powers of charging.

Bequest of leaseholds upon trusts to correspond with uses declared of the freeholds.

47. I GIVE AND BEQUEATH all my leasehold messuages, tenements, and lands situate, &c., with appurtenances thereto belonging, unto the said [*trustees*], their executors or administrators, for all the estate, term, and interest which I shall have therein at the time of my death, upon the trusts following (that is to say), UPON TRUST, from time to time, out of the yearly rents and profits of the same leasehold premises, to pay and perform the rents and covenants reserved and contained by and in the several leases by which the same premises are respectively held; And subject thereto shall hold the same premises upon such trusts and with and subject to such powers, provisoes, and declarations as shall correspond as nearly as may be with the uses, trusts, powers, provisoes, and declarations hereinbefore limited, declared, and contained concerning the freehold hereditaments hereby devised in strict settlement, or as near thereto as the nature and tenure of the property will permit, but so as not to increase or multiply charges or powers of charging: But so that the said leasehold premises shall not vest absolutely in any person hereinbefore made tenant in tail [male or in tail] by purchase of the said freehold hereditaments until he [*or* she] shall attain the

(*b*) See as to this sect. 45 of the Copyhold Act, 1887, *ante*, p. 756, note (*u*).

Strict Settlement.

age of twenty-one years, but on his [*or* her] death shall devolve as if they had formed part of the said freehold hereditaments.

Renewable leaseholds upon trusts for renewal, and to go with freeholds devised in strict settlement;

48. I GIVE all that messuage and hereditaments at ——, which at my death I may hold under any lease from the Dean and Chapter of ——, unto my said trustees, their executors, administrators, and assigns, UPON TRUST that my trustees or trustee for the time being shall, from time to time, out of the income thereof, pay the rents and perform the covenants on the lessee's part to be paid and performed, and also, from time to time, if and as and when my trustees or trustee shall deem expedient, procure a renewal of the lease thereof which for the time being may be in force, and for that purpose surrender such lease, and raise the costs of such renewal either out of the income of the said hereditaments or by mortgage thereof or of any part thereof; any such mortgage or mortgages to be, from time to time, and as soon as may be, paid off out of the income from the said leasehold hereditaments: PROVIDED, that it shall be lawful for my trustees or trustee, if they or he should think fit, out of the income from the said hereditaments, to effect and keep on foot an insurance on the lives for which any subsisting lease shall be granted, or any of them, to such amount as my trustees or trustee shall estimate as the probable expense of obtaining a renewal thereof on the failure of such lives or life, and to apply the proceeds of such insurance in obtaining such renewal, and to apply any surplus of such proceeds as if the same were income from the said hereditaments: PROVIDED ALSO, that, if my trustees or trustee should deem it expedient either to surrender any lease and obtain a renewal thereof, or to abstain from obtaining a renewal of any lease which may have expired, the produce of any such insurance shall be invested either in the purchase of freehold or copyhold lands of inheritance in England or Wales, to be conveyed to such uses and upon such trusts as are hereinbefore limited concerning the said freehold hereditaments at ——, or on government, parliamentary, or real securities in England or Wales (but not in Ireland), to be held upon trusts corresponding as nearly as may be with the trusts hereinafter declared concerning the said leasehold messuage and hereditaments at ——: AND my trustees or trustee shall be pos-

**Strict Settlement.**

sessed of the said leasehold hereditaments for such original and renewed estates IN TRUST for the person or persons, successively, who for the time being shall be entitled, under the limitations hereinbefore contained, to the freehold in possession of my said freehold hereditaments at ——, and in the like shares and proportions, and subject to the like trusts and powers in all respects, as nearly as may be; BUT so that no such person shall take any interest in the said leasehold hereditaments, or any share thereof, beyond the term of his or her life, until he or she shall have effectually barred or destroyed such estate tail and remainders over as are hereinbefore limited in respect of the freehold hereditaments to which he or she shall be so entitled, and as shall not have previously expired or failed, or until the expiration of twenty-one years from the death of the survivor of such of the persons mentioned by name in my will, and such of the issue of my paternal grandfather as shall be living at my death, whichever shall first happen.

trusts of leaseholds in strict settlement.

49. I BEQUEATH all my diamonds, with the settings thereof, plate, pictures, engravings, drawings, sculptures, books, linen, and articles of vertu whatsoever [being at the time of my death in my house called —— Hall], (including any articles

Bequest of chattels as heirlooms (*c*);

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(*c*) Forms of bequests of chattels to be held as heirlooms independently of real estate devised in strict settlement will be found, *ante*, pp. 767, 768, Forms 33 and 34.

The following alternative form of such a bequest may here be suggested:—

I BEQUEATH the articles of plate presented to me as a testimonial in acknowledgment of my services in ——, namely, ——, a salver, centrepiece and inkstand, which said articles of plate I am anxious should descend in the nature of heirlooms in my family, to [*trustees*], their executors, administrators, and assigns, UPON TRUST to stand possessed of the said articles of plate as if I had directed the same to be sold, and the money arising from such sale to be laid out in the purchase of real estate, and had settled such real estate to the uses following, that is to say; To the use of my wife for her life, with remainder to the use of my first and other sons, successively for life, with remainder, immediately after the life estate of each such son, to the use of his first and other

Trusts of heirlooms in strict settlement by hypothecal devise.

Strict Settlement.

which shall or may have been removed therefrom for repair or other temporary purpose or which shall or may have been purchased by me, and directed to be sent to my said house), to the said [*trustees*], their executors, administrators, and assigns, UPON TRUST to permit the same to go and devolve with the said house, so far as the rules of law and equity will permit, by the person or persons who for the time being shall be entitled to the possession of the same house, by virtue of this my will; but so that the same effects shall not vest absolutely in any person hereby made tenant in tail [male or in tail] by purchase of the said house, unless such person shall attain the age of twenty-one years: But on the death of such tenant in tail [male or in tail] by purchase the same effects shall go and devolve and remain in the same manner as if they were freeholds of inheritance and had been hereby devised in settlement to the uses and upon the trusts hereinbefore declared of and concerning my said house. AND I DIRECT, that as soon as conveniently may be after my death, the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, shall cause schedules and inventories to be taken of the said diamonds and other articles, and

direction to trustees to take an inventory;

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sons successively in tail, with remainder to the use of the first and other daughters of each such son successively in tail, and so that the daughters or daughter of every elder son shall take before the daughters or daughter of every younger son, with remainder to the use of my first and other daughters, successively for life, with remainder, immediately after the life estate of each such daughter, to the use of her first and other daughters successively in tail, with remainder to the use of the first and other and each such daughter successively in tail, and so that the daughter or daughters of every elder daughter or daughters of mine shall take before the daughters or daughter of every younger daughter of mine, with remainder to such uses as my wife shall by will appoint; And in default of and subject to any such appointment, to the use of [*ultimate devisee*] successively.

Another method is to bequeath heirlooms in trust for sale, the proceeds to be invested in real estate. The heirlooms thus are converted out and out, and may be settled strictly; then introduce a provision that the heirlooms are not to be sold but with consent of parties necessary to disentailing deed.

Strict Settlement.

two copies to be made thereof, and shall sign each of the said copies and keep one of them, and leave the other at my said house; and shall from time to time cause the same copies to be signed by the person for the time being entitled in possession to the said house under this my will. And I direct, that the said [*trustees*], and the survivor of them, and the executors and administrators of such survivor, shall at all times keep the said diamonds and other articles adequately (so far as may be) insured against loss or damage by fire, and shall from time to time inspect and examine into the state of the said furniture and other effects, and cause such reparations and restorations and replacings to be made thereof from time to time as they or he shall think proper; such insurances, reparations, restorations, and replacings to be made at the expense of the person or persons for the time being entitled to hold, use, and enjoy the said diamonds and other articles under the trusts of this will.

and from time to time examine the effects.

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## TRUSTEE CLAUSES.

Power to specified tenants for life successively to appoint new trustees (*d*).

1. Provided always, and I hereby nominate for the purpose of exercising the statutory power of appointing a new trustee or new trustees of this my will, when and so often as any vacancy shall occur, my said wife during her widowhood, and after her death or marriage [or in case she shall refuse or neglect by the space of —— calendar months to make such appointment] the said [*next tenant for life*], [*or*, my said daughter [*name*], and her said husband [*name*], during their joint lives, and on the death of either of them the survivor of

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(*d*) The Conveyancing Acts, 1881 (s. 31), and 1882 (s. 5), have rendered it now unnecessary to state in detail the circumstances under which a power to appoint new trustees may be exercised, and have indicated the persons by whom the power is to be exercised, including "the person or persons nominated for this purpose by the instrument, if any, creating the trust." See, for a full discussion of the subject, the Preliminary Dissertation on "Appointment of New Trustees," Vol. II., pp. 1 *et seq.* It will generally be convenient to nominate one or more of the beneficiaries for this purpose. The indication of the persons who are to be entrusted in each event with the power of appointment

Trustee Clauses.

them], [And in case the said [*next tenant for life, or*, "my said daughter," &c.] shall so refuse or neglect as aforesaid, I DECLARE that thereupon the power to make such appointment shall be exercisable as provided by statute.]

Power to tenants for life of will to appoint new trustees.

2. PROVIDED ALWAYS, AND I HEREBY NOMINATE for the purpose, &c., the person or persons for the time being entitled directly under my will, and not by assignment, to the receipt of the income from the said trust estates [trust funds], or of any aliquot part thereof, being of full age [discovert], and competent, unless such person should have absolutely sold or parted with his or her interest; for the purpose of exercising the statutory power of appointing: And in case the person or persons so nominated shall refuse or neglect by the space of —— calendar months to make such appointment, &c.

Power to tenants for life of realty to appoint new trustees.

3. PROVIDED ALWAYS, AND I HEREBY NOMINATE for the purpose, &c., the person or persons who for the time being shall, by virtue of any of the limitations of this my will, be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the hereditaments hereinbefore devised, or such of the same persons respectively as shall be of full age and otherwise competent, And in case, &c.

Power to devisees in common and survivors to appoint new trustees.

4. PROVIDED ALWAYS, AND I HEREBY NOMINATE for the purpose, &c., the said [*devisees in common*], or the survivors or survivor of them, or such of them respectively as shall be competent, or any executor or administrator of such survivor, or, if there be no such person, for my acting executors or administrators, And in case, &c.

Power to children to appoint new trustees.

5. PROVIDED ALWAYS, AND I HEREBY NOMINATE for the purpose, &c., my children, the said [*five children*], and any child or children of mine hereafter to be born, or such of the same children respectively as for the time being shall be living and of full age and otherwise competent, And in case, &c.

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is a matter of some nicety, not only requiring an exercise of judgment in selecting from among the several objects of confidence who may be suggested, but also sometimes rendering advisable a provision for the refusal or neglect of the primary donee of the power to exercise it. The forms in the text, with the variations appended to them, afford examples of different solutions of this problem, from which the practitioner may select such as best accords with the wishes of the testator or his own notions of expediency.

Trustee Clauses.

Power to appoint new trustees in respect of daughters' shares.

6. PROVIDED ALWAYS, AND I FURTHER DECLARE, that each child of mine, in respect of his or her own share in the said trust funds, and if any such child, being a daughter, should have died, then the husband of such daughter (if any) who may for the time being be entitled to the income of any part of the said trust premises, under any [testamentary] appointment to be made in his favour as aforesaid, shall be the person to exercise the statutory power of appointing a new trustee or new trustees of this my will (*e*).

Appointment of new trustees where there are distinct trusts under the same will (*f*).

7. PROVIDED ALWAYS, AND I HEREBY NOMINATE my said wife [*or*, [*tenant for life*]] during her widowhood, [*or*, during his life], as the person to exercise the statutory power of appointing a new trustee or trustees of my will generally, or of any special trust fund comprised therein: AND I DECLARE that after her death or marriage [*or*, after his death], subject to the statutory provisions in that behalf so far as the same are not inconsistent herewith, if at any time there shall be no surviving or continuing trustee or trustees, hereinbefore respectively appointed, of the same class of any special trust fund, then my acting executors or executor, or, being none, the personal representatives of the last survivors of such executors, shall have power to appoint themselves, or some, or one of them, or any other person or persons, to be a trustee or trustees of such special trust fund.

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(*e*) Observe the difference between this clause, which vests the power of new appointment in each child respectively in regard to its own share, and the general clause which vests the power in regard to entire trust property in the donees collectively.

(*f*) By sect. 5 of the Conveyancing Act, 1882, "a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property," and it would seem that, apart from express provision in the will, where there are already distinct sets of trustees under the same will the power given by sect. 31 of the Conveyancing Act, 1881, as amended by the above-mentioned section of the Act of 1882, is confined to trustees of the same class. As to whether the last-mentioned section applies where there are distinct trusts, see Wolst. & Turner's Conv. Acts, p. 144; Lewin on Trusts, 667 (8th edit.); and *Re Paine's Trust*, 28 Ch. D. 725. The object of the latter part of the clause in the text is when there are no trustees left of the same class to give the executors of the will an over-riding power to appoint themselves or some other person new trustees of the special fund. See also *post*, p. 972, Form 13.

**Trustee Clauses.**

Special power of new appointment in regard to a separate trust fund.

8. Provided also, and I further declare, that the power lastly hereinbefore contained is not intended to apply to the trusteeship hereby constituted in respect of the said trust fund or sum of £—— hereinbefore bequeathed or settled for the benefit of my said sister [*name*], and her children; But that when and so often as a vacancy shall occur therein, a new trustee or trustees shall be appointed by the said [*sister*], and the last mentioned trust fund shall thereupon, at the cost of the said [*sister*], be transferred to, or vested in such trustee or trustees accordingly.

Recommendation of friends as trustees not to be obligatory.

9. And I recommend that my friends [*names*], be nominated to fill the first and second vacancies so as aforesaid occurring in the said trusteeship; But I expressly declare that such recommendation shall not be obligatory on the person or persons exercising such power as aforesaid (*g*).

Power to appoint separate trustees in respect of investments in Australia.

10. Provided always, and I hereby declare, that in case of the death or absence from the Colony of —— for more than twelve calendar months, of any trustee of my said real and personal property in that Colony, so devised and bequeathed to the said [*trustees of property in Colony*], or in any other event, by reason of which a vacancy would occur, mentioned in the 31st section of the Conveyancing and Law of Property Act, 1881, upon the trusts hereinbefore declared concerning the same, then it shall be lawful for the surviving or continuing trustees or trustee of such last mentioned property, or the personal representatives of such last surviving or continuing trustee, from time to time, [with the consent of such one of my said daughters as shall be interested in such trust funds (if living),] to appoint a person or persons resident in the said Colony, to be a trustee or trustees of the same

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Trustees directed to nominate certain persons on first vacancies.

(*g*) It should be distinctly shown whether a recommendation of this nature is intended to be obligatory; if so, the clause in the text may be thus varied—

"And I direct that my friends [*names*], be nominated to fill the first and second vacancies so as aforesaid occurring in the said trusteeship, and that no other person shall be appointed thereto, unless they respectively shall decline such nomination."

Trustee Clauses.

property, separately from the other trust property under my will, either in the room of the trustees or trustee of my property in the said Colony existing before such appointment, or jointly with any such trustees or trustee; And with all such powers and authorities in respect of the property whereof he or they shall be appointed trustee or trustees, so far as applicable, as are herein given to the trustees of my other property hereby appointed (*h*).

Proviso that trustee residing elsewhere shall cease to be trustee.

11. PROVIDED ALWAYS, AND I DECLARE, that any person being a trustee of my will, who shall cease to reside in the county of ——, or within —— miles of such county, shall (*i*) be deemed to be a trustee incapable of acting in the trusts or powers contained in my will within the meaning of the 31st section of the Conveyancing and Law of Property Act, 1881, and such trustee shall thereupon cease to be a trustee of my will.

General proviso as to consents to appointment of new trustees (*k*).

12. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the statutory power of appointing new trustees of this my will [*or*, of any trust fund or trust property settled by this my will] shall from time to time be exercisable with the consent in writing of the person or persons, being of full age and not under any disability, for the time being entitled to the [rents and profits or] income of the said trust premises [*or*, of such trust fund or trust property]; and if and so long as there shall be no such person, at the discretion of the person in whom [subject as is next hereinafter provided,] such statutory power shall for the time being be vested.

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(*h*) The introduction of the special power will not, of course, supersede the necessity for a power to appoint trustees of the general estate, which will be in the usual form.

Provision in case trustee of a farm, &c., removes from the neighbourhood.

(*i*) Sometimes, when trustees are required to manage a trading or farming concern, or when the trusts are otherwise of such a nature as to require constant or frequent personal superintendence at a particular locality, provision is made for the appointment of a new trustee in the room of any trustee going to reside away from the neighbourhood; and this provision gives authority to make a change in the trusteeship, and declares that the person so removing shall *ipso facto* cease to be a trustee.

(*k*) The words in leaded brackets are applicable where separate sets of trustees are appointed by the will.

Trustee Clauses.

Proviso as to appointment of new trustees of separate funds (*l*).

13. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that the statutory power of appointing trustees shall as regards each separate trust fund or trust property settled by this my will, be vested in and exercisable by the continuing or surviving trustees or trustee of the trust fund or trust property, in relation to which the appointment of a new trustee or trustees shall have become necessary or expedient, by reason of any event rendering exercisable such statutory power, or by the personal representatives or representative of such last surviving or continuing trustee.

Trustees' receipt clause (*m*).

14. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the receipt signed by my trustees or trustee for any trust monies, securities, or other personal property paid, transferred, or delivered to them or him as the trustees or trustee for the time being of this my will under any trust, power, or provision therein contained, shall be a good, effectual, and sufficient discharge for all sums, securities, and other personal property thereby acknowledged to have been received, and shall exonerate any person so paying, transferring, or delivering the same from being bound to see to the application, or being liable for the loss or misapplication thereof.

Indemnities to trustees (*n*).

15. PROVIDED ALSO, AND I HEREBY DECLARE, [in addition and without prejudice to the statutory provisions in relation

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(*l*) The better opinion seems to be that the statutory power given by sect. 31 of the Conveyancing and Law of Property Act, 1881, is vested as provided in this clause; but it seems advisable, where separate sets of trustees are appointed by the testator, to exclude by express provision all possible question: see *ante*, p. 969, note (*f*).

Statutory provision as to trustee's receipts.

(*m*) By sect. 36 of the Conveyancing Act, 1881, the effect of a trustee's signed receipt, declared by the above clause, is now implied, so that there is no necessity for its insertion, except in cases where the will applies or is likely to apply to property situate out of the United Kingdom, in some colony or other place where no such provision is implied by the law there, so as to save expense of proving that such a provision is implied by English law.

Inefficacy of ordinary indemnity clauses to exonerate trustees.

(*n*) A full dissertation on the responsibility of trustees, and on the inefficacy of the ordinary indemnity clauses to diminish and restrict it, will be found in Vol. VI., sub tit. "SETTLEMENTS." The effect of Lord St. Leonards' Act (22 & 23 Vict. c. 35), sect. 31, is that indemnity clauses may generally be dispensed with, except where it is desired specially to indemnify trustees against the consequences of acts for which they would otherwise be responsible

Trustee Clauses.

to the indemnity of trustees (*o*),] that the trustees for the time being of this my will shall not be answerable or accountable [the one for the others or other of them, or for the acts, deeds, defaults, receipts, payments, or disbursements of the others or other of them; or be charged or chargeable with or accountable for any further or other sum or sums of money or other trust property than what shall actually come to the hands of and be received by them respectively, notwithstanding they or any or either of them shall give or sign, or join or concur in giving or signing any receipt or receipts for the sake of conformity; And that they or any or either of them shall not be answerable or accountable for the insufficiency, defect, or failure of any banker, broker, auctioneer, agent, or other person in whose hands any part or parts of the aforesaid trust-monies or other property shall or may at any time or times hereafter happen to be by them or any or either of them placed or lodged for safe custody, or who may be allowed to receive the same in the course of the execution of the trusts of these presents; or] for any defect or insufficiency in the title or evidence of title to any hereditaments or property which the said trustees or trustee shall or may purchase, or on the security of which they or he may lend money, under or by virtue of the trusts, powers, and provisions hereinbefore contained, in case such title shall have been approved by counsel on their or his behalf, or, on lending any money on leasehold security, for dispensing wholly or partially with the investigation or production of the title of any lessor, or for any deficiency or depreciation in value of any hereditaments, investments, or other property in or upon which the said trust monies, or any part thereof, may have been invested, or for any loss or damage which shall or may happen or arise of or to all or any

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as for breaches of trust. The words within brackets in the form given above are therefore unnecessary, and should be omitted, unless the testator has or may have property situated in some colony or other country where the law may not afford any general indemnity to trustees. If it be intended by the testator that one trustee shall not be answerable for another, he should afford a more special indication of such intention than is disclosed by the clause in the text. For this purpose the clause should be inserted.

(*o*) These words will be omitted if the words within leaded brackets are inserted.

Trustee Clauses.

of the aforesaid trust estates, monies, effects, and premises, or the proceeds or produce thereof or of any part thereof, provided the same shall happen without any wilful neglect or default on the part of such trustees respectively.

Special indemnity to trustees (*p*).

16. PROVIDED ALWAYS, AND I HEREBY DECLARE, that if and so often as any trustee for the time being of this my will shall pay over to or cause or permit any co-trustee to receive any sum or sums of money, in order and to the intent that the same may be applied by such co-trustee for the purposes of this my will, it shall not be incumbent on the trustee making such payment, or causing or permitting such receipt, to see or inquire into the application of the said monies, or to ascertain the truth or accuracy of any representation made by his co-trustee concerning the same, nor shall the trustee who shall make default in any of the particulars aforesaid be responsible for any loss which shall arise to the said trust estate by reason thereof, any rule of equity to the contrary notwithstanding. Nevertheless, I DECLARE, that this exemption from legal responsibility shall not affect the right of any trustee to call for accounts or to inquire into the transactions of his co-trustee or trustees.

Clause for reimbursement of trustees (*q*).

17. AND I DECLARE, that every trustee for the time being of this my will may reimburse himself respectively, and allow to his co-trustees or co-trustee out of the trust premises all such costs, charges, and expenses as they or any or either of them shall or may pay or incur in or about the execution of the trusts or powers of this my will, or otherwise relative thereto.

Legacy to newly appointed trustees (*r*).

18. AND I HEREBY GIVE AND BEQUEATH to each and every of the trustees to be appointed under the power hereinbefore contained, the sum of £——, in consideration of the trouble

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(*p*) The efficacy of an indemnity clause to the effect of that given in the text was upheld in the cases of *Wilkins* v. *Hogg*, 3 Giff. 116, and *Pass* v. *Dundas*, 43 L. T. (N. S.) 665; 29 W. R. 332.

(*q*) This clause may now generally be omitted: see sect. 31 of Lord St. Leonards' Act (22 & 23 Vict. c. 35). See *ante*, p. 972, note (*n*).

(*r*) This and the following clause may be useful in the case of a large estate, the administration of the trusts whereof requires business capacity on the part of the trustees for the time being, and is likely to make serious demands on their time and attention.

Trustee Clauses.

such trustee or trustees respectively will have in the execution of the trusts of this my will, such legacy or legacies to be paid out of so much of my residuary personal estate as shall at the time of such appointment or appointments respectively remain subject to any of the trusts of this my will.

Authority to executors and trustees to deduct commission on sums received.

19. I AUTHORISE AND EMPOWER my said executors and trustees, and all and every other the trustees and trustee for the time being of my said will, to deduct and retain a commission or salary, at the rate of 2*l.* 10*s.* per centum on the gross amount of the monies received by them respectively in the execution of the trusts of my said will; And in case any question shall arise in regard to the proportions in which the respective trustees should be entitled to such commission, then I DIRECT that the sum to be claimed by each trustee shall be proportional to and calculated on his own separate receipts.

Power for trustees to employ solicitors, agents, &c.

20. PROVIDED ALWAYS, AND I HEREBY DECLARE, that my trustees or trustee may, in their or his uncontrolled discretion, instead of acting personally, employ and pay a solicitor or any agent or other person to transact all or any business, or do any act of whatever nature required to be done in the premises, including the receipt and payment of money, and shall be entitled to be allowed and be paid all charges and expenses so incurred.

Professional trustee may charge for services.

21. PROVIDED ALWAYS, AND I FURTHER DECLARE, that any trustee of this my will, being a solicitor or other person engaged in any profession or business may be so employed or act, and shall be entitled to and be paid all usual or proper professional or other charges for any business or act done by him or his firm in the premises, whether in the ordinary course of his profession or business or not, and although not of a nature requiring the employment of a solicitor or other professional person.

Power for trustee resident or going abroad to delegate his authority.

22. PROVIDED ALWAYS AND I HEREBY DECLARE, that, if at any time when any sale, purchase, or other dealing, matter, or thing relating to the sale, conversion, administration, or management of the trust premises, or the execution of any of the trusts or powers of this my will shall be pending or in prospect, any trustees or trustee for the time being of this my will shall be travelling or residing or intending to travel or

Trustee Clauses.

reside abroad [*or*, in some country other than the country wherein the property to be sold, converted, administered, or managed shall be situate, or the trusts or powers are to be executed] such trustees or trustee may, by writing under their or his hands or hand, with the consent in writing of their or his co-trustee or co-trustees, delegate to such co-trustee or to all or any one or more of such co-trustees who shall for the time being be resident in England [*or*, in the country wherein such property shall be situate, or such trusts or powers are to be executed] the execution of all or any of the trusts and powers of this my will, and may by powers of attorney or otherwise authorise such co-trustee or co-trustees to execute, make, and do, or concur in executing, making, and doing all such deeds, instruments, payments, receipts, acts, and things relating to any of the trusts, powers, or provisions of this my will, without being accountable or responsible for any loss occasioned thereby: Provided also that no purchaser or person dealing with any trustee or trustees purporting to act under such delegation or authority as aforesaid shall be bound or concerned to inquire whether occasion for such delegation or authority has arisen or is likely to arise, or as to the propriety, regularity, or sufficiency thereof, or whether or not the same is at the time of such dealing valid and subsisting.

Protection to purchasers, &c.

Advice.

23. I REQUEST my trustees or trustee, but without imposing any obligation on them or him, to employ and take the professional advice and assistance of my friend [*name*], of, &c., solicitor, in all matters relating to the trusts of my will wherein they or he may require professional assistance.

Trustees to be bound by the majority.

24. AND I DECLARE, that in case a difference of opinion should exist among my trustees for the time being in regard to any of the trust-affairs, or any act, matter, or thing proposed to be done in relation thereto, the opinion and determination of the majority of the same trustees shall be conclusive, it being my intention that the acts and proceedings of the majority of the said trustees shall for all the purposes of this my will be and be deemed to be and be taken as the acts and proceedings of the whole or entire body of the same trustees, any rule of law or equity to the contrary notwithstanding.

Trustee Clauses.

Proviso, that questions arising under the will shall be settled by the trustees.

25. And I declare that, if any question should arise concerning the construction or administration of my will, or any clause, matter, or thing therein contained or with relation thereto, my trustees or trustee acting either on their or his own judgment, or under professional advice, and upon such evidence as they or he shall think fit, may determine such question by writing under their or his hands or hand: And I declare, that such determination shall be final, and binding on all persons interested under this my will or any codicil hereto.

Power to the trustees to determine questions concerning the construction and administration of the will;

26. Provided always, and I hereby declare, that my trustees or trustee shall have full power and authority to apportion blended trust funds and to determine the amount of any deductions or allowances to be made in respect of any alleged advancement or loan by me in my lifetime to any of my children, and what articles pass under any specific bequest herein contained, and what monies are to be treated as or are to be payable out of capital or income, and by whom and in what manner valuations are to be made for any purpose in the opinion of my trustees or trustee, necessary or expedient for the carrying into effect any of the trusts, powers, or provisions of this my will or any codicil hereto, and generally to determine any question which shall arise among my children or more remote issue, or any persons claiming through or under such children or issue, respectively, concerning the true construction and effect of this my will or of any clause or expression therein contained, or concerning the rights and interests of my children or more remote issue respectively, under or by virtue of the same, provided that the decision of such trustees or trustee shall be supported by the opinion in writing of one of her Majesty's counsel practising in the Chancery Division of the High Court of Justice, or of a conveyancing counsel of not less than —— years' standing at the bar, to be nominated by my said trustees or trustee. And I declare, that in case any of my children or more remote issue, or any of such other

forfeiture clause (*o*).

(*o*) What is the precise operation of a clause of this nature, under certain circumstances, it may be rather difficult to define. There is no doubt, however, of its having a pacific tendency, as few persons would be so imprudent as to incur the risk (for at least it must be admitted that there would be *risk*) of forfeiture, by refusing to bow to the decisions of the testator's tribunal of interpretation: see Jarm. Wills, Vol. II., p. 58.

Remark on trustees' power of deciding on construction of will.

Trustee Clauses.

person or persons as aforesaid, should refuse to abide by the decision of my said trustees, supported as aforesaid, and should bring an action or institute any other proceeding or proceedings whatsoever for the purpose of obtaining the determination of any court or courts upon such question, as aforesaid, then, and in every such case, I absolutely REVOKE and make void every gift, bequest, and trust contained in this my will to or in favour of the person or persons who shall so act, any rule of law or equity to the contrary notwithstanding; AND I GIVE AND BEQUEATH the share, property, and interest comprised in every such revoked gift, bequest, and trust to such person or persons, and for such purpose or purposes as the same would have gone and been applicable to under this my will, if the object or objects of such gift, bequest, or trust had died in my lifetime.

Power to compound debts, &c.

27. AND I HEREBY AUTHORISE and empower the trustees or trustee for the time being of this my will [*or*, of my said trust property in the colony of —— hereinbefore devised in trust for sale and conversion] in their or his absolute discretion, to allow, pay, compromise, compound, enforce, waive, accept, or give real or personal security for, or give time without taking any security for, or refer to arbitration, any debts or demands whatsoever which may be owing from or to or be made upon or against or in behalf of my estate [in the colony aforesaid], whether the same be legally enforceable or not, and upon such evidence as they or he shall think sufficient (*p*).

Proviso as to remitting proceeds of sale, &c., of property in a colony.

28. PROVIDED ALWAYS AND I HEREBY DECLARE, that the said [*colonial trustees*], or other the trustees or trustee for the time being of my property in [*colony*] aforesaid hereinbefore devised and bequeathed to them in trust for sale and conversion shall from time to time remit the proceeds of such sale or conversion, and also the rents, profits, and income of and

(*p*) The above clause is now no longer necessary in ordinary cases, similar powers being given by sect. 37 of the Conveyancing Act, 1881. It might, however, be properly inserted in a will relating to property in a colony or other country where similar powers are not implied by the law there. It might also be advisable, where required, to give a *special* executor such powers and expressly to exclude the general executors from exercising their statutory powers in respect of property of which a special executor is appointed: see *post*, p. 986, Form 16.

arising from such parts of the same property as for the time being shall remain unsold or unconverted to the said [*English trustees*] or other the general trustees or trustee of this my will to be received, held, and applied by such last-mentioned trustees or trustee upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning my residuary estate.

Trustee Clauses.

## MISCELLANEOUS CLAUSES.

1. I DECLARE that the provision hereby made for my said wife shall be in bar and full satisfaction of all dower and freebench, which she may be entitled to claim in or out of any freehold, copyhold, or customary hereditaments, of which I have been, or am, or shall be seised, possessed, or entitled.

Dower clause (*q*).

2. I BEQUEATH unto my nephew [*name*], the sum of £——, but upon condition that he shall refund the same, without interest, for the benefit of my residuary estate, in case at any time he should become tenant in tail in possession of the estates comprised in the marriage settlement of my brother [*name*]. AND I DIRECT that the same legacy shall not be paid to my said nephew until he shall have delivered to my executors or trustees or trustee for the time being an undertaking or agreement, that, in case of his so becoming tenant in tail of the same estates, he will immediately refund the said legacy, and that the said estates shall be charged with the repayment thereof (*r*).

Legacy to be refunded on succeeding to a certain estate.

(*q*) This clause is now no longer necessary, except in the rare cases where the testator was married before 1834, or perhaps where the testator is possessed of copyholds, which are not within the Dower Act (3 & 4 Will. 4, c. 105): see *Powdrell* v. *Jones*, 2 Sm. & Giff. 407; *Smith* v. *Adams*, 5 De G. M. & G. 712; *Thompson* v. *Burra*, L. R. 16 Eq. 592; but in *Lacey* v. *Hill*, L. R. 19 Eq. 496, it was held that a widow's right to freebench was defeated by the husband's devise under sect. 3 of the Wills Act (*ante*, p. 726).

(*r*) An immediate legacy, conditioned to be void in a certain event, will be paid to the legatee without his being required to give security to refund it: *Fawkes* v. *Gray*, 18 Ves. 131. But see *Colston* v. *Morris*, 6 Mad. 59. Such an agreement as that

Conditional legacy.

**Miscellaneous Clauses.**

Condition as to release of claims.

3. I DECLARE, that my wife shall not, nor shall any child of mine, take any benefit under my will (other than the benefit of maintenance or advancement during infancy), until she or he has, to the satisfaction of my trustees or trustee, confirmed my will in all respects, and released all her or his demands in opposition thereto or against my real or personal estate; And in case my wife or any child or children of mine should not execute such confirmation and release within three calendar months after being thereto requested in writing by my trustees or trustee, I DIRECT that my will shall take effect as if she, he, or they were not mentioned therein.

Children to forfeit all benefit under the will, unless they confirm a sale by testator of an estate comprised in his marriage settlement.

4. WHEREAS, I have contracted for the sale of certain hereditaments at ——, which were, by the will of my cousin [*name*], late of —— aforesaid, devised to me for my life, with remainder to my children as tenants in common in fee; and my four eldest children, being of age, have conveyed unto the respective purchasers of the said hereditaments all their respective estates and interests in the said hereditaments. Now, I DECLARE that no other child of mine, and no issue of any such child, shall take any benefit under my will (other than the benefit of any provision for his or her maintenance, education, or advancement), unless he or she shall, within six months from my death, or from his or her attaining his or her majority (whichever shall last happen), execute a sufficient conveyance to the said several purchasers, or their respective heirs, appointees, or assigns, of all his or her estate and interest in the said hereditaments, and shall allow all the purchase monies for the same hereditaments or any part thereof to be received by my trustees or trustee as part of my personal estate; And my will shall be construed and operate as if the child or children who or whose issue shall refuse or neglect to execute such conveyance as aforesaid had never existed or been referred to in my will.

Declaration that provision made for wife is upon con-

5. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the said annual sum or yearly rentcharge of £——, hereinbefore

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above required will, if unsealed, be liable to the agreement stamp only, and not to the stamp on a mortgage, or on a "declaration of trust not otherwise charged."

Miscellaneous Clauses.

limited to my said wife and her assigns during her life, and the said annual sum or yearly rentcharge of £—— hereinbefore limited to my said wife and her assigns during her widowhood, are so respectively limited to her and them as aforesaid, upon condition that she my said wife shall, at her own costs and charges, within the period of —— calendar months next after my decease, by such ways or means as by my said trustees or trustee for the time being, shall be required, surrender, or otherwise release or dispose of the life interest of her my said wife, under the settlement executed on our marriage, in the several sums of stock in the same settlement mentioned or comprised, so and in such manner, that the interest, dividends, or annual produce of the same several sums of stock may from time to time, during the life of her my said wife, be received and enjoyed by the person or persons who would for the time being have been entitled thereto in case she were then dead. AND I HEREBY EXPRESSLY DECLARE, that, in case my said wife should refuse or neglect to make and execute such surrender or release of her life interest in the said trust funds as aforesaid, within the period aforesaid, and should persist in such refusal or neglect for the further period of —— days after a demand or request in writing, delivered to my said wife or left for her at her last or usual place of abode, by or on the part of my said trustees or trustee, then and in such case, from and immediately after the expiration of the said period of —— days, the said several annual sums or yearly rent-charges respectively hereinbefore limited to my said wife, or such of them as shall be then subsisting, shall absolutely cease and determine, notwithstanding that my said wife shall or may, at any time thereafter, be willing and desirous to make and execute, or actually shall make and execute such surrender or release as aforesaid, any rule of equity to the contrary notwithstanding (*s*).

dition of her giving up life interest under her marriage settlement;

in case of her neglect to do so after notice, the rent-charges to cease.

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(*s*) If a testator really intends to make compliance with the condition a *sine quâ non*, the intention should be placed above the possibility of misconstruction, by explicit declaration, as in the text, since points of this nature have occasioned much litigation: see *Clavering* v. *Ellison*, 7 H. L. C. 707; *Langdale* v. *Briggs*, 8 De G. M. & G. 429; *Hervey-Bathurst* v. *Stanley*, 4 Ch. D. 272.

Where there is no gift over, or substituted disposition, in the event of non-compliance with the testator's injunction, and that

Remarks upon conditions requiring performance of an act by devisee or legatee.

**Miscellaneous Clauses.**

Devisee to produce title-deeds.

6. PROVIDED ALWAYS, AND I DECLARE, that all title deeds and muniments of title relating to the said hereditaments at ——, hereinbefore devised to my said son [*elder son*], are to be delivered to him upon the express condition that he do, within three calendar months after demand thereof in writing by my said son [*younger son*], his heirs or assigns, execute and deliver to my said son [*younger son*], his heirs or assigns, at the equal expense of both parties, a covenant or statutory acknowledgment and undertaking for the production, and delivery of extracts from and copies of such of the said deeds and muniments, as relate also to the said hereditaments at ——, devised to my last mentioned son, such covenant or acknowledgment and undertaking to be in the usual form, and to be settled, in case of dispute, by the counsel for or solicitor of my said son [*younger son*], his heirs or assigns; in default whereof I GIVE the said title deeds and muniments of title to my said son [*younger son*], his heirs and assigns.

Recital that two of testator's children are supposed to be illegitimate;

7. AND WHEREAS the marriage ceremony between me and my said wife was twice performed, namely, once in the parish church of ——, on the —— day of ——, and once in the parish church of ——, on the —— day of ——; AND WHEREAS the second of the said marriages was solemnized in

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injunction relates only to the payment of money, equity will relieve against forfeiture on subsequent payment of principal, interest, and costs: *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Grimstone* v. *Lord Bruce*, 2 Ves. sen. 492; *Paine* v. *Hyde*, 4 Beav. 468. And this relief has been sometimes, with more doubtful propriety, extended to other conditions not equally susceptible of compensation, as where the testator bequeaths a sum of money on the condition (as in the text) of the legatee executing a release within a given time: *Taylor* v. *Popham*, 1 Br. C. C. 168; *Simpson* v. *Vickers*, 14 Ves. 341; *Hollinrake* v. *Lister*, 1 Russ. 500. In these cases the legatee has been allowed to take the legacy on his performing the act *after* the lapse of the prescribed period.

Where, however, there is an express gift over, in default, equitable interference is prevented by the claims of the substituted object of gift, who obviously is entitled to equal consideration with the original devisee or legatee. In such cases, therefore, equity is compelled, by its own principles, to remain neuter, leaving the prior devisee or legatee to the consequence of his contumacy or laches: *Leaver* v. *Spurling*, 2 P. Wms. 426; *Simpson* v. *Vickers*, 14 Ves. 341. See *Tulk* v. *Houlditch*, 1 Ves. & B. 248; *Burgess* v. *Robinson*, 1 Mad. 172; 3 Mer. 7; see also Jarm. Wills, Vol. II., p. 13.

Miscellaneous Clauses.

consequence of some doubts having been raised respecting the validity of our previous marriage, by reason of an irregularity in the license in pursuance of which the same was solemnized; AND WHEREAS two of my children, namely [*name*] and [*name*], were born in the interval between the performance of the said two marriage ceremonies: NOW I HEREBY DIRECT AND DECLARE, that all the gifts, trusts, and legacies in this my will contained and declared unto and in favour of my children, shall extend to and comprise the said [*two children*], although they may happen or prove, in contemplation of law, to be illegitimate by reason of the circumstances aforesaid, or from any other cause whatsoever (*t*), it being my intention that such gifts, trusts, and legacies shall have the same operation and effect, to all intents and purposes whatsoever, in regard to each and every child and reputed child of me and my said wife, as the same would have had if the first marriage or intended marriage between us had been duly and regularly solemnized, any rule of construction to the contrary notwithstanding.

direction that they shall participate in the benefits given by the will to children.

8. PROVIDED ALSO, AND I HEREBY DECLARE, that, in case I should in my lifetime give, advance, or settle, or covenant, or agree to give, advance, or settle, unto, for, or upon any of my children or grandchildren respectively, any sum or sums of money or other property for the placing him, her, or them in or to any profession, trade, or business, or for or towards his, her, or their marriage portion, or otherwise for or towards his, her, or their advancement or benefit, and such sum or sums or other property should be entered in any of my books of account by way of debit, then such sum or sums of money, or the value of such property so to be advanced for, or received by, or given to, or settled upon any such children or grandchildren respectively, shall, if less than the portion or share or portions or shares hereby given and provided for such children or grandchildren respectively, be accounted, deemed, and taken as and for part of such portion or share or portions

Advancements in testator's lifetime to children or grandchildren to be deducted from their shares (*u*).

(*t*) This clause may easily be adapted to a case where a second marriage ceremony has been rendered necessary, by reason of the first having been irregularly performed abroad; also, to the case of a testator who has gone through the ceremony of marriage with his deceased wife's sister.

(*u*) See *ante*, p. 816, note (*o*).

Miscellaneous Clauses.

or shares respectively, but if equal to or more than such portion or share or portions or shares respectively, then shall be deemed and taken as and for the whole of such portion or share or portions or shares respectively, unless I should, by writing under my hand, signify and declare the contrary.

Advancements in testator's lifetime to be deducted (*w*) (*short form*).

9. PROVIDED ALWAYS, that money, land, or other property advanced or settled by me in my lifetime, to or for the benefit of any child or grandchild of mine, shall be reckoned as if the same were part of my residuary estate, and as a satisfaction to that extent of the portion or portions hereby given to such child, or his or her issue, or such grandchild, unless I shall have otherwise declared by writing under my hand.

Advancements in testator's lifetime to be brought into account.

10. I DIRECT, that such sums of money as I have or shall have applied for the benefit of any of my children or grandchildren, to the amount at any one time of £—— or more, shall be taken in part satisfaction of the legacies hereby provided for him, her, or them; [And in case such advancements to any legatee should exceed the amount of his or her legacy, the surplus shall be brought into distribution by such legatee with my residuary estate, before he or she shall be entitled to share therein.]

Advancement not to be in satisfaction of portions.

11. I DECLARE, that such advancements as I may make to any of my children [*or*, said nephews and nieces] shall be in addition to and not in satisfaction of any legacy or legacies, portion or portions, or other benefit given to him, her, or them by my will.

Advancements to children in testator's lifetime to be deducted from the respective shares of residue.

12. PROVIDED ALWAYS, that such monies as I have or shall have advanced to any of my said children, or as shall be owing to me from any of them at my death, shall be considered as part of my residuary estate, and shall be deducted from his, her, or their share or respective shares; But so, nevertheless, that no such child shall be called upon to refund such monies for investment upon the trusts of my will. PROVIDED ALWAYS, that, if the monies so to be owing to me from any of my children should, alone or together with any advancements made by me to him or her, exceed in amount

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(*w*) As to ademption of legacies and portions, see *ante*, p. 816, note (*o*).

Miscellaneous Clauses.

one equal [ninth] part of my total residuary estate (including such advancements and debts), then the excess thereof beyond such equal [ninth] part shall be paid to my trustees or trustee, for the benefit of my other children and their issue (if entitled thereto), in manner aforesaid. [AND, for the information of my trustees, I DECLARE, that I have, up to the —— day of ——, made to or for the benefit of my children advancements (being gifts and not loans) to the amounts or values hereinafter mentioned: namely,—To my son [*name*], £——; To my son, &c.; AND that the above-mentioned sums are the only advancements made by me to any of my children before the said —— day of ——.]

Declaration as to advancements already made.

13. PROVIDED ALSO, AND I HEREBY DECLARE, that, if any sum or sums of money shall have been advanced by me previously to my death to any of my daughters as a marriage portion, or any sums of money shall have been advanced by me to any of my sons, and an entry or entries of the last mentioned monies shall be found in my private books of account, called ——, under the titles of their names respectively, and denominated legacy account, such sum or sums so advanced (whether to daughters or sons), shall be deemed part or parts of the legacy or legacies given to him, her, or them respectively by this my will, save and except as to the said legacy of £—— hereby given upon trust for the benefit of my said daughter [*married daughter*], and which I direct shall not be subject to any reduction or diminution in respect of any advancement to her.

Advancements to be taken as part of children's legacies, except as to legacy to married daughter.

14. PROVIDED ALWAYS, that if, at the time of my death, I should have conveyed away my said estate called ——, or any part thereof, my trustees or trustee for the time being shall invest the sum of £——, or a proportionate part thereof, to be ascertained by them or him in such manner as they or he shall, in their or his absolute discretion, think fair and proper, upon trusts corresponding as near as may be with the uses hereinbefore limited and declared concerning the same estate as an equivalent.

Pecuniary legacy to trustees in lieu of estate devised to uses, if sold by testator.

15. I DIRECT that the trustees or trustee for the time being of my residuary estate shall set apart, free from legacy duty, at their or his option, either wholly or in part, from any money which at my death may be payable to my estate from

Power to set apart any debts owing from testator's sons, and transfer

Miscellaneous Clauses.

the same to the trustees of certain legacies in satisfaction thereof;

or in respect of any copartnership then existing between me and my sons or any of them, or which may at my death be owing to me on any account by my sons or any of them, or wholly or in part from other my estate and effects, the said two several legacies or sums of £—— and £——, with interest thereon respectively at —— per cent. per annum from the day of my death; And, at the absolute discretion of my said trustees or trustee, shall either raise and pay the said two legacies or sums within a convenient time after my death, with interest thereon, unto the said [*trustees of legacies*] or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of the said legacies or sums, in such manner as such last-mentioned trustees or trustee shall require, or assign unto and vest in such trustees or trustee the securities or security on which such sums of money respectively, or any part thereof, shall for the time being be outstanding, and the remedies for recovering the same, such assignment to be made at the costs of my residuary personal estate.

authority to trustees of legacy to accept specific funds in satisfaction;

And I authorise the said trustees or trustee for the time being of the said two several legacies or sums of £—— and £——, at their or his absolute discretion, to accept such funds, or such securities or security, whether personal or otherwise, for the said two several legacies or sums, either in full satisfaction of or for the said several legacies or sums, or of or for any specified part or parts thereof respectively, or otherwise upon such terms and conditions as they or he shall think proper; And also, either to permit all or any of my sons from whom any money shall be payable or owing as aforesaid, to retain the same or any part thereof at interest (or, if such last-mentioned trustees or trustee shall think fit, by way of partnership with such trustees or trustee), for such period or periods, and either on any security or securities which, at the time of my death, I may hold for the same, or on such personal or other security as the said trustees or trustee shall think fit, or to call in the said several legacies or sums respectively, or such part or parts thereof respectively, as shall not be permitted to be retained by my sons as aforesaid.

to leave debts from sons outstanding at interest or by way of partnership.

Power to testator's partner to wind up partnership

16. I empower my said son [*name*], to receive the credits of our said partnership firm, and in his discretion to settle, adjust, and wind up the accounts and transactions thereof,

Miscellaneous Clauses.

affairs without interference of executors (*x*).

without any interference on the part of my other executors nereinbefore named, whom I hereby expressly exclude from all participation in, or control under any statutory or other powers or otherwise over, or liability in respect of such credits, accounts, and transactions; AND I EMPOWER my said son to adjust, settle, waive, suspend, take personal or other security for or compound any accounts, claims, and demands whatever, in respect of, or which may be made by or on behalf of or against, the said partnership, and that upon such evidence, whether strictly legal or not, as he shall deem sufficient; AND I DIRECT that my said son [*name*], after paying or providing for the debts owing by the said partnership firm, shall from time to time account for and pay over to my executors, my part or share in the net or clear proceeds of the credits received by him as aforesaid.

Direction as to lapse of charges on lands (*y*).

17. I DECLARE, that, in case any annuity or legacy herein directed to be paid out of any real estate, or any charge upon or limited interest in any real estate hereinbefore created or limited, should fail by being void by lapse or by any other means, such failure shall be for the benefit of the person or persons to whom such real estate is herein given, subject to such charge or limited interest.

Direction as to lapsed shares of residue, &c. (*z*).

18. I DECLARE, that every part or share of, or interest in, or charge upon, any real or personal property, whether residuary or otherwise, which would but for this provision be undisposed of by my will, shall be disposed of in such manner in all respects as is herein directed concerning such part or parts of or share or shares in my residuary personal estate as I have hereinbefore effectually disposed of, and in augmentation of such parts or shares in proportion to their respective amounts (*a*).

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(*x*) For a form of appointment of special executors of partnership shares or business, see *ante*, p. 749.

(*y*) See as to this, *ante*, p. 469.

(*z*) For provisions as to lapse of pecuniary legacies, see p. 796 *et seq.*

(*a*) If the residuary gift is properly framed, this clause (which is in the nature of a limitation of cross remainders) will be superfluous. But it may be resorted to where, on account of the complexity of the residuary limitations, there is any ground for apprehension of an intestacy as to part of the residue.

**Miscellaneous Clauses.**

Lapse to be for benefit of devisee.

19. And, in case the trusts hereinbefore declared concerning the sum of £——, to be raised out of my said hereditaments at ——, should wholly or partially fail, I direct that such failure shall be for the benefit of the person or persons who shall be entitled to the same hereditaments.

Proviso against lapse of general or residuary gift (*b*).

20. [*Devise of realty and personalty to one person, ante*, p. 862, *Form* 7.] Provided always, and I hereby declare, that if the said [*devisee*] shall die in my lifetime, whether leaving issue or not, the devise and bequest hereinbefore made to him shall not lapse, but in such case my said [residuary] real and personal estate shall go to and vest in his heirs or devisees, executors, or administrators respectively, according to the nature and tenure of the property, as part of the real and personal estate of the said [*devisee*] respectively, as if he had been living at, and died immediately after my death.

Proviso against lapse of an aliquot share in residue (*c*).

21. Provided always that if my said daughter [*name*] shall die in my lifetime without leaving issue [*or*, if the said [*legatee, not being a child or other issue of testator*] shall die in my lifetime, whether leaving issue, or not], then I declare that the one equal —— part or share hereinbefore given to her [*or* him] of and in the proceeds of sale and conversion of any residuary real and personal estate, and the investments for the time being representing the same and the annual produce and income thereof, shall be held and applied by my trustees or trustee, upon the trusts, and with and subject to the powers and provisions hereinbefore declared concerning the other —— equal —— parts or shares of the same proceeds and investments respectively as if the same had hereby been originally divided into three equal parts or shares for the benefit of the several persons entitled to or interested in such —— parts or shares respectively, or such of the same trusts, powers, and provisions as shall at the time of my death be subsisting and capable of taking effect.

(*b*) For forms of bequests of pecuniary legacies so as to prevent lapse, see *ante*, p. 799.

(*c*) See as to the necessity for inserting a proviso against lapse where a residue is given in shares, *ante*, p. 473.

**Miscellaneous Clauses.**

22. If any legatee be now dead, or died before me, I GIVE the legacy intended for him or her to his or her executors or administrators, to be applied as if the same had formed part of the personal estate of such legatee at his or her death.

General provision against lapse.

23. I DECLARE, that no legatee under my will or any codicil thereto shall be entitled to receive his or her legacy (of whatever nature the same may be), until he or she shall have first paid to my executors all monies owing from such legatee to me; and that no legacy hereby given to any female, who shall be married at my death or before the same is paid or transferred, shall be payable or transferable in case she or her husband, or his representative in the event of his decease, should stand indebted to me or my estate, until such debt or debts shall be paid by such husband or his representative; And that, where any legacy is directed to go to the children of any legatee in case of his or her death in my lifetime, such children shall take subject to first paying all debts due and owing to me from the parent or parents of such children.

Provision where legatee or legatee's husband or parent is indebted to testator (*cc*).

24. I DIRECT that all the pecuniary legacies bequeathed by this my will or any codicil hereto (unless otherwise expressly directed), shall be payable within —— calendar

Proviso as to time at which legacies are to be payable (*d*).

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(*cc*) See as to this, *Re Briant*, 39 Ch. D. 471.

(*d*) The payment of general pecuniary legacies cannot be enforced until the lapse of a year from the testator's death, though the executor may, if he think proper, pay them at an earlier period, if the estate is adequate to the payment of the legacies. The time of payment is not varied by a mere direction to pay as soon as convenient, or even within a specified time, as three or six months after the testator's death. In the case of *Brooke* v. *Lewis*, 6 Mad. 358, a direction to pay certain legacies within six months after the testator's death, and to divide the residue among certain persons, or such of them as should be living at the time the same should be distributed, was held to entitle those who were living at the end of a year from the testator's death. See also *Spencer* v. *Duckworth*, 18 Ch. D. 634.

The general doctrine is, that legacies carry interest only from the period when they become payable: *Wood* v. *Penoyre*, 13 Ves. 333; *Pearson* v. *Pearson*, 1 Sch. & L. 10. Generally, therefore, interest on legacies does not begin to run until the expiration of one year from the testator's death: *Lord Hertford* v. *Lord Lowther*, 9 Beav. 266; and the effect of directing payment to be made at an early period after the testator's death, is to accelerate the legatee's claim to interest: *Lord Londesborough* v. *Somerville*, 19 Beav. 295. Of course, a legacy may, by express declaration, be made to carry interest before the time of payment: but a direc-

Miscellaneous Clauses.

months after my death, and if not then paid shall bear interest as from that time until payment at the rate of —— per cent. per annum.

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tion to pay "as soon as possible" does not exclude the application of the general rule: *Webster* v. *Hale*, 8 Ves. 410; *Benson* v. *Maude*, 6 Mad. 15.

Reason for postponing the payment of legacies, and consequently for not giving interest on them during the first year from the testator's death, is the necessity for giving time to realise and ascertain the claims on the residue; and, accordingly, the general doctrine does not apply to legacies charged primarily on real estate, which therefore bear interest from the testator's death: *Maxwell* v. *Wettenhall*, 2 P. Wms. 26; *Spurway* v. *Glynn*, 9 Ves. 483; *Shirt* v. *Westby*, 16 Ves. 393. And the alteration in the law by which real estate is made assets for payment of debts, does not, it is conceived, furnish a reason for altering the rule, which is not founded on the liability of the residue to debts, but on the presumption that it is not producing income.

The rule which postpones a legatee's title to interest until the end of a year, or any other prescribed period of payment, admits of an exception in regard to legacies bequeathed in satisfaction of the testator's debts: *Clarke* v. *Sewell*, 3 Atk. 99 (*secus* if bequeathed in satisfaction of debts of another person, *Askew* v. *Thompson*, 4 K. & J. 620); or by way of portion by a parent to an infant child, who may in general claim interest from the day of the testator's death as a fund for maintenance: *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372. And so, where interest on a deferred legacy is expressly given for the maintenance of an infant not related to the testator, it commences from the testator's death: *Newman* v. *Bateson*, 3 Swanst. 689; *Dowling* v. *Tyrell*, 2 Russ. & M. 343. And see *Boddy* v. *Dawes*, 1 Kee. 362; *Pickwick* v. *Gibbes*, 1 Beav. 271. But, generally, a deferred legacy with interest in the meantime carries interest only from the end of the year: *Knight* v. *Knight*, 2 S. & St. 492. Even in other cases, however, it is often found convenient to fix an earlier time of payment than is prescribed by the general rule, as the delay of a year presses rather hardly upon a legatee, whose income is to be derived principally or solely from the bequeathed fund. This is especially felt where the legacy is directed to be invested in trust for a person for life; the legacy is not payable to, or rather is not demandable by, the trustee until the end of a year, and if, at that time, the half-yearly dividend (assuming the investment to be made in stock) had just accrued, the *cestui que trust* for life would have to wait for nearly six months longer before another dividend would be receivable; so that there would be an aggregate interval of nearly eighteen months between the death of the testator and the legatee's actual usufructuary enjoyment. Hence the expediency in such cases of accelerating the period of payment, or (which would be preferable where early payment might be inconvenient to the estate) of making the legacy carry interest from the period of the testator's death, or from some early day afterwards. See further as to interest on general legacies, Theobald on Wills, pp. 137 *et seq.*

Miscellaneous Clauses.

25. I HEREBY DECLARE that the legacy duty payable for the several annuities and legacies given by my will or any codicil thereto, as well specific as pecuniary, and as well for any limited interest as absolutely, shall be paid out of the residue of my personal estate and effects; And that, in case the residue of the monies to arise from my said personal estate and effects should be insufficient for the payment of the same annuities and legacies and the duty thereon, the deficiency shall in such case only be a charge upon and payable out of the monies to arise from the sale of my said real estate.

Legacy duty to be paid out of residue; charge of legacies on realty.

26. I DIRECT that all the annuities and legacies given by my will or any codicil thereto be paid free of legacy duty [and succession duty].

Annuities and legacies to be free of duty.

27. AND I DIRECT, that the legacy duty payable on the said sum of £—— Consolidated Two and three quarters per Cent. hereinbefore bequeathed shall be paid out of my residuary personal estate.

Legacy duty on specific bequest to be paid out of residuary personalty.

28. I DIRECT that the succession duty and legacy duty respectively on the rentcharges, annuities, and life interests, given by this my will or any codicil thereto, shall be paid out of my residuary personal estate.

Legacy duty on life interests to be paid out of residue.

29. I DIRECT that the legacy duty [or succession duty] on every annuity and legacy, as well specific as pecuniary, and on every share of residue given by my will, whether absolutely or for any limited interest, shall be paid by the said [*name*] out of such property as is hereby given to him [*or*, out of the one-tenth part of my residuary estate hereby given to [*name*] (*e*)].

Fund for legacy duty.

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The preceding remarks, in reference to pecuniary legacies, apply with equal force to general legacies of stock in the public funds, the legatees of which are, under the ordinary rule, entitled to call for a transfer at the end of a year from the testator's death; and, if the transfer is longer delayed, they are entitled to a sum equal to the dividends accruing from that time. Under *specific* gifts of stock, or of any other species of property, real or personal, the devisee or legatee takes all the income accruing from the subject of gift subsequently to the testator's death: *Barrington* v. *Tristram*, 6 Ves. 345; *Bristow* v. *Bristow*, 5 Beav. 289; *Maclaren* v. *Stainton*, 3 De G. F. & J. 202; *Davies* v. *Fowler*, L. R. 16 Eq. 308.

(*e*) When the legacy duty is directed to be paid out of a specific fund, so much of the fund as is required for payment of the duty

As to providing a fund for

Miscellaneous Clauses.

If funds for legacies be insufficient, one legacy to bear deficiency, and if that proves insufficient, certain other legacies to abate proportionally (*f*);

30. PROVIDED ALWAYS, AND I HEREBY DECLARE, that in case the monies to arise by the sale of the real estate hereinbefore by me made saleable, and the stocks, funds, shares, and securities, of or to which I shall die possessed or entitled as aforesaid, should not, after payment thereout of my funeral and testamentary and trust expenses and debts be insufficient to pay and satisfy the whole of the several legacies and annuities hereinbefore by me directed to be paid thereout as aforesaid, then the deficiency shall wholly fall upon and be satisfied out of the legacy of £—— hereinbefore bequeathed to my said children (subject to the power of appointment of my said wife) [*or* to [*legatee*]]; And in case such deficiency should exceed the amount of the last-mentioned legacy, then I declare that one moiety (being the moiety over which the power of settlement hereinbefore contained does not extend) of the several legacies of £—— hereinbefore bequeathed to each of my said unmarried daughters, and the said legacy of £—— bequeathed to or in trust for my said daughter [*married daughter*], and her children, shall respectively abate in proportion to the respective amounts thereof, but the other legacies hereby bequeathed shall be paid in full.

Proviso (*g*) as to payment of legacies, &c., out of pure personalty for purposes of duty.

31. PROVIDED ALWAYS AND I HEREBY DIRECT, that the annuities and pecuniary legacies given by this my will or any codicil hereto, and the legacy duty on all such annuities and legacies as are so given free of legacy duty shall be paid

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payment of legacy.

on other parts of the personal estate is exempt from duty: Stat. 36 Geo. 3, c. 52, s. 21, *ante*, p. 246. Where the will is made in favour of strangers or distant relatives, an important saving may be thus effected by appropriating a specific fund for payment of the legacy duty on the residue; and of course a direction for payment of the duty on pecuniary legacies out of the residue, or out of a specific fund, effects a proportionate saving. As to the propriety of exempting annuitants and legatees for life from duty, see *ante*, p. 824.

As to the priority and order of payment of legacies.

(*f*) Where a testator has bequeathed legacies payable at different periods out of a fund of indefinite amount, some of which will become payable before it can be known whether the produce of the fund will be sufficient to pay all the legacies in full, it is convenient to give to the legatees priority according to the prescribed order of payment; otherwise the executors are compelled either to suspend the payment of all the legacies until the net produce of the fund has been ascertained (which seems contrary to the intention), or else to take security from the legatees to refund, which is generally attended with inconvenience and expense: see *ante*, p. 711.

As to apportionment of legacies pay-

(*g*) By sect. 21 (2) of the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), legacies, including annuities, payable out of monies

primarily out of the proceeds of sale, calling in, and conversion of my personal estate, in exoneration of the proceeds of sale of my real estate: AND I DIRECT that the several parts of my residuary estate shall, if necessary, be marshalled, for the purpose of effectuating this provision.

Miscellaneous Clauses.

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arising from the sale or mortgage of real estate of a testator dying on or after the 1st July, 1888, are rendered liable to succession duty under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and the additional duties under the Act of 1888, as to which see *ante*, p. 250. Where therefore a testator directs a sale of his real and personal estate so as to form a mixed fund, out of which legacies are to be paid, the Commissioners of Inland Revenue now claim (and, as it is conceived, rightly claim), that the legacies shall be apportioned between the real and personal estate according to their respective values (after first deducting any specific gifts, and charitable legacies charged solely thereon), and that the amount then apportioned or chargeable against the real estate shall be deemed liable to succession duty at the higher rate; and they require that the legacies shall respectively be accounted for on the Succession Duty Form No. 11, a schedule being annexed to show how the apportionment is arrived at, and that if any of the legatees come under the provisions of sect. 11 of the Act of 1853 (*ante*, p. 250), the relationship shall be stated on the receipt.

able out of a mixed fund for purposes of duty.

This claim has been brought to the notice of the Editor since these "Common Forms" were in the press, and the provision in the text has been framed with a view of obviating as far as possible the expense and inconvenience arising therefrom. It has been suggested that some saving might perhaps be effected by directing that debts, &c., should be paid primarily out of proceeds of real estate, but, as in such case the debts, &c., could not be deducted for purposes of probate duty, there seems to be no advantage in adopting this course. Considerable expense of valuation, &c., and trouble, may however often be saved by directing that legacies, &c., shall be paid primarily out of the personalty.

The most convenient place for the insertion of this proviso seems to be immediately after the direction or trust for payment of legacies, &c., out of the proceeds of sale of the residuary real and personal estate (*ante*, p. 866, Form 1, or p. 873, Form 15); and it will be advisable for testators who have already made wills containing such directions, now to make a short codicil containing a direction as in the text.

Another serious inconvenience arising from the recent enactment is that it must often delay the payment of any pecuniary legacies in the cases under consideration, until the testator's estate has been fully administered, for, until all his debts and liabilities have been paid and satisfied, it may be impossible to ascertain what proportion of each legacy will ultimately be liable to duty at the higher rate. It may therefore sometimes be advisable to direct that small pecuniary legacies shall be paid primarily out of the proceeds of sale of the real estate, and so dispose of the question of duty at a slight increase of expense to the estate, or the legatees.

# PRECEDENTS.

## I. *WILL giving the* WHOLE *of the Testator's Property to his Wife.*

THIS IS THE LAST AND ONLY WILL of me, [*testator*], of, &c. I DEVISE AND BEQUEATH all the real and personal property whatsoever and wheresoever, to which I may be entitled, or over which I have any disposing power at the time of my death (*a*), UNTO AND TO THE USE of my wife, [*name*], her heirs, executors, administrators, and assigns absolutely. I APPOINT my said wife to be sole executrix of this my will. IN WITNESS whereof I have hereunto set my hand, this —— day of —— (*b*).

Attestation (*short form*).

Signed (*c*) by the said [*testator*], [with his mark,] in the joint presence of us, who, in his presence, and in the presence of each other, have hereunto set our hands as witnesses. [*Two witnesses.*]

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(*a*) These words will be deemed to be a sufficient reference to a special power authorising an appointment to the testator's widow: *Re Batchellor*, W. N. (1880), p. 64.

(*b*) As to what is a signature at the foot or end of a will, see *ante*, pp. 365 *et seq.*

If the testator is unable to sign the will himself, add here—

"In witness whereof I [*name*], of, &c., by the direction and in the presence of the said [*testator*]."

[*Signature.*]

Attestation of wills.

(*c*) This form of attestation expresses with precision all the formalities of execution which are requisite to the validity of a will, and is so framed for the purpose of informing the parties of what is to be done at the moment when such information is required. The longer form given at the end of the next Precedent is, however, more generally used. Although the words "in the presence of each other" may not be absolutely necessary, yet it is advisable that both the witnesses should attest together, and that the fact should be stated in the attestation clause. Of course the signature

## II. *WILL giving a Legacy to a* MARRIED NIECE, *and directing a Legacy to be appropriated or purchased for an* ONLY DAUGHTER *and her Husband successively for Life, and then for Daughter's Children.* RESIDUE *of* REALTY (*if any*) *and* PERSONALTY *to Testator's* WIFE.

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of executors*, p. 747, *Form* 3. *Specific bequests*, pp. 759 *et seq.*] I BEQUEATH to my niece [*name*], the wife of [*husband*], the sum of £—— for her sole and separate use (*d*). [*Other pecuniary bequests*, pp. 792 *et seq.*] I GIVE AND BEQUEATH to the said [*trustees*] £—— Consolidated Two and Three Quarters per cent. Stock, to be retained, appropriated, or purchased by them out of my personal estate within three calendar months after my death, and to be held upon the trusts hereinafter declared concerning the same; AND I DIRECT, that the legacy duty payable on the said sum of £—— Consolidated Stock, shall be paid out of my residuary personal estate. AND I DIRECT AND DECLARE, that the said [*trustees*] and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being

Legacy for separate use of niece.

Bequest of stock to be appropriated for benefit of daughter and her husband and children.

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by each witness must be made after the testator has made or acknowledged his signature in the presence of both witnesses: see *ante*, p. 372. A will is sufficiently executed and attested if the testator shows his signature to the witnesses and requests them to write their names under it, although there is no express acknowledgment.

If the will is signed by an amanuensis, say—

"Signed by [*amanuensis*], as the will of the said [*testator*], in his presence and by his direction, in the joint presence of us, &c."

The amanuensis should sign the testator's name, but a signature by the amanuensis in his own name is sufficient. He may be a witness.

(*d*) A legacy should be given to the separate use of a married woman, notwithstanding the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 5, if it is wished to prevent the legacy from being subject to a covenant to settle after-acquired property, other than property given for her separate use, contained in a marriage settlement executed before 1883: *Re Stonor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227.

Separate use.

**II. Personalty: Legacy for Daughter and Children.**

of this my will, shall stand possessed of the said £—— Consolidated Stock hereinbefore bequeathed (*e*), UPON TRUST to pay the dividends and income thereof to my daughter [*name*], or permit her to receive the same during her life, but without power of anticipation; And after the death of my said daughter [*name*], [UPON TRUST to pay the said dividends and income unto the surviving husband of my said daughter (if any), or permit him to receive the same, during his life; And after his death,] to stand possessed of the said trust fund and the future income thereof, IN TRUST for such child or children of my said daughter [*name*] by her deceased [*or*, her present, or any future] husband, as (being a son or sons) shall attain the age of twenty-one years, or (being a daughter or daughters) shall attain that age or marry under that age; PROVIDED ALWAYS, that such child or children of any son of my said daughter [*name*], who shall die under the age of twenty-one years, shall be entitled, and if more than one, equally, to the share in the said trust fund to which such son respectively would have been entitled if he had attained the said age. AND in case there should be no child or grandchild of the said [*daughter*] who shall acquire a vested interest in the said trust fund or any part thereof, then IN TRUST for such person or persons as my said daughter [*name*], whether covert or sole, shall by any deed or will or codicil appoint; And in default of and subject to any such appointment, IN TRUST for the person or persons who, at the time of the death of my said daughter, would be entitled to her personal estate in case she had then died intestate and without leaving a husband, in the like shares and proportions as such persons (if more than one) would be entitled thereto. [*Advancement clause* (*if desired*), p. 914, *Form* 8, *mutatis mutandis*. *Residue of real* (*if any*) *and personal estate to wife absolutely*, p. 862, *Form* 7. *Trustee clauses*, pp. 967 *et seq.*]

in trust for testator's daughter for inalienable use; after her death,

in trust for survivor for life; and after his or her death

the capital for children of daughter;

substitution of children of sons dying before majority;

in default of issue, in trust for such persons as daughter shall appoint;

and in default of appointment, for her next of kin (*f*).

Testimonium. IN WITNESS whereof I [[*name*], of, &c., by the direction and in the presence of the said [*testator*]] have hereunder

(*e*) There is no power to vary investments. If the testator had intended to give such a power, he would have bequeathed, not a specific sum of stock to be appropriated or purchased, but a sum of money to be invested.

(*f*) See, as to the necessity for this clause, *Re Lambert's Estate*, *Stanton* v. *Lambert*, 39 Ch. D. 626.

set my hand this —— day of ——, and I have also set my hand to each of the [*six*] preceding sheets (*g*) of this my [*or* his] will. II. Personalty: Legacy for Daughter and Children.

[*Testator's Signature.*]

Attestation;

Signed by the said [*testator*], as his last will, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses (*h*).

[*Two witnesses.*]

of signature by amanuensis (*i*).

Signed by [*amanuensis*], as the last will of the said [*testator*], in his presence, and by his direction, in the presence of us, present at the same time, who at the request of the said [*testator*], in his presence, and in the presence of each other, have subscribed our names as witnesses.

[*Two witnesses.*]

(*g*) If the testator's strength is likely to fail, he should sign the last sheet, and have it attested, before he attempts to sign the other sheets, which is not essential. The witnesses usually sign only the last sheet.

(*h*) If the will contains interlineations or erasures (which latter should be made with a pen, so as to show how the will originally stood), add— Attestation of a will containing alterations.

"the said testator having, before signing the same, caused the words, "[*interlined words*]," to be inserted between the fourth and fifth lines of the third page; and the words, "[*erased words*]," to be erased from the ninth and tenth lines of the same page; and the words, "[*substituted words*]," to be interlined in lieu thereof."

(*i*) The amanuensis should sign the testator's name. But a signature by the amanuensis in his own name has been held sufficient. He may be a witness.

### III. *WILL giving the whole of the Testator's Real and Personal Property to* One Person, *with* Substitution *of his* Children *or* Issue.

**III. Realty and Personalty to one, with Substitution of Children.**

I, [*testator*], of, &c., HEREBY REVOKE all wills, codicils, and testamentary dispositions heretofore made by me, and declare this to be my last will: I appoint [A. B.], of, &c., to be sole executor of this my will: I DEVISE and bequeath all the real and personal property to which I may be entitled, or over which I may have any disposing power, at the time of my death, unto and to the use of the said [A. B.], [his heirs, executors, administrators, and assigns] absolutely. BUT IF the said [A. B.] should be dead at my death, I APPOINT [*executors*], of, &c., to be my executors and trustees; And [subject to the payment of my debts,] I DEVISE and bequeath the said real and personal property unto and to the use of the child or children of the said [A. B.] living at my death, and the child or children then living of such child or children of the said [A. B.] as may be then dead, [and his, her, or their heirs, executors, administrators, and assigns,] absolutely, in equal shares, and so that the child or children of a deceased child shall take only such share as his, her, or their parent would have taken if living.

Appointment of executors.

General devise and bequest to A. B.;

If A. B. be dead, appointment of executors and trustees, and gift, subject to debts, to children of A. B. as tenants in common.

IN WITNESS, &c.

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### IV. *WILL of a* Married Woman *under a* Power *in her* Marriage Settlement *in favour of her* Husband.

Appointment under power, of income to husband for life; capital to children [except eldest son]; in default of children to husband absolutely.

THIS IS THE LAST AND ONLY WILL of me, [*testatrix*], wife of [*husband*], of, &c. IN EXERCISE of the power contained in an indenture dated, &c., being the settlement executed on my marriage with my said husband, and of every other power me hereunto enabling, I DIRECT and appoint that the trustees or trustee for the time being under such settlement shall pay the income from the trust funds therein comprised and subjected to my appointment unto my

IV. Will of Married Woman.

present (*j*) husband or his assigns, during his life; And, after his death, shall transfer the said trust funds unto such child or children of mine [other than my said son, [*name*]] as shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry; [*add, if authorised, substitutionary gift to issue of deceased children, as in* p. 901, *Form* 20], if more than one in equal shares; And, if there should be no such child, shall transfer the said trust funds unto my present husband, his executors, administrators, or assigns. And I devise, bequeath, and appoint all other real and personal property whatsoever and wheresoever, of or to which I shall be possessed or entitled, or over which I shall have any power of appointment or disposal at my death, unto my said husband, his heirs, executors, administrators, and assigns absolutely: And I appoint my said husband sole executor of this my will.

Gift of all other property to husband absolutely.

In witness, &c.

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### V. *WILL of a* Widower *with four Children, containing Specific and Pecuniary Bequests, and Specific Devise of Lands* in Mortgage. *Residuary* Real *and* Personal *Estate to be* converted, *and the Produce divided into four Shares for benefit of Two Sons and Two Daughters (one married, the other an infant). Provision against* Improvidence *of Younger Son.*

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of executors and trustees*, p. 747, *Form* 3. *Appointment of grandson as special executor of mortgage debt*, p. 749, *Form* 10. *Specific bequests*, p. 759 *et seq.* *Household effects to be divided among children*, p. 762, *Form* 17. *Bequest to daughter of debt owing on her husband's bond*, p. 773, *Form* 45. *Mortgage debt to grandson*, p. 773, *Form* 46. *Pecuniary Legacies*, p. 792, *Form* 3 *et seq.* *Direction as to time for paying legacies*, p. 819, *Form* 54. *Legacies free of duty*, p. 819, *Form* 53. *Direction to purchase annuity for*

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(*j*) So far as it affects property which would not go to the heir or personal representative of the testatrix in default of appointment, the will would not be revoked by a subsequent marriage: Stat. 7 Will. 4 & 1 Vict. c. 26, s. 18, *ante*, p. 376.

V. Various Trusts for Children.

*servant*, p. 824, *Form* 1. *Bequest of stock in the funds to trustees in trust for nephew for life, and after his death for his issue*, p. 835, *Form* 1. *Specific devise to son of lands in mortgage cum onere, except as to arrears of interest*, p. 851, *Form* 10. *Residuary devise and bequest to trustees*, p. 864, *Form* 11. *Trust for conversion, &c.*, p. 866, *Form* 1 *a.*, *and* p. 873, *Form* 15. *Authority to suspend conversion*, p. 869, *Form* 7. *Declaration of trusts of residue*, p. 877, *Form* 24], (that is to say,) as to one equal fourth part or share of the proceeds of such sale and conversion, IN TRUST for my said elder son [*name*] absolutely; AND if he shall die in my lifetime, whether leaving issue or not, I DECLARE that the said one equal fourth part or share shall go to his executors or administrators as part of his personal estate; AND AS TO the three remaining equal parts or shares of the same proceeds, I DECLARE, that my trustees or trustee shall, at their or his discretion, invest the same respectively in their or his name or names [or under their or his legal control], IN, &c. [*Investment clause*, pp. 874 *et seq.*, *Forms* 18 to 22. *Power to vary investments*, p. 877, *Form* 23.] AND I DECLARE that my trustees or trustee shall stand possessed of and interested in the said last-mentioned three remaining equal fourth parts or shares of the proceeds of sale and conversion of my residuary real and personal estate, and the stocks, funds, [shares,] and securities of which the same shall consist, or in, or upon which the same shall from time to time be invested, and the annual produce and income thereof, Upon the trusts, for the purposes, and with and subject to the powers and provisions hereinafter expressed concerning the same (that is to say): AS TO one of such remaining equal fourth parts or shares, UPON TRUST, that my trustees or trustee shall pay the income of such last-mentioned part or share to my younger son [*name*], unless and until, &c. [*Continue as on* p. 895, *Form* 6, *substituting the words* "such last-mentioned part or share" *for* "the trust fund"]. AND from and after the death of my said younger son my trustees or trustee shall hold such last-mentioned part or share and the future income thereof, UPON TRUST, &c. [*Continue as on* p. 894, *Form* 5 *c*, *trust in default of children of younger son*, pp. 894, 895, *Form* 5 *f.*] AND AS TO one other of such remaining equal fourth parts or shares as aforesaid, Upon trust to pay the income thereof, or permit the same to be received by my elder daughter [*name*],

Trusts of residue; one-fourth for eldest son absolutely; remaining three-fourths to be invested for benefit of other children and their issue.

during her life, but without power of anticipation during any coverture; And from and after the death of my said daughter [*then for her husband for life; and then issue as she shall appoint, and, subject thereto, for children of elder daughter at twenty-one or marriage, &c., as on* p. 906, *Form* 27 *c, d, e, substituting the words* "elder daughter" *for* "sister"]. But if no child of my said elder daughter [*name*] shall live to acquire a vested interest in such daughter's share, [*ulterior trusts*, p. 888, *Form* 3 *g*.] And as to the last one other of such remaining equal fourth parts or shares as aforesaid, Upon trust for my younger daughter, [*name*], absolutely, subject, nevertheless, as is next hereinafter provided: Provided always, &c. [*Power for trustees to settle younger daughter's share if she shall marry when under twenty-one years*, p. 932, *Form* 36. *Proviso against lapse of younger daughter's share*, p. 988, *Form* 21. *Trustee clauses*, pp. 967 *et seq.*]

In witness, &c.

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VI. *WILL of a* Widower. Devise *in trust for* Three Sons *for Life, with equitable* Remainders in Fee *to their* Children. Specific Devise *in trust for Two Daughters and their Children.* Cross Limitations. Specific Devise *to Grandson. Residuary* Personalty *for Surviving* Children *equally with substitution of issue.*

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of executors and trustees*, p. 747, *Form* 3. *Specific bequests*, pp. 759 *et seq. Pecuniary Legacies*, pp. 792 *et seq.*]

I devise [*parcels*], and all other my real estate (if any) not otherwise disposed of by this my will or any codicil hereto, unto and to the use of the said [*trustees*] and their heirs, Upon trust from time to time to pay the rents and profits thereof equally among my sons [*three names*], as tenants in common, for their respective lives; And after their respective deaths, then Upon trust for such of the children of my said three sons respectively as shall have attained or shall attain the age of twenty-one

Devise of freeholds in trust for testator's three sons for life, with remainder to their children attaining twenty-one, or dying leaving issue;

VI. Realty, &c., in Trust for Children and Grandchildren.

years, or shall die under that age leaving issue living at his, her, or their death or respective deaths, and his, her, or their heirs and assigns, if more than one as tenants in common; but so, nevertheless, that the respective child or children of each of my said three sons shall have his, her, or their parents' share or respective parents' shares only (*j*); And if any of my said three sons should die without leaving any child who shall survive me and shall attain the age of twenty-one years, or die under that age leaving issue living at his or her death, then, as to the share or shares, as well original as accruing, of such child or children respectively, upon such and the same trusts as are hereby limited and declared concerning the other share or shares of the said hereditaments, or such of the same trusts as shall be then subsisting or capable of taking effect; But if [*name*], the present wife of my said son, [*name*], should survive him, then I direct my trustees or trustee, immediately after my said son's death, whether he leave issue or not, out of the rents and profits of his third or other share of the said trust premises, to pay to the said [*wife*] an annuity of £—— during her life by quarterly payments, clear of legacy duty and all other deductions: I DEVISE all those two messuages at ——, in the occupation of [*name*] and [*name*], UNTO AND TO THE USE of the said [*trustees*], their heirs and assigns, UPON TRUST to pay the rents and profits thereof unto my daughters, [*name*], the wife of [*husband*], and [*name*], the

Cross limitations in trust.

Annuity to present wife of son if she survive him.

Devise in trust for two daughters for life, for their inalienable use; and after their death, for their chil-

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Remark on the scheme of disposition exemplified in the text.

(*j*) It will be observed, that the share of a son dying during minority leaving issue, does not go to such issue, but vests absolutely in the father, from whom it would in all probability descend to the surviving issue, or one of them, if consisting of more than a single individual.

As to limitations to preserve contingent remainders.

In such gifts as the present, it is more simple and convenient to vest the legal inheritance in trustees, giving the intended beneficiaries *equitable* interests only, than to attempt to carve out the legal inheritance among the latter, which would formerly have rendered it necessary to interpose a vested particular estate in remainder between the prior estate for life and the contingent remainder expectant thereon, in order to preserve such remainder from destruction.

The precaution of inserting limitations to trustees to preserve contingent remainders before the limitations of such remainders, even at the present time, would, it appears, still be necessary where (as here) the prior life estate might determine before all the children had attained the age of twenty-one years: see Vaizey on Settlements, at p. 1165.

wife of [*husband*], in equal shares, as tenants in common, during their respective lives, but without power of anticipation: And after the death of my said daughters respectively, IN TRUST for such of the children of my said two daughters respectively (except my grandson, [*name*], for whom I have hereinafter otherwise provided), as shall have attained or shall attain the age of twenty-one years, or shall die under that age leaving issue living at his, her, or their deaths or respective deaths, and his, her, or their heirs and assigns, if more than one as tenants in common; But so, nevertheless, that the child or children of each daughter shall take his, her, or their own parents' share only. I DEVISE [*parcels*] TO THE USE of my said grandson, [*name*], his heirs and assigns [*Gift of residuary personalty to surviving children with substitution of issue of deceased children*, p. 862, *Form* 6. *Appointment of trustees of will to be trustees for purposes of Settled Land Acts, and sect.* 42 *of Conv., &c., Act*, 1881, p. 956, *Form* 34, *and* (*if desired*) *add the provisoes extending the powers given by the Settled Land Acts*, pp. 956 *et seq.*, *Forms* 35 *to* 45. *Trustee clauses*, pp. 967 *et seq.*]

IN WITNESS, &c.

VI. Realty, &c., in Trust for Children and Grandchildren.

dren attaining twenty-one or leaving issue;

specific devise to grandson in fee.

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VII. *WILL of* WIDOWER *confirming* MARRIAGE SETTLEMENT *and* APPOINTING *among Children by name equally, and directing that* ADVANCEMENTS *are not to be brought into* HOTCHPOT. *Bequest of* ANNUITY *to Mother, &c.* GIFT *of* RESIDUE *to surviving Children equally.*

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Confirmation of marriage settlement*, p. 747, *Form* 8.] And in exercise of the power given to the survivor of my wife, [*name*], and myself in the said settlement, I now, having survived her, hereby appoint all the funds and property remaining subject to the trusts of the said settlement unto and among my four children, [*names*], in equal shares; PROVIDED ALWAYS, and I hereby direct and declare, that my said son, [*name*], shall not

VII. Appointment under Marriage Settlement by Widower among his Children.

be liable to bring the sum of £—— already advanced to him or for his benefit into hotchpot: [*Appointment of executors with substitution in case of their not acting*, p. 748, *Form* 5. *Son at twenty-one to be executor with the others*, p. 748, *Form* 6. *Special executor of life policies*, p. 748, *Form* 7. *Appointment of guardian of infant children, with power to appoint a successor*, p. 752, *Form* 19. *Specific bequest of household furniture for daughters while unmarried*, p. 766, *Form* 32. *Specific bequest of policies of life insurance*, p. 773, *Form* 44. *Other specific bequests*, pp. 759 *to* 777. *Allowance to son during minority*, p. 795, *Form* 10. *Other pecuniary bequests*, pp. 792—823. *Annuity to Mother*, p. 830, *Form* 8. *Other annuities*, pp. 824—835. *Gift of residuary real and personal estate to surviving children equally*, p. 862, *Form* 8.]

In witness, &c.

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VIII. *WILL of an* Unmarried Man *or* Woman. *Various* Provisions *for* Relations. Gift *of Residuary Real and Personal Estate to Trustees as Tenants in Common for their own use and benefit.*

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Bequest of leaseholds to brother A. with limited executorship, and appointment of general executors*, p. 750, *Form* 12. *Specific bequests*, pp. 759 *et seq.* *Pecuniary legacies*, pp. 792 *et seq.* *Gifts of annuities to several*, p. 826, *Form* 4; *general directions as to annuities*, p. 833, *Form*, 12; *annuities to be free of legacy duty*, p. 834, *Form* 15. *Gift of settled legacy for benefit of brother B. and his issue*, p. 835, *Form* 1.] I

Bequest of legacy on trusts for benefit of brothers and sisters, &c.

bequeath unto the said [*trustees*] the sum of £—— with interest thereon at the rate of 4 per cent. per annum from the day of my death clear of legacy duty and all other deductions, Upon trust to invest the same sum in or upon some of the stocks, funds, [shares], or securities hereby authorised with respect to the investment of the proceeds of sale and

VIII. Distribution among Relations, &c., by a Childless Person.

conversion of my residuary estate, with the like power of varying investments; AND I DIRECT that the said trustees and the survivor of them, and the executors or administrators of such survivor or other the trustees or trustee for the time being of this my will (hereinafter called "my trustees or trustee") shall stand possessed of the said sum of £—— and the investments for the time being representing the same, and the interest and income thereof, In trust, &c. [*Trusts for brothers and sisters and their respective issue, either* p. 904, *Form* 26; p. 905, *Form* 27; p. 907, *Form* 28; *or* p. 908, *Form* 29.] I BEQUEATH unto the said [*trustees*] the sum of £——, &c. [*ut supra*]; And I direct that my trustees or trustee shall stand possessed of the said sum of £—— and the investments for the time being representing the same, and the interest and income thereof, UPON TRUST to pay one —— of the income of such last-mentioned trust fund, &c. [*Trusts for relations and their issue*, p. 909, *Form* 30 *or* 31. *Bequest of leasehold house and furniture to sister C. for life, remainder to her son D. absolutely*, p. 843, *Form* 3, *mutatis mutandis*. *Specific devise to infant nephew E., with gift over in case of his death under twenty-one to nephew F.*, p. 849, *Form* 5.] I DEVISE and bequeath all my real and personal estate whatsoever and wheresoever not otherwise disposed of by this my will or any codicil hereto, unto and among the said [*trustees*], their heirs, executors, administrators, and assigns, according to the nature and tenure of the same premises respectively, for their absolute use and benefit in equal shares as tenants in common. [*Appointment of trustees for purposes of S. L. Acts, and of sect.* 42 *of the Conv., &c., Act*, 1881. *Trustee clauses*, pp. 967 *et seq.*]

Bequest of legacy on trusts for other relations.

Gift of residue to trustees absolutely.

IN WITNESS, &c.

### IX. *WILL of a* SPINSTER; *giving Legacies to Servants, &c.;* CHARITABLE *Legacies; Residue among her five* BROTHERS *and* SISTERS; *and* PROVISIONS *for* FAMILY *of* DECEASED BROTHER *by* REFERENCE *to his* WILL.

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of executors and trustees*, p. 747, *Form* 3. *Directions as to funeral*, p. 757, *Form* 1 *or* 2. *Specific bequests: wearing apparel to servant*, p. 759, *Form* 1 *or* 2; *specific articles by reference to schedule*, p. 763, *Form* 21. *Pecuniary bequests: legacies to trustees*, p. 792, *Form* 3 *a*; *legacies for mourning rings*, p. 794, *Form* 7; *legacies to servants*, p. 794, *Form* 8 *b*; *legacy to a widow to be paid by weekly instalments*, p. 795, *Form* 9. *Charitable legacies*, pp. 820 *et seq.*, *Forms* 57 *to* 64. *Gift of residuary estate to trustees*, p. 864, *Form* 11. *Trust for sale and conversion*, p. 866, *Form* 1. *Trusts of proceeds to pay debts, &c.*, p. 873, *Form* 15. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clause*, pp. 874 *et seq.*, *Forms* 18 *to* 22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of investments*, p. 877, *Form* 24.]

Trusts for five brothers and sisters of testatrix, and the family of a deceased brother by reference to his will.

UPON TRUST for my [*five*] brothers and sisters now living, and for the family (as hereinafter mentioned) of my deceased brother [A. B.], to be divided among them in equal shares (the family of my said deceased brother taking among them a single share only); And I direct that the share so appropriated to the family of my said deceased brother shall be transferred by the trustees or trustee for the time being of this my will to the trustees or trustee for the time being of the will of my said deceased brother, and be held by such last-mentioned trustees or trustee upon such trusts and with and subject to such powers for investment and variation of investment and for the benefit of [B. B.], widow of my said deceased brother, during her life and widowhood, and after her death or second marriage for the benefit of the child or children of my said deceased brother, or any one or more of them as the said [B. B.] shall appoint, or otherwise in default of appointment, and upon and with and subject to such other trusts, powers, and provisions as are in the said will of my said deceased brother contained, with respect to his residuary personal estate and the proceeds and investment thereof;

IX. Will of Spinster giving bulk of Property for Charitable Purposes.

PROVIDED ALWAYS AND I HEREBY DECLARE, that if any of my [*five*] brothers and sisters now living shall die in my lifetime, then such child or children living at my death of every or any brother or sister of mine so dying as being a male or males shall attain the age of twenty-one years, or, being a female or females, shall attain that age or marry, shall take the share of the said trust premises which his, her, or their parent would have taken if living at my death; And such children, if more than one, shall take the same in equal shares: PROVIDED ALWAYS AND I HEREBY DECLARE, that in case there shall be no child of my said deceased brother, who shall attain an absolutely vested interest in the share hereinbefore appropriated to the family of my last-mentioned brother (in which event the said share shall after the failure or determination of the trusts hereinbefore declared of the same be re-transferred to the trustees or trustee for the time being of this my will); And also in case as to any of my brothers or sisters so dying hereafter in my lifetime as aforesaid, there shall be no child, or no child who shall attain an absolutely vested interest in the share which his or her parent would have taken if living at my death, then and in any and every such case the share (as well original as accruing under this proviso) whereof the trusts shall so have failed, or so much thereof as shall not have become vested, or been applied under any of the trusts or powers herein contained, or referred to (and as to the said share of the family of my deceased brother, subject and without prejudice to the interest therein of the said [B. B.] during her life or widowhood) shall go over and accrue by way of addition (equally between them if more than one) to the other shares or share of the said trust premises, so that every such addition to any such share may from the period of accruer be held upon and for the same trusts and purposes as the share to which the same shall be added, and may thenceforth devolve together with such share and be considered as forming part thereof. [*Trustee clauses*, pp. 967 *et seq.*]

Substitution of issue.

Accruer clause.

IN WITNESS, &c.

X. *WILL of* WIDOW *giving* SPECIFIC *and* PECUNIARY *Legacies, and giving the* RESIDUE *of* REAL *and* PERSONAL ESTATE *to two* SONS *as Tenants in Common.*

X. Residue to Tenants in Common.

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of two sons as executors*, p. 747, *Form* 3. *Directions as to funeral*, p. 757, *Forms* 1, 2. *Specific bequests*, pp. 759 *et seq.* *Legacies to friends*, p. 794, *Form* 7; *and other legacies*, pp. 799, 800.] I DEVISE AND BEQUEATH all the residue of my real and personal estate and effects, whatsoever and wheresoever, unto my said two sons [*names*], their heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively, for their absolute use and benefit respectively in equal shares as tenants in common.

Gift of residue.

IN WITNESS, &c.

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XI. *WILL disposing of* RESIDUARY ESTATE *in favour of the* TESTATOR'S WIFE *and* CHILDREN.

XI. Residue in favour of Wife and Children.

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of executors*, p. 748, *Form* 4; *and guardians*, p. 751, *Form* 16. *Specific bequests*, pp. 759 *et seq.* *Gift of furniture, &c., to wife*, p. 761, *Form* 15. *Immediate pecuniary legacy to wife*, p. 792, *Form* 1. *Legacies to executors, to servants, &c.*, pp. 792 *et seq.* *Pecuniary legacies to children, to be invested*, p. 805, *Form* 35. *Annuity to testator's mother*, pp. 824 *et seq.* *Gift of residue to trustees*, p. 864, *Form* 11. *Trust for conversion*, p. 866, *Form* 1 *a*. *Trusts of proceeds of conversion*, p. 873, *Form* 15. *Authority to delay conversion, and declaration as to income*, p. 869, *Form* 7. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clauses*, pp. 874 *et seq.* *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts*, p. 877, *Form* 24; *for wife during widowhood, and then for children*, pp. 884 *et seq.*, *Forms* 18 *to* 22. *Advancement clause*, p. 914, *Form* 8. *Trustee clauses*, pp. 967 *et seq.*]

IN WITNESS, &c.

XII. *WILL of a* FARMER, *directing his* FARMING BUSINESS *to be* CARRIED ON *until his youngest Child attains Twenty-one or marries; the* PROFITS *and* INCOME *in the meantime for the* MAINTENANCE *of his* WIFE *and* CHILDREN; LEGACIES *to* CHILDREN *at Twenty-one or marriage with consent; when the* BUSINESS *is discontinued,* LIFE ANNUITY *to* WIDOW *and* RESIDUE *to* CHILDREN. *Full discretionary Powers; Discretionary Power to* CONVERT REAL ESTATE (*k*).

Appointment of executors, trustees, and guardians.

THIS IS THE LAST AND ONLY WILL of me, [*testator*], of, &c. I APPOINT my wife [*name*], during her widowhood, and [*names*], and also my son [*name*], when he shall attain the age of twenty-one years, executors and trustees of this my will. I APPOINT my said wife sole guardian of my children during her widowhood, and after her death or marriage my trustees or trustee for the time being (other than my said son) guardian and guardians of my children, but during the remainder of the life of my said wife, jointly with her (*l*). [*Here insert any specific bequests,* pp. 759 *et seq.*]

Immediate legacy to wife.

I GIVE to my said wife the sum of £——, to be paid to her immediately after my death, for present use and for mourning for herself and children.

Legacies to children at twenty-one or marriage with consent; substitution of children of deceased children.

I GIVE the sum of £—— to each child of mine who shall survive me and attain the age of twenty-one years or marry with the consent of his or her guardian or guardians. IF any of my children should die before me, I GIVE the sum of £—— unto or equally between or among such child or children of each child of mine so dying before me as shall survive me and attain the age of twenty-one years or marry with the consent of my said wife or, after her death

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(*k*) The above Precedent (taken from the former edition of this work) embodies in a concise form, and, as far as possible, in untechnical language, a scheme of testamentary disposition, which may be recommended for ordinary use in cases where children are to be provided for without entailing the real estate. The provisions for the testator's wife, and those relating to the real estate, may be omitted, if not required; and the directions for carrying on the farming business may easily be adapted to any other business: see forms of trusts for carrying on a business, *ante*, pp. 777 *et seq.*

(*l*) See as to this, *ante*, p. 751, note (*q*).

XII. Will of a Farmer.

Power to retain legacies for employment in business.

or marriage, of my trustees or trustee. I AUTHORISE my trustees or trustee in their or his discretion to retain all or any of the legacies hereinbefore bequeathed to my children or their issue, or any part thereof respectively, and to employ the same in my farming business for so long a period as my trustees or trustee shall think fit, but so that if the payment of any such legacy, or any part thereof, should be delayed beyond the time of vesting, my trustee or trustees shall thenceforth pay interest upon such legacy or such part thereof as shall for the time being remain unpaid, at the rate of four per cent. per annum until payment thereof, such interest to be paid quarterly on the usual quarter days. I DEVISE all my freehold closes of land at —— in the county of —— aforesaid, and all other (if any) my real property, and I bequeath all that my leasehold farmhouse and farm at —— aforesaid which I hold of [A. B.], Esquire, under a lease dated, &c., for the residue of the term of —— years from the —— day of ——, 18—, And all other (if any) the farm or farms which I may occupy as lessee or tenant at the time of my death, UNTO AND TO THE USE of the said [*trustees*], their heirs, executors, administrators and assigns, according to the nature and tenure of the same premises respectively, UPON TRUST to sell the same, and to hold the proceeds of such sale, upon the trusts hereinafter declared of my residuary personal property: BUT I AUTHORISE my trustees or trustee in their, his, or her absolute discretion to postpone such sale; AND I DECLARE that my real property shall, until sale thereof, be held UPON TRUST for the respective persons entitled under my will to my residuary personal estate, and, as nearly as may be, for the like estates and interests, subject to the like powers and in like manner in all respects. AND I EMPOWER my trustees or trustee to let any unsold real or leasehold property (subject as to customary property to any customary restrictions), at the best rent obtainable, without fine or premium, subject to such covenants as they, he, or she may think fit, for any term not exceeding twenty-one years from the time of letting, or for mining, building, repairing, or improving purposes, for any period and on any terms; AND to drain, improve, repair, cut and sell timber on, insure from fire, manage and receive the rents of any unsold real or leasehold property; AND to raise any money for payment of my debts and legacies by mortgaging any part of my real estate,

Gift of realty and chattels real in trust for sale.

Realty, &c., until sale, to be held on same trusts as personalty.

Power to let, improve, and manage real estate.

Power to mortgage for

and giving to any mortgagee or mortgagees such powers as my trustees or trustee shall think reasonable. And I declare, that the income actually produced by my real and leasehold property shall be applicable as income under my will; But fines and premiums for building or mining leases shall be dealt with as capital. I authorise and request my trustees or trustee, while any son of mine is under age, or any daughter of mine is under age and unmarried, or for such shorter period as they, he, or she shall think fit, to carry on my farming business, and for that purpose to retain unsold all or such parts as they, he, or she shall think fit of my household furniture, plate, household linen, china, books, and other household effects, carriages, horses, saddles, harness, and stable furniture and effects, and my dairy and brewing utensils, implements of husbandry, crops, and live and dead stock; With full discretionary powers as to insurance, alteration, disposition and increase or diminution of capital or stock, and purchase of stock, employment of bailiffs, servants, and labourers, and their salaries, powers, and authorities, and the extent of personal superintendence to be exercised by my trustees or trustee; And, at the discretion of my trustees or trustee, to accept a fresh lease or fresh leases of any leasehold farm or farms I may occupy at my death, or to hire on lease any other farm or farms, on such terms and for such time or times as they, he, or she may think expedient; And to take possession of and use in such business any unsold freehold or customary lands and property; And generally to act in the management of such farming business and to use my real and personal property therein as if they, he, or she were absolute owners or owner thereof. And I direct, that the dwelling-house I shall occupy at my death, or such other house as my trustees or trustee shall from time to time think fit, together with my household furniture and household effects, or a sufficient part thereof, shall be kept up at the expense of my residuary estate for the residence of my wife during her widowhood, and of my unmarried children, so long as any one of them is under age [*or*, so long as the said business is continued]; And I direct, that, while the said business is continued, all or such part as my trustees or trustee shall think fit of the profits thereof, and my consumable household stores, and the income from my other proparty, shall be applied for the maintenance of my wife during her widowhood,

payment of debts and legacies.

Actual income to be applicable as income.

Authority to carry on farming business and retain farming stock, &c.;

discretionary powers;

power to take new leases of farms.

Residence and furniture for wife and infant and unmarried children.

Power to apply all or part of profits for maintenance.

XII. Will of a Farmer.

and the maintenance and education of my children and the issue of any deceased children, in such proportions as my trustees or trustee shall think fit; With power for my trustees or trustee to allow my wife to receive such profits and income or any part thereof during her widowhood for that purpose, without seeing to the application thereof; And I direct, that the unapplied profits (if any) of the said business shall be added to the capital of my residuary estate. Subject to the foregoing trusts, directions, and powers, I direct, that my personal estate shall be sold, got in, and converted into money; And, after payment (subject as is hereinafter provided) of all expenses of and incident to such sale and conversion, and of my debts, funeral and testamentary expenses, and legacies and the legacy duty on all legacies given by my will or any codicil hereto, I direct the clear surplus of the proceeds of my personal estate, and of such real and leasehold property as shall be sold, to be invested by my trustees or trustee as hereinafter mentioned; the unapplied income thereof to be accumulated and added to the capital until the same is distributed, which distribution is not to take place until the discontinuance of my farming business: But I direct, &c., [*ante*, p. 992, *Form* 31]. And if the said business should be discontinued during my wife's widowhood, I direct my trustees or trustee to set apart so much of my residuary real and personal property, or the investments thereof producing permanent income, as shall be sufficient to produce the clear yearly sum of £——, and I give the income from such fund to my wife during her widowhood; And, in case she should marry again, I direct that thereupon the fund so set apart shall be reduced so as to produce the clear yearly sum of £—— only, in which event, I give the yearly income of such reduced fund to my wife during the remainder of her life. And if my wife should marry before the said business is discontinued, I direct the said yearly sum of £—— to be paid to her from the time of her marriage out of the income of my residuary estate until a fund is appropriated for the same. Provided, that if either of the said appropriated funds should afterwards yield less than the before stated income, the deficiency shall be made up out of the capital; And that such yearly sums given to my wife shall be made good up to the time of her marriage or death respectively by apportionment. And, subject to the foregoing

Surplus profits to accumulate.

Direction to get in and invest residue of personalty.

When residue is distributed, fund to be set apart for annuity for wife;

reducible on her marriage;

Residue to issue as wife shall appoint,

XII. Will of a Farmer.

provision for my wife, and as to the residue of my personal estate and effects (including the capital of the said appropriated funds after the determination of my wife's interest therein respectively), I GIVE the same [UNTO such child or children or other issue of mine, for such interests, and in such shares and manner as my wife, whether married or sole, shall by will appoint, so that every appointed interest shall vest before the end of twenty-one years from the death of the survivor of my wife and children; And subject to any such appointment] UNTO such child or children of mine living at my death, and such child or children then living of any child or children of mine then dead as shall attain the age of twenty-one years or marry with such consent as aforesaid, and his, her, or their executors, administrators, and assigns, and if more than one in equal shares, as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of mine shall take only the share which such deceased child would have taken if living (*m*). BUT I DIRECT, that any monies which in my lifetime I may have advanced to or for the benefit of any child of mine shall be allowed for as part of the share of such child or of such child's issue; [And that no child or grandchild, to whom or to whose issue any appointment shall be made, shall take any benefit under the foregoing gift in default of appointment, without bringing the same into hotchpot or allowing for the benefit of such appointment]. I AUTHORISE my trustees or trustee [with the consent of my said wife during her life] to raise and apply for the

in default, to children at twenty-one or on marriage with consent;

advancements to be allowed for.

Hotchpot.

Advancement.

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(*m*) Or omit the gift of a life income to the wife, and give her a share of the residue—

Variation giving wife an equal share in residue with children in lieu of a life income.

"I GIVE the residue of my personal estates and effects UNTO my said wife, if she survive me, and such child or children of mine living at my death, and such child or children then living of any child or children of mine then dead as shall attain the age of twenty-one years, or marry with such consent as aforesaid, in equal shares as between or among brothers and sisters, and so that my wife shall take an equal share with any one of her children, But so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living."

XII. Will of a Farmer.

advancement in life or benefit of any minor not more than one half of his or her presumptive or vested legacy or share.

Power to sell to son at a valuation;

I DECLARE that my trustees or trustee may sell my farming business, and any property employed therein, to any son of mine, at a valuation, and take his bond or other security for payment of all or part of the purchase money within —— years, with interest at the rate of —— per cent. per annum till payment; And may invest any trust monies in the public stocks or funds or on government or real securities or railway debentures, or debenture stock, in England or Wales, but not in Ireland, nor in any other mode of investment [*or*, in or upon any of the stocks, funds, shares, or securities following, that is to say: *continue investment clause, ut ante*, pp. 874 *et seq.*, *Forms* 18 *to* 22], and may vary any investments of trust monies.

to invest and change investments.

Power to apportion realty and personalty among *cestuis que trust*.

I AUTHORISE my trustees or trustee, in their or his discretion, to apportion and allot my real and personal estates or any parts thereof among and to the persons entitled thereto, or any of them; and, if my trustees or trustee think fit, for equality of partition, to sell or mortgage the same or any part thereof, or charge any sum or sums on any part or parts. I DECLARE, that it shall be lawful [*powers for wife during widowhood, and afterwards for children to appoint new trustees*, p. 967, *Form* 1 *and* p. 968, *Form* 5; *or omit in reliance on statutory powers*]; PROVIDED ALWAYS AND I LASTLY HEREBY DECLARE, that any trustee, being a solicitor, or auctioneer or appraiser, or other professional person, may give advice and transact business in relation to the trusts, and charge for the same as if he were not a trustee.

Power for trustees to charge for professional services.

IN WITNESS, &c.

XIII. *WILL bequeathing* LEGACY *to* WIFE *for* LIFE; *then for* CHILDREN, *subject to* POWER *of* SELECTION. *Bequest of* COAL AND IRON WORKS *to be* CARRIED ON *for a stated Period; Son to be admitted into the Concern on his Majority. Profits and Proceeds of Ultimate Conversion to be held on Trusts of Residuary Personalty.* GENERAL DEVISE *of* REAL ESTATE (*subject to* LIFE INTEREST *given to* WIFE *in* DWELLING-HOUSE, &c.), *to* ELDEST SON *absolutely. Residue of Personalty to be Invested in Trust* (*subject to* ANNUITY *to* WIDOW) *for* SONS AND DAUGHTERS *at Twenty-one or Marriage.* SETTLEMENT *of* SHARES *of* DAUGHTERS. GIFT *over of* RESIDUARY PERSONALTY *for benefit of* BROTHERS *and* SISTERS *of Testator and their* ISSUE *per stirpes.*

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of executors and trustees and guardians*, p. 751, *Form* 16. *Bequest to wife of consumable stores and household effects*, p. 761, *Forms* 14, 15. *Other specific bequests*, pp. 759 *et seq.* *Pecuniary bequests, to wife*, p. 792, *Form* 1.] AND I DECLARE that such legacies shall be paid to my said wife by way of satisfaction of any amount which may be owing to her from me at my death. [*Pecuniary legacies to trustees, &c.*, p. 792, *Form* 3; *to clerks, &c.*, p. 794, *Form* 8. *Legacies to children, with interim maintenance*, p. 797, *Form* 18. *Legacy upon special trusts for benefit of married sister*, p. 801, *Form* 28. *Bequest of a sum with interest until payment to trustees upon trust for investment*, p. 836, *Form* 2*a*, *and to hold the* "settled legacy fund,"] UPON TRUST, during the life of my said wife [*name*], to pay the income of the settled legacy fund unto my said wife or her assigns, for her or their absolute benefit; And from and after the death of my said wife, IN TRUST for such one or more exclusively of the others or other of my children, or more remote issue, such remoter issue to be born in the lifetime of my said wife, at such age or re-

Legacy to wife to be in satisfaction of testator's debt (*mm*).

Trust to pay income to wife for her life;

after her death in trust for issue, according to wife's appointment by deed or will;

(*mm*) See *Rowe* v. *Rowe*, 2 De G. & Sm. 294; and see as to loans by wives to their husbands for the purpose of any trade or business, sect. 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

XIII. Coal Works, &c.

spective ages, in such manner, and if the appointment shall extend to more than one, then in such shares and proportions as my said wife, by deed or deeds revocable or irrevocable, or by will or codicil shall appoint; And in default of and subject to any such appointment, IN TRUST for such child or children of mine as being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, and if more than one, in equal shares. [*Hotchpot clause*, p. 886, *Form* 1*d*. *Advancement clause*, p. 914, *Form* 8. *Bequest of coal and iron works to trustees in trust to carry on works, &c.; Power to admit son, and to discontinue works; Ultimate conversion*, pp. 788 *et seq.*, *Form* 7. (*n*).] I DEVISE and bequeath all my messuages and lands at ——, and all other my real property and chattels real, whatsoever and wheresoever situate, and not otherwise disposed of by this my will or any codicil hereto. As TO all that my messuage or dwelling-house, with the gardens, lawn, pleasure grounds, and appurtenances thereto belonging, called ——, and situate at —— aforesaid, and now in my occupation, To the use of my said wife [*name*], during her life, she keeping the same in good tenantable repair and order, and insuring the said messuage and all the buildings upon the said last mentioned premises against loss or damage by fire; And as to the same messuage and premises from and after the death of my said wife, and as to all other my lands and real estate, including chattels real, from and immediately after my death, UNTO AND TO THE USE of my said son [*name*], his heirs, executors, administrators, and assigns, for his and their own use and benefit. [*Gift of residuary personalty to trustees*, p. 866, *Form* 16. *Trust for conversion* (*omitting interpretation clause and substituting* "my trustees

in default of appointment, in trust for the children at twenty-one or marriage, equally;

General devise and bequest of realty and chattels real.

As to messuage, &c., to wife for life.

Subject thereto as to all real estate to son absolutely (*o*).

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Auditing clause.

(*n*) For the auditing clause in the form referred to above the following clause may (if desired) be substituted:—

"Which accounts shall be yearly audited and settled by a competent accountant or accountants to be appointed by my trustees or trustee, such accountant or accountants to be paid such salary or compensation for their trouble out of the profits of my said coal and iron works as my trustees or trustee shall think reasonable and proper."

(*o*) If desired, the real estate may, either subject to a life interest of the widow in the messuage, &c., or otherwise, be limited to uses in strict settlement: see pp. 933 *et seq.*, with such auxiliary powers and provisions as may be thought proper.

or trustee"), p. 866, *Form* 1 *a*. *Power to postpone sale and conversion, and destination of income until sale*, p. 869, *Form* 7. *Trusts of proceeds of sale and conversion*, p. 873, *Form* 15. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clause*, p. 874 *et seq.*, *Forms* 18—22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of residue*, p. 877, *Form* 24.] UPON TRUST that my trustees or trustee shall in the first place, by and out of the income of the residuary trust fund, pay to my said wife an annuity, &c., [*continue ut ante*, p. 825, *Form* 2.] AND subject to the said annuity shall stand and be possessed of the said residuary trust fund and the income thereof, In trust for [*testator's sons at twenty-one and daughters at twenty-one or marriage*, p. 887, *Form* 3*b*; *Settlement of daughters' shares*, 3*c* to 3*h*]; AND if there shall be no child of mine who shall acquire a vested interest in the residuary trust fund under the trusts hereinbefore contained, then I declare that my trustees shall stand possessed of the same and the income thereof, subject to the said annuity, UPON TRUST, &c., [*Trusts for brothers and sisters for their respective lives with remainder for children of brothers and sisters*, pp. 904, *Forms* 26 *a*, *b*. *Appointment of trustees for purposes of S. L. Acts, and (if necessary) of sect.* 42 *of the Conv., &c., Act*, 1881, p. 955, *Form* 33. *Trustee clauses*, pp. 967 *et seq.*]

Annuity to wife (*p*).

IN WITNESS, &c.

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XIV. *WILL of a* TRADER, *giving a* PECUNIARY LEGACY *to* EACH *of his* CHILDREN, *to vest at Twenty-one or on Marriage, and his* REAL ESTATE (*charged with the Legacies*) *and the* RESIDUE *of his* PERSONAL ESTATE *to his* WIDOW *absolutely.* POWER *for* WIDOW *to* RETAIN LEGACIES *during Minorities of Children, if she* CARRY *on the Testator's* TRADE *and remain* UNMARRIED, *paying* INTEREST *for the* MAINTENANCE *of the Children.*

[*COMMENCEMENT*, p. 745, *Forms* 1, 2.] I APPOINT my wife and [*two trustees*], of, &c., to be my executors and

Appointment of executors.

(*p*) For a form giving an annuity out of residue to wife during widowhood, and a reduced annuity on re-marriage, see p. 828, Form 7.

XIV. **Will of a Trader Legacies to Children. Widow to carry on Trade.**

trustees [*Specific legacies*, pp. 759 *et seq.*]. I GIVE to each of my children who shall survive me and attain the age of twenty-one years or marry, the sum of £——. And as to each child of mine who shall be dead at my death, I give the sum of £—— to such his or her child or children as shall attain the age of twenty-one years or marry; if more than one, in equal shares. [*Other pecuniary legacies*, pp. 792 *et seq.*] I DIRECT the legacy duty on the pecuniary legacies hereby given to be paid out of my residuary personal estate. I DEVISE and bequeath all the freehold and copyhold hereditaments and all the leasehold and personal property, over which I may have any disposing power, unto my wife, her heirs, executors, administrators, and assigns. I DIRECT my said trustees or trustee for the time being to raise, as soon as conveniently may be after my death, the legacy or legacies to which any person or persons being under age shall be presumptively entitled under my will, and to invest the same, in the names or name of my trustees or trustee for the time being (other than my wife), in or upon [*Investment clause*, pp. 874 *et seq.*, *Forms* 18—22]; With power for the said trustees or trustee from time to time to vary such investments; [*Power to advance*, p. 914, *Form* 8]. PROVIDED ALWAYS, that, while my wife shall carry on my trade of ——, and shall remain unmarried, it shall be lawful for my other trustees or trustee, in their or his discretion, to permit her to retain and employ in the said trade any of the aforesaid legacies during the respective minorities or the minority of the persons or person presumptively entitled thereto, she applying towards, or (at the discretion of my other trustees or trustee) paying to my other trustees or trustee for the maintenance and education of such minors or minor, interest on the legacies or legacy so retained, after the rate of —— per cent. per annum, to be paid, if demanded, on the 25th day of March and other usual quarter days. [*Trustee clauses*, pp. 967 *et seq.*]

Legacies to children at twenty-one or marriage; substitution of children of deceased child.

Legacy duty.

General devise, and bequest to widow.

Presumptive legacies to be raised and invested.

Power to vary investments.

Power to lend the amount of legacies to widow, to be employed in trade.

IN WITNESS, &c.

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## XV. *WILL of a* TRADER, *a Married Man. Directions for carrying on* TRADE.

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of wife and other executors and trustees*, p. 748, *Form* 4. *Appointment of guardians*, p. 752, *Form* 18. *Specific be-*

XV. Directions for carrying on Trade.

*quests*, pp. 759 *et seq.* *Use of furniture, &c., to wife for life*, p. 764, *Form* 25. *Directions for carrying on business, and for its being taken to by testator's son*, pp. 782 *et seq.*, *Form* 5. *Pecuniary legacies*, pp. 792 *et seq.* *Gift of residue to trustees*, p. 864, *Form* 11. *Trust for sale and conversion of residue*, p. 866, *Form* 1. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clause*, pp. 874 *et seq.*, *Forms* 18—22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of residue*, p. 877, *Form* 24. *Trusts of residue for wife for life for maintenance of herself and children, and then for children, with settlement of shares of daughters*, pp. 887 *et seq.*, *Form* 3.] PROVIDED ALWAYS, AND I HEREBY DECLARE, that the trust or obligation hereinbefore imposed on my said wife to apply a portion of the gains and profits of trade, or other annual income, for the support and maintenance of my children for the time being, shall not implicate my trustees in any responsibility respecting the application thereof, nor shall the same extend to any son or sons of mine after he or they respectively shall have attained the age of twenty-one years or shall have married, or to any daughter of mine after she shall have married, nor for any longer period than she shall be willing to reside with my said wife, it being my intention merely to provide my daughters with a home, and not to support a separate establishment for them. [*Advancement*, p. 914, *Form* 8. *Trustee clauses* pp. 967 *et seq.*]

Proviso, explanatory of trust for maintenance.

IN WITNESS, &c.

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XVI. *WILL of a* PARTNER. *Bequest of* SHARE *in* BUSINESS *to* TRUSTEES, *upon trust to* REALISE *the same, with* POWERS *to settle* ACCOUNTS, *and to leave* CAPITAL *of* SHARE *in Business on* LOAN; PROCEEDS *of* REALISATION *to be as* RESIDUARY ESTATE. USUAL TRUSTS *of* RESIDUE *for Benefit of* WIFE *and* CHILDREN.

[*COMMENCEMENT*, p. 745, *Form* 1.] I APPOINT my two sons, [A. B.] and [B. B], executors and trustees of my will. [*Specific bequests*, p. 759 *et seq.*] AND WHEREAS I am a partner in the partnership or firm of ——, carrying on the business of ——, in ——, in the county of ——, under

XVI. Will of a Partner whose share is to be realised.

certain partnership articles dated the —— day of ——, [*Recite any provision in the articles for winding-up the business after the death of a partner*]: NOW I HEREBY BEQUEATH all my share and interest in the said partnership business and in the real and personal property, assets, capital, stock-in-trade, goodwill, and all trade-marks or other rights in connection with such goodwill, credits, profits, and other the effects of the said partnership, and all arrears, profits, and other monies owing to me by the said firm unto the said [A. B.] and [B. B.], their heirs, executors, administrators, and assigns, UPON TRUST, that they the said [A. B.] and [B. B.], and the survivor of them, and the executors or administrators of such survivor, and other the trustees or trustee for the time being of this my will (hereinafter called my trustees or trustee) shall concur with the other persons or person for the time being interested in winding-up the said partnership business, or any other business in which I may be engaged as a partner at the time of my death; AND for that purpose I authorise my trustees or trustee to adjust and settle, &c. [*Continue as at* p. 790, *Form* 9]: AND I HEREBY DECLARE, that my trustees or trustee shall stand possessed of all arrears of gains and profits which shall, upon such adjustment and settlement of accounts as aforesaid, be found to be due to my estate, and also of all monies to arise from the winding-up and realisation of my share in the said business, upon the trusts, and with and subject to the powers and provisions hereinafter declared concerning the proceeds of sale and conversion of my residuary estate, and shall pay and apply all the net gains and profits which shall arise in respect of my share in the said partnership business from and after my death and during any such postponement of the winding-up of the said business and ascertainment and disposal of my share therein, as if the same were income arising from investments of my said residuary estate. [*Gift of residue to trustees*, p. 864, *Form* 11. *Trust for sale and conversion*, p. 866, *Form* 1 *a*. *Trust of proceeds of sale, &c.*, p. 873, *Form* 15. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clause*, pp. 874 *et seq.*, *Forms* 18 *to* 22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of invested residue*, p. 877, *Form* 24. *Trusts for wife during widowhood, then for children, &c.*, pp. 884 *et seq.*, *Form* 1. *Trustee clauses*, pp. 967 *et seq.*]

Bequest of share in partnership to sons.

Upon trust to realise.

Arrears of profits and proceeds of realisation to go as residuary personalty.

IN WITNESS, &c.

XVII. *WILL of a PARTNER who has Married Twice.* DIRECTIONS *as to carrying on Partnership Business and Admission of Sons. Proviso for Discontinuance of Business. Proceeds of Realisation of Share in Partnership to form Part of Residuary Personal Estate.* PROVISIONS *for present* WIFE *and for* CHILDREN *by both Marriages.*

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of executors*, p. 747, *Form* 3. *Appointment of sister as sole guardian of daughters by first wife, with an annuity for each*, p. 755, *Form* 23. *Specific bequests*, p. 759 et seq. *Recital of partnership: power to trustees to carry on business and ancillary powers: option to sons at twenty-one to take over business*, pp. 780, 781, 782, *Form* 4.] AND if at any time it shall seem expedient to my trustees to cease to carry on the said business, or if all my sons shall die under the age of twenty-one years, or refuse to take thereto on attaining that age, then I direct my said trustees or trustee, as soon as conveniently may be after the happening of any such event, to concur, &c. [*Continue as at* p. 790, *Form* 8 *or* 9]: AND I declare that, in case my trustees or trustee shall so as aforesaid realise my share and interest in the said partnership, my trustees or trustee shall stand possessed of any monies to arise from realisation and the income thereof, Upon the trusts for the purposes, and with and subject to the powers and provisions hereinafter declared concerning my residuary personal estate [*Gift of residue to trustees*, p. 864, *Form* 11. *Trust for conversion*, p. 866, *Form* 1. *Trusts of proceeds of Sale and conversion*, p. 873, *Form* 15. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clause*, pp. 874 et seq., *Forms* 18 *to* 22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of residue*, p. 877, *Form* 24.]; UPON TRUST, that my trustees or trustee, in case any child of mine by my present wife, or any issue of any child of mine by my present wife, should survive me, shall divide the trust fund into as many equal parts as there shall be children of mine living at my death or leaving issue living at my death; AND shall transfer one of such parts unto my son [*name*], his executors, administrators, or assigns; AND

(*Residue of realty and personalty*)—to be divided into as many parts as there shall be children;

as to three of such parts,

XVII. Will of a Partner with Directions to continue share in Business.

shall pay the income from one other of such parts unto my elder daughter [*name*], during her life, but without power of anticipation; And after her death shall transfer the capital of such part in such manner as she shall by will appoint; And, subject thereto, shall transfer the same to such child or children of my said daughter as, being a son or sons, shall attain the age of twenty-one years or, being a daughter or daughters, shall attain that age or marry under that age, if more than one in equal shares, and his, her, or their heirs, executors, administrators, and assigns. And I declare that my trustees or trustee shall stand possessed of and interested in the capital and income of one other such part or share of the trust fund, upon such or the like trusts, for the benefit of my younger daughter [*name*], and her children as are hereinbefore declared concerning the part or share of the same trust fund hereinbefore given for the benefit of my said elder daughter [*name*] and her children. And, on failure of the aforesaid trusts as to any one of the said parts by lapse or otherwise, to be possessed thereof upon the trusts hereinbefore declared concerning the other or others of them. And, on failure of the aforesaid trusts as to both of the said parts by lapse or otherwise, to be possessed thereof upon the trusts herein declared concerning the other part or parts of the trust fund. And, as to the other part or parts of the trust fund (and, on failure by lapse or otherwise of the trusts hereinbefore declared in favour of my said children [*names*], as to the whole of the trust fund), to transfer the same unto my wife, her heirs, executors, administrators, and assigns absolutely; And, if she should die before me, Upon trust to pay the income therefrom unto my child or children living at my death, and the child or children then living of any child or children of mine then dead (other than the said [*children by former wife*] and their issue), during his, her, or their life or respective lives, if more than one in equal shares as between brothers and sisters; and as to a female or females, without power of anticipation during any coverture; But so that the child or the children collectively of any child of mine shall take only such share as his, her, or their parent would have taken if living; And, after the death of each such child or grandchild of mine, to transfer a share of the capital of the trust fund proportionate to the share of the income thereof hereinbefore given to him or her,

for son and daughters by former wife, as to daughters for life, and then for their children;

cross limitations of the three shares;

as to the other parts, for widow absolutely;

or if she be dead, for children by her for life,

then for their issue per stirpes in equal shares (subject to power of selection);

unto or for the benefit of such his or her issue living at his or her death, and in such manner as he or she shall by will appoint. And, subject thereto, to transfer the same unto such his or her child or children as shall attain the age of twenty-one years or marry, and his, her, or their heirs, executors, administrators, and assigns [*Hotchpot clause*, p. 886, *Form* 1 *d*]. And, on failure by any means of any of the trusts herein declared of any part or parts of the trust fund in favour of any of my issue by my present wife, I direct such part or parts, and the income therefrom, to be held upon such trusts in favour of my other issue by my present wife as may then be subsisting in respect of any other parts of the trust fund, and the income therefrom; And, on failure by any means of all the trusts hereinbefore declared in favour of my present wife and my issue by her, I direct the whole of the trust fund to be held upon the trusts hereinbefore declared concerning part of it in favour of the said [*children by former wife*], and their issue. But, if there should be no issue of mine by my present wife living at my death, and if my wife should survive me, I direct one moiety of the trust fund to be transferred unto my wife, her heirs, executors, administrators, and assigns, and the other moiety to be held upon the trusts hereinbefore limited in favour of my said children [*names*], and their issue [as if my wife had died in my lifetime]. [*Advancement*, p. 914, *Form* 8. *Trustee clauses*, pp. 967 *et seq.*]

**XVII. Will of a Partner with Directions to continue share in Business.**

cross limitations among issue by present wife;

if wife should survive, and there should be no issue by her, then as to one moiety for her, and as to the other for issue by former wife.

In witness, &c.

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## XVIII. *WILL in favour of* Wife, Son, *and* Daughters *Residuary* Personalty (*except Stock in the Funds*) *to* Wife. Realty *to be converted. The* Bulk *of the Property given in* Legacies *for the benefit of* Children, *&c.* Annuities *to* Sisters.

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Executors and guardians*, p. 751, *Form* 16. *Bequest of ready money to wife; legacies to trustees, &c.*, p. 792, *Form* 3. *Legacy to*

XVIII. Wife and Children.

*son at twenty-two; interest for maintenance; further legacy at twenty-four, after death or marriage of wife*, p. 798, *Form* 20; *Legacies to other children to be invested: substitution of issue of children predeceasing testator; accruer clause; wife to take interest on legacies for twelve months to keep up household, &c.; power to settle each daughter's legacy on marriage under age*, pp. 807 *et seq.*, *Form* 36. *Gift of residuary real and personal estate to trustees*, pp. 864, 865, *Forms* 11, 12 *or* 13. *Trust for sale and conversion*, p. 866, *Form* 1*a*. *Trusts of proceeds of sale and conversion*, p. 873, *Form* 15. *Trust for investment of residue*, p. 874, *Form* 17. *Investment clause*, pp. 874 *et seq.* *Power to vary investments*, p. 877, *Form* 23. *Trustees to stand possessed of investments upon trust*, p. 877, *Form* 24. *To pay annuities to two sisters*, p. 903, *Form* 25*a*. *Subject thereto, to wife during widowhood; then for children, &c., as widow shall appoint; in default, to children equally; hotchpot clause*, pp. 884 *et seq.*, *Form* 1. *Advancement clause*, pp. 914 *et seq.*]: PROVIDED ALWAYS, and I hereby declare that if my said sisters or either of them should be living at the death or re-marriage of my said wife, &c. [*Continue as at* p. 830, *Form* 9. *Trustee clauses*, pp. 967 *et seq.*].

Power to purchase annuities out of residue.

IN WITNESS, &c.

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XIX. *WILL bequeathing Specific and Pecuniary Legacies. Residue for Conversion.* INCOME *of* RESIDUE *to* WIFE *during Widowhood.* RESIDUE *for* CHILDREN: *Sons' Shares to vest at Twenty-five.* SETTLEMENT *of* DAUGHTERS' SHARES. *Variation by which the* VESTING *of* GRANDSONS' SHARES *is postponed until* TWENTY-FIVE. PROVISION *for* ILLEGITIMATE CHILD.

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of executors*, p. 747, *Form* 3; *and guardians*, p. 755, *Form* 22. *Furniture of a certain value to wife*, p. 762, *Form* 18. *Immediate legacy to wife*, p. 792, *Form* 1 *or* 2. *Legacies to*

*children, including a natural daughter: investment and maintenance; substitution of issue of deceased children*, p. 805, *Form* 35.] And whereas I have contracted with [*vendor*], of, &c., for the purchase of certain freehold messuages and hereditaments at ——; Now I hereby authorise my trustees or trustee either to complete such purchase or relinquish the same, as circumstances, &c. [*Continue as at* p. 926, *Form* 28. *Realty and personalty to trustees*, p. 864, *Form* 11. *Trusts for conversion and investment, &c.*, pp. 866 *et seq.* *Residue in trust for wife during widowhood; then for children, sons at twenty-five, daughters at twenty-one or marriage; daughters' shares to be settled on them and their issue*, p. 889, *Form* 4. *Conditional postponement of vesting of grandsons' shares until twenty-five*, p. 900, *Form* 19. *Maintenance*, p. 910, *Form* 1. *Power to postpone payment of legacies*, p. 819, *Form* 54. *Trustee clauses*, pp. 967 *et seq.*].

In witness, &c.

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XX. *WILL giving* Real *and* Personal Estate *in trust for* Sale, *the Produce to be invested for the* Wife and Children. Life Interest in one Moiety *to the* Wife. *Capital to Children in* unequal Shares. *Daughters' Shares settled, with cross Limitations.* Life Annuities *to Sister and Niece determinable on Alienation.*

[*COMMENCEMENT*, p. 744, *Forms* 1, 2. *Appointment of executors and guardians*, p. 751, *Form* 16. *Furniture to wife*, p. 761, *Form* 15, *or* p. 762, *Form* 18. *Other specific legacies*, pp. 759 *et seq.* *Pecuniary legacies to wife*, p. 792, *Form* 1 *or* 2; *and to trustees, &c.*, *Form* 3; *other pecuniary legacies*, pp. 793 *et seq.* *Annuities to two sisters and a brother, with proviso for cesser on alienation*, p. 827, *Form* 6. *Gift of residue to trustees*, p. 864, *Form* 11. *Trust for sale and conversion*, p. 867, *Form* 1 (*a*). *Trusts of proceeds of sale and conversion*, p. 873, *Form* 15. *Authority*

XX. Produce of Real and Personal Estates for Wife and Children.

*to postpone conversion*, p. 869, *Form* 7. *Trusts for investment of residue*, p. 874, *Form* 17. *Investment clause*, pp. 874 *et seq.*, *Forms* 18—22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of residue*, p. 877, *Form* 24. *Income of one moiety to wife during widowhood; subject thereto, the entirety for children, sons at twenty-five, daughters at twenty-one or marriage; sons' shares double those of daughters; substitution of issue of children dying before the vesting age; on failure of children, the remaining moiety to wife for life, and, subject thereto, to testator's niece for her life, and then to her children; share of each daughter to be in trust for her inalienable use for life, and then for her children; accruer; power to daughters to bequeath life interests to husbands, &c.*, pp. 889 *et seq.*, *Form* 4. *Power to invest trust-monies in purchase of lands*, p. 878, *Form* 26. *Power to lease land*, pp. 921 *et seq.* *Trustee clauses*, pp. 967 *et seq.*

In witness, &c.

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XXI. *WILL of a* Widower, *devising* specific Freehold *and* Copyhold Estates *to each of his* three Daughters *respectively for* Life, *with Power to* appoint Life Estates *to their surviving* Husbands, *and a* Power *of Selection among their respective Children or more remote Issue. In default of Appointment, the Estates devised to each Daughter to go to* her Children *as Tenants in Common in Fee.* Cross-executory Limitations *between the several Families. Provision for* Indemnity *of Testator and his Co-trustee under his Daughter's Marriage Settlement, against a* Breach *of* Trust. *The Residue of the Testator's* real *and* personal Estates *to form* One Fund, *to be held upon Trusts similar to the Uses and Trusts limited of the real Estates spe-*

*cifically devised, in such manner as to* COMPENSATE *for any* INEQUALITIES *in the* VALUES *of the* ESTATES SPECIFICALLY DEVISED. *Power of Advancement out of the Real and Personal Estates.*

XXI. Specific Devises: Tenants for Life to Repair and Insure.

[*COMMENCEMENT*, p. 745. *Appointment of executors as to a specific debt, and appointment of debtor and others as executors as to residue*, p. 750, *Form* 11. *Appointment of guardians with power to substitute*, p. 753, *Form* 20. *Directions as to funeral*, p. 757, *Forms* 1, 2. *Specific bequests*, pp. 759 *et seq.* *Legacy to trustees*, p. 792, *Form* 3; *and other pecuniary legacies*, pp. 793 *et seq.*]. AND I CHARGE all my freehold and copyhold hereditaments situate at Thorpe, in the said county of ——, and all my freehold land at Redham aforesaid, which I purchased of John Wood, with four cottages which I have erected thereon, with the full and complete exoneration and indemnification of, in the first place, the said [*one of the trustees*], his heirs, executors, and administrators, and estate and effects, and then of my other real estates and my personal estate, from and against all liabilities, demands, losses, costs, charges, and expenses whatsoever, incurred or to be incurred or sustained in consequence of the execution by me and the said [*trustee*] of a deed of composition, dated, &c., whereby we have agreed to accept a composition for, and have discharged a debt or sum of £——, secured by the bond of my son-in-law [*name*], to me and the said [*trustee*], as trustees of the settlement made upon the marriage of my daughter [*eldest daughter*], the wife of the said [*son-in-law*]; And I authorise my said trustees or trustee for the time being from time to time to raise, by sale or mortgage of all or part of the said hereditaments, or otherwise therefrom, such monies as they or he shall deem necessary for the purpose of such exoneration and indemnification, and to apply the same accordingly. AND, subject thereto, I GIVE AND DEVISE all my said hereditaments at Thorpe, and my said freehold land at Redham, purchased of John Wood, with the four cottages thereon, UNTO AND TO THE USE of my said daughter [*eldest daughter*], during her life, for her sole, separate, and inalienable use during her present or any future coverture. And, after her death, TO SUCH USES AND UPON SUCH TRUSTS, for the benefit of any surviving husband of my said daughter, as to all or any part of the said hereditaments and for any

Charge of certain hereditaments with indemnity to testator and his co-trustee against liability for a certain breach of trust;

subject thereto devise to eldest daughter for life;

power to appoint life-interest to husband;

XXI. Specific Devises: Tenants for Life to Repair and Insure.

power to appoint the fee among her issue;

in default of appointment to children and issue of deceased children, with cross-limitations of shares of children dying under twenty-one without issue;

in default of such issue to similar uses in favour of other daughters, their husbands, and issue, by reference.

Devise of another estate to similar uses in favour of second daughter, her husband, and issue;

period not exceeding the term of his life, as my said daughter shall, by will, notwithstanding coverture, or (being unmarried) by deed, appoint. And, subject thereto, To such uses and upon such trusts for the benefit of all or any of my said daughter's children or more remote issue (born in her lifetime), as she shall at any time or times by deed, revocable or irrevocable, or by will appoint, but so that no infant and unmarried child or other issue shall take a vested interest under any such appointment in the lifetime of my said daughter. And, subject thereto, To the use of such child or children of my said daughter as shall be living at my death, and such child or children of any child or children of my said daughter who shall be then dead as shall survive me, and if more than one, in equal shares as between or among brothers and sisters, and his, her, or their heirs and assigns for ever, but so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living. But in case any of such children or grandchildren should die under the age of twenty-one years without leaving issue, then I give and devise, his, her, or their share or shares (as well under this substitutionary limitation as under the foregoing original limitation), To the uses herein limited concerning the other share or shares of the said hereditaments: Provided that no child or grandchild shall take under the foregoing limitation in default of appointment, without bringing into hotchpot or allowing for the benefit of any appointment which shall have been made to him or her or to his or her issue. And if no child or grandchild of my said daughter should be living after my decease, and attain the age of twenty-one years or die under that age leaving issue, then, subject to any such appointment as aforesaid, and as to one moiety of the said hereditaments, To and upon the uses and trusts and with the powers hereinafter limited and contained concerning my hereditaments at Easton, purchased of James Watt; And as to the other moiety thereof, To and upon the uses and trusts and with the powers hereinafter limited and contained concerning my hereditaments at Easton, purchased of John Hutton. And I give and devise all my copyhold hereditaments at Easton, in the said county of ——, which I purchased of James Watt, and to which my daughter [*second daughter*], the wife of [*name*], has been admitted in trust for me, And all

XXI. Specific Devises: Tenants for Life to Repair and Insure.

my copyhold hereditaments at Redham aforesaid, which I purchased of Charles Reed, with the cottages erected thereon, To AND UPON SUCH OR THE LIKE USES AND TRUSTS, and with such or the like powers in favour or for the benefit of my said daughter [*second daughter*], her surviving husband, and her issue, as are hereinbefore limited, expressed, and contained as to my said hereditaments at Thorpe, concerning the said [*eldest daughter*], her surviving husband, and her issue; AND, subject thereto, as to one moiety of the hereditaments lastly hereinbefore devised, To AND UPON THE USES AND TRUSTS and with the powers hereinbefore limited and contained concerning my hereditaments at Thorpe (including the charge, trust, and provisions hereinbefore contained for the exoneration and indemnification of the said [*trustee*], his heirs, executors, and administrators, and estates and effects, and of my other real and personal estates; And as to the other moiety thereof, To AND UPON THE USES AND TRUSTS and with the powers hereinafter limited and contained concerning my hereditaments at Easton aforesaid, purchased of James Hutton. AND I GIVE AND DEVISE all my freehold and copyhold hereditaments at Easton aforesaid, which I purchased of James Hutton, To AND UPON SUCH OR THE LIKE USES AND TRUSTS and with such or the like powers in favour or for the benefit of my daughter [*third daughter*], her surviving husband, and her issue, as are hereinbefore limited, expressed, and contained as to my said hereditaments at Thorpe, concerning the said [*eldest daughter*], her surviving husband, and her issue; And, subject thereto, as to one moiety of the hereditaments lastly hereinbefore devised, To AND UPON THE USES AND TRUSTS and with the powers hereinbefore limited and contained concerning my hereditaments at Thorpe (including the said charge, trust, and provision for exoneration and indemnification; And as to the other moiety thereof, To AND UPON THE USES AND TRUSTS and with the powers hereinbefore limited and contained concerning my hereditaments at Easton, purchased of James Watt. AND I DIRECT that each tenant for life, or for any less estate, of any hereditaments, shall, during her or his estate, keep the buildings thereon in good and substantial repair and insured in the names or name of my said trustees or trustee, in some respectable office or offices of insurance against damage by fire, to the full value thereof; And that the monies to be

on failure of such uses, to similar uses in favour of other two daughters, their husbands, and issue.

Devise of a third estate to similar uses in favour of third daughter, her husband, and issue;

on failure of such uses, to similar uses in favour of other daughters, their husbands, and issue.

Tenants for life to repair and insure;

XXI. Specific Devises: Tenants for Life to Repair and Insure.

on their default, trustees may repair and insure, and recover costs by distress and entry.

received under every such insurance shall be applied in reinstating the property in respect whereof the same shall become payable; And that, if any such person should neglect to effect such repairs as aforesaid within six calendar months after being thereunto requested in writing by my said trustees or trustee, or to effect or keep on foot such insurance, or to produce to my said trustees or trustee, upon demand, the receipt for each premium thereon within fourteen days after the same shall have first become payable, it shall be lawful for (but not incumbent on) my said trustees or trustee, out of any trust-monies in their or his hands, to effect such repairs or to effect or keep on foot such insurance, and to deduct the expenses thereof, with interest thereon after the rate of £5 per centum per annum, from any monies which shall then or afterwards be payable to such person, or to recover such expenses and interest, with all costs incidental to the recovery thereof, by distress or entry upon and perception of the rents and profits of any hereditaments to which such person shall be entitled for any estate or interest, either by original limitation or by appointment under my will. I

Gift of residuary real and personal estate to trustees.

DEVISE AND BEQUEATH all the residue of my real estate and chattels real, and of my personal estate and effects whatsoever and wheresoever UNTO AND TO THE USE of the said [*trustees*] their heirs, executors, administrators, and assigns according to the nature and tenure of the same premises respectively, to hold the same subject to the directions and upon the trusts hereinafter declared and contained concerning the same: AND

Trustees to cause estates specifically devised to be valued.

I DIRECT that my trustees or trustee shall, as soon as conveniently may be after my death, cause the several freehold hereditaments hereinbefore particularly mentioned and specifically devised, and also my said residuary real and personal estate, to be respectively valued by some competent person or persons, to be appointed for that purpose by my trustees or trustee. AND

Gift of residuary realty and personalty, for benefit of daughters and their husbands and issue, by reference, in such proportions as to make all their shares under the will of equal value.

I DIRECT that my trustees or trustee shall set apart such a part or portion of my said residuary real and personal estates as shall, together with the value (so to be ascertained as aforesaid) of my said hereditaments hereinbefore specifically devised for the benefit, in the first instance, of my said daughter [*eldest daughter*], (without regarding or making any allowance for the said charge thereon for exoneration and indemnification hereinbefore contained), be equal in amount or value to one equal third part of the total value (so to be ascertained as

XXI. Specific Devises: Tenants for Life to Repair and Insure.

aforesaid) of all my specifically devised hereditaments and my said residuary real and personal estates taken together, And shall be possessed of such part or portion, Upon trusts and subject to powers corresponding as nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Thorpe (including the said charge, trust, and provision for exoneration and indemnification); And shall set apart such other part or portion of my said residuary real and personal estates as shall, together with the value (so to be ascertained as aforesaid) of my hereditaments hereinbefore specifically devised for the benefit, in the first instance, of my said daughter [*second daughter*], be equal in amount or value to such equal third part as aforesaid, And shall be possessed of such other part or portion, Upon trusts and subject to powers corresponding as nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Easton, purchased of James Watt, And shall be possessed of the remaining part or portion of my said residuary real and personal estate, Upon trusts and subject to powers corresponding as nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Easton, purchased of John Hutton. [*Maintenance clause, if desired*, pp. 910 *et seq.* *Advancement clause*, p. 914, *Form* 8. *Appointment of trustees to be trustees of settlement for purposes of S. L. Acts, and for purposes of sect.* 42 *of Conv., &c., Act*, 1881, p. 955, *Form* 33. *Provisions modifying statutory powers and provisions of S. L. Acts*, pp. 966 *et seq.* *Trustee clauses*, pp. 967 *et seq.*]

In witness, &c.

## XXII. *STRICT SETTLEMENT of* Two Estates *on Testator's* Two Daughters *respectively and their Issue, with cross Remainders, and ultimate Remainder to a Niece and her Issue.* Term *for* raising *Money for* Debts *and* Legacies. Name *and* Arms Clause. Shifting Limitations. *Appointment of* Protectors. Heirlooms.

Devise of testator's estates in the county of York.

[*COMMENCEMENT*, p. 745, *Form* 1.] I give and devise all that my manor or lordship of ——, and all other the manors or reputed manors, messuages, farms, lands, tenements, and hereditaments whatsoever in the county of York, of or to which I or any person or persons, In trust for me, am, is, or are seised or entitled for any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, or otherwise howsoever or which I have power to dispose of or appoint by my will, with their appurtenances and all my estate and interest therein, to the uses following (that is to say), To the use of [*trustees of term*], their executors, &c. [*Continue as at* p. 934, *Form* 5. *And, subject to the term so created, to elder daughter for life: remainder to her sons successively in tail male; remainder to her sons in tail general; remainder to her daughters in tail male; remainder to her daughters in tail general; remainder to younger daughter and her issue in strict settlement, with corresponding limitations to those for elder daughter; remainder to testator's own heirs*, p. 940, *Form* 15.]: And I declare that the term of —— years hereinbefore limited to the said [*trustees of term*], their executors, administrators, and assigns, is so limited to them, Upon trust that they the said [*trustees of term*], or the survivor of them or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the said term of —— years, shall as soon as conveniently may be after my death, by demising, assigning, mortgaging, selling, or otherwise disposing of the said manors and other hereditaments comprised in the said term of —— years, or any of them or any part thereof, for the whole or any part of the same term, or out of the rents

Trusts of term for raising money for payment of debts and legacies (*p*).

(*p*) See also power to raise money for these purposes by mortgage of the fee, *ante*, p. 758, n.

XXII. Strict Settlement: Shifting Clauses.

and profits of the same hereditaments or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments or any of them, for the rents then in arrear, or by any other means raise any such sum or sums of money as the trustees or trustee of such term shall, in their or his discretion, think fit for the payment of my funeral and testamentary expenses and debts, and the legacies given by this my will or any codicil hereto, and shall pay or apply such monies in or towards the payment or satisfaction and discharge of my said funeral and testamentary expenses, debts, and legacies, to uses following [*Devise of estates in Lincolnshire, ut ante, devise of Yorkshire estates, mutatis mutandis; limitations to younger daughter and her issue in strict settlement; remainder to elder daughter and her issue in strict settlement, ut ante*, p. 940, *Form* 15, *mutatis mutandis, adding before ultimate remainder to testator's heirs limitations to testator's niece by name and her issue in strict settlement.*]

Power to daughters and niece to appoint rent-charges to husbands for life.

PROVIDED ALWAYS, AND I HEREBY DECLARE that it shall be lawful for each and every or any of my said daughters and niece respectively, either before or after she shall become actually entitled [*Continue as at* p. 948, *Form* 26. *Clause limiting the aggregate amount of rent-charges affecting the lands at one time*, p. 949, *Form* 27. *Clause reducing estates in tail male and in tail of persons born in testator's lifetime to estates for life; reduction not to apply to children en ventre sa mère*, p. 937, *Form* 12.]: AND I DIRECT AND DECLARE that any and every such tenant for life, being a female, shall have the same or the like power of limiting or appointing one or more yearly rent-charge or rent-charges unto or in favour of any husband surviving her as is or are hereinbefore reserved to my daughters and niece respectively: AND I FURTHER DIRECT AND DECLARE that it shall be lawful for any and every such tenant for life, if a male, either before or after he shall become entitled to the actual possession or to the actual receipt of the rents and profits of the same hereditaments, but subject and without prejudice [*Continue as at* pp. 947, 948, *Form* 25. *Direction to devisees to assume testator's name and arms*, p. 943, *Form* 21.]: PROVIDED ALSO, AND I FURTHER DECLARE, that if by reason of the failure of issue of the said [*elder daughter*] entitled or inheritable under the limitations hereinbefore contained, any child of the

Power to such persons to limit rent-charges to husband or wife.

Proviso shifting Lincolnshire estate in case of its becoming united with

XXII. Strict Settlement: Shifting Clauses.

the Yorkshire estate in a child of the younger daughter.

said [*younger daughter*] or any issue of any such child should for the time being, under the limitations hereinbefore contained, of the said manors and other hereditaments in the said county of York, be tenant in tail male or in tail general in possession of the same manors and other hereditaments, and should at the same time, under the limitations hereinbefore contained, of the said manors and other hereditaments in the said county of Lincoln, be tenant in tail male or in tail general in possession of the said last-mentioned manors and other hereditaments, and there should then be living any other child of the said [*younger daughter*] or any issue of any such other child, then and so often as the same shall happen, the estate in tail male or in tail general in possession, which the person so in possession under the limitations hereinbefore contained shall be seised of or entitled to, of or in the said manors and other hereditaments in the said county of Lincoln, and also any estate in tail general to which, under the limitations aforesaid, any such person may happen to be entitled of, or in the same manors and other hereditaments in remainder immediately expectant on his or her estate in tail male in possession therein, shall cease and determine; But I declare that if, by virtue of this proviso my said estates in the said county of Lincoln should have shifted from any child of the said [*younger daughter*] or any issue of any such child, and there should afterwards be a failure of issue of the other child or of all the other children (if more than one) of the said [*younger daughter*], then and in that case my said estates in the said county of Lincoln shall return, be, and remain to such child, from whom or from whose issue the same shall have so shifted in tail male with remainder to such child in tail general, with such remainders over as are hereinbefore limited, expressed, or contained of or concerning the same [*Proviso shifting the Yorkshire estate, in the event of its becoming united with the Lincolnshire estate in a child of the elder daughter. Repeat preceding form, substituting* "younger" *daughter for* "elder" *daughter and vice versâ, and substituting* "Lincoln" *for* "York" *and vice versâ*]: In exercise of the power in this behalf given to or vested in me by the 32nd section of the Act, intituled "An Act for the Abolition of Fines and Recoveries and for the Substitution of more simple Modes of Assurance," and of all other powers

(if any) are hereunto enabling, I HEREBY NOMINATE and appoint my friends [*three persons*] to be protectors of the several estates tail created by this my will in lieu of the person who would have been the protector if this clause had not been inserted, during the continuance of the estate or respective estates for life for the time being, prior or antece-

Appointment of protectors of estates tail (*q*).

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(*q*) By sect. 32 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), power is given to any settlor to appoint one or more protectors of the settlement in lieu of the person who would otherwise be such protector. By sect. 33 of the same Act, in cases of lunacy and certain other cases, the protectorship is vested in the Court of Chancery and now in the Chancery Division of the High Court of Justice. In framing the appointment of protectors and the power of supplying vacancies, the following points are to be remembered:—

Points to be attended to in framing appointment of and power of nominating protector.

1st. That the protectors appointed by the testator must not exceed three in number, must be *in esse* at his death, and not *aliens*.

2nd. That the power of new appointment authorised by the Act only extends to vacancies occurring by death or relinquishment. Other occasions of vacancy are provided against by the Legislature itself.

3rd. That if the owner of the prior estate for life, or estate determinable with life, is made one of the protectors, he should be prohibited from acting as protector in case of the office becoming, by the death or retirement of his coadjutors, vested solely in him, as otherwise it should seem he might do. The effect of such a declaration is to constitute the Court protector until the vacancy in the protectorship is supplied under the power. The "owner of the prior estate" means the person beneficially entitled to the rents and profits: *Re Dudson*, 8 Ch. D. 628.

Such an appointment may tend to prolong the continuance of entails; as a disinterested protector, who is specially appointed for the preservation of an entail, is far more likely to abstain from concurring in its destruction than a tenant for life, who often derives a benefit from, and is indeed the chief mover in, the transaction. It is to be remembered, however, that a specially appointed protector cannot be restrained from *selling* his concurrence in the destruction of the entail, however discreditable such a bargain might be. The most efficient security for the preservation of an entail is, perhaps, to be found in the Court: *Re Blewitt*, 3 Myl. & K. 250. By appointing infants protectors, and providing for the substitution of other infants on their coming of age, the Court may, it seems, be made in effect the protector of the settlement. The Court has declined to appoint a protector under sect. 32: *Banks* v. *Le Despenser*, 11 Sim. 508; see also *Clarke* v. *Chamberlin*, 16 Ch. D. 176.

See further, as to the appointment of protectors of settlements, Vaizey on Settlements, Vol. II., pp. 1601 *et seq.*

XXII. Strict Settlement: Shifting Clauses.

dent to such estate tail or estates tail respectively: And I direct and declare that the person or persons who would, if no protector were appointed by this my will, be the protector or protectors of the said entail or entails, shall be absolutely and wholly excluded from the protectorship, notwithstanding that by death or the happening of any other event or contingency occasioning a vacancy in the said office the protectorship hereby constituted shall be temporarily suspended (*r*): Provided always, and I further declare that if any of them the said [*protectors*] or any protector or protectors to be appointed as hereinafter mentioned shall die (*s*) or shall by deed relinquish his or their office of protector, it shall be lawful for the surviving or continuing protectors or protector for the time being, or, if there should be no surviving or continuing protector, then for the executors or administrators of the last deceased protector, or, if there should be no such person, then for the protector or protectors so relinquishing the office as aforesaid, by any deed or deeds to be duly enrolled in the Chancery Division of the High Court of Justice, to nominate and appoint one or more person or persons, not being tenant for life in possession for the time being of the hereditaments hereinbefore devised and appointed, to be a protector or protectors in the room of the person or persons who shall so have died or have relinquished the protectorship as aforesaid, to the intent that the full number of three persons may, so far as practicable, from time to time fill the said office; and the person or persons so to be nominated and appointed as aforesaid shall have and may exercise, either in conjunction with the surviving or continuing protector or protectors, or solely, as the case may be, the same discretionary powers, authorities, and privileges in all respects as he or they would have had and might have exercised if he or they had been appointed a protector or protectors of the said estate tail or respective estates tail by

Power of supplying vacancies in protectorship.

(*r*) As to the vesting of the protectorship in the events here mentioned in the absence of express provision on the point, see *Clarke* v. *Chamberlin*, 16 Ch. D. 176.

(*s*) Where several protectors are appointed under the stat. 3 & 4 Will. 4, c. 74, sect. 32, the protectorship is not determined by the death of one of them, but vests in the survivors or survivor: *Bell* v. *Holtby*, L. R. 15 Eq. 178.

this my will; AND it is my especial request and desire (but without imposing any legal obligation) that the protectors for the time being will exercise the controlling power vested in them by the Act of Parliament in that behalf in declining and refusing, during the whole continuance of the protectorship hereby created, to aid any tenant in tail under this my will in acquiring the fee simple in the hereditaments hereby limited to him or her, unless for the purpose of resettling and assuring the said hereditaments in such manner as will tend to fix and perpetuate the same in my descendants (*t*) [*Furniture, &c., as heirlooms*, p. 965, *Form* 49]: I DEVISE AND BEQUEATH all the residue of my real and personal estate whatsoever and wheresoever unto and between my daughters in equal shares absolutely as tenants in common [*Appointment of executors and trustees*, p. 747, *Form* 3. *Appointment of trustees of will to be trustees for purposes of Settled Land Acts and sect.* 42 *of Conv., &c., Act*, 1881, p. 955, *Form* 33; *with provisoes extending the powers given by the Settled Land Acts*, pp. 956 *et seq.*, *Forms* 34—45. *Trustee clauses*, pp. 967 *et seq.*].

IN WITNESS, &c.

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XXIII. *WILL of Realty and Personalty. Town House for Wife's Residence.* REALTY *to* SONS *successively in* STRICT SETTLEMENT; *in default of such issue to be* SOLD *for benefit of* DAUGHTERS. HEIRLOOMS. LEGACIES *to* CHILDREN *and their* ISSUE. RESIDUE *of* PERSONALTY *for* WIFE, *and then for* ISSUE *as she shall appoint; in default, equally. Power to* SETTLE PART *of Daughter's Legacies.*

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of executors and trustees*, p. 747, *Form* 3; *and guardians*,

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(*t*) The injunction which the testator has here laid upon his protectors created no legal obligation; the Act having expressly declared that the protector's discretion is absolute and uncontrollable: see sect. 36.

XXIII. Realty and Personalty: Wife and Children.

Real estate for first and other sons and their issue in strict settlement.

p. 752, *Form* 17. *Immediate legacy to wife*, p. 792, *Form* 1 *or* 2. *Furniture during widowhood*, p. 764, *Form* 25. *Bequest of leasehold house in trust for wife's residence; subject thereto, to be sold*, p. 843, *Form* 4. *General devise of freeholds to the uses following*, p. 933, *Form* 1. *To use of eldest son for life*, p. 935, *Form* 6. *Remainder to his first and other sons successively in tail male*, p. 936, *Form* 9. *Remainders to second and other sons and their respective issue in like manner.*] With remainder, in default of such issue, To THE USE of the said [*trustees*], their heirs and assigns, UPON TRUST

Devise, in default of such issue, to trustees for sale;

that the said [*trustees*] or the [survivors or] survivor of them, or the executors or administrators of such survivor or other the trustees or trustee for the time being of my will (hereinafter called my trustees or trustee) shall, as soon as conveniently may be after the death and failure of issue male of my said several sons as aforesaid, sell the said real estates hereinbefore devised. AND I DIRECT that my trustees or trustee shall stand possessed of the net proceeds of such sale, UPON TRUST to pay or divide the same unto, between, or among such of my daughters as shall be living at the time of my death and at the death of the survivor of my said sons, and such failure of issue male of their respective bodies as aforesaid, if more than one in equal shares; And if any of my daughters should die before the death of the survivor of my said sons and such failure of issue male of their respective bodies as aforesaid (whether in my lifetime or after my death) leaving one or more child or children living at her death, and who shall be living at the death of the survivor of my said sons and such failure of issue male as aforesaid (*u*) and shall attain the age of twenty-one years, then I DIRECT that such child or children of every such daughter shall be entitled to such share of the said trust monies as his, her or their deceased parent would have been entitled if living at the death of the survivor of my said sons and such failure of issue male as aforesaid, and that such share shall be divided

Proceeds of sale to be divided among testator's daughters, &c.

Substitution of issue of deceased daughters.

(*u*) This bequest, although not to take effect until after an indefinite failure of issue is valid; the persons, the failure of whose issue is to entitle the legatees, being devisees in tail. The gift, therefore, notwithstanding its remoteness, does not transgress the rule against perpetuities: see *ante*, p. 424, and *Heasman* v. *Pearce*, L. R. 11 Eq. 522; 7 Ch. 275.

between or among such children if more than one in equal shares. [*Furniture as heirlooms*, p. 965, *Form* 49. *Legacy to trustees upon trust to invest and hold investments upon trust for inalienable use of married daughter for life, after her death for her issue as she shall appoint, and in default of appointment for her children and children of her sons dying under twenty-one equally; hotchpot clause: in default of issue, as daughter shall generally appoint, in default of appointment for daughter's next of kin: power to advance portions*, pp. 836 *et seq.*, *Form* 2 (*or substitute for daughter's general power and trust to next of kin the following:* Upon trust to pay, apply, and transfer the said settled legacy fund in such manner and to and for such trusts and purposes as are herein declared with respect to the residue of my personal estate): *Legacy among other children equally; shares of minors to be invested; substitution of issue of children dying before testator; clause of accruer as to shares of children dying in testator's lifetime or under age*, pp. 807 *et seq.*, *Form* 36. *Advancement clause*, p. 914, *Form* 8. *Power to trustees to settle shares of daughters marrying under age*, p. 932, *Form* 36. *Residue of personalty to trustees*, p. 866, *Form* 16. *Trust for conversion*, p. 866, *Form* 1. *Trust for investment*, p. 874, *Form* 17. *Investments*, pp. 874 *et seq.*, *Forms* 18—22. *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts of invested residue*, p. 877, *Form* 24. *Trusts for wife for life, then for children or issue as she appoints; in default for children equally*, p. 886, *Form* 2.] And if there shall be no child of mine who shall acquire a vested interest in the said residuary trust fund under the trust in default of appointment hereinbefore contained, my trustees or trustee shall stand possessed of the said residuary trust fund Upon trust [*continue as at* p. 883, *Form* 1. *Appointment of trustees of will to be trustees for purposes of S. L. Acts and sect.* 42 *of Conv., &c., Act*, 1881, p. 955, *Form* 33. *Trustee clauses*, pp. 967 *et seq.*].

In witness, &c.

XXIV. *REAL ESTATE in* STRICT SETTLEMENT. *Usual Clauses. Legacies to Daughters and younger Sons.* RESIDUE *to* CHILDREN *generally.* POWER *to raise* DEBTS *and* LEGACIES *by* MORTGAGE *of* REALTY.

XXIV. Strict Settlement.

[*COMMENCEMENT*, p. 745, *Form* 1. *Appointment of executors*, p. 747, *Form* 3. *Devise of realty to uses declared*, p. 933, *Form* 1. *To use of first and other sons and their issue male in strict settlement; remainder to daughters concurrently and their issue male in strict settlement, with cross remainders; remainder to testator's children concurrently in tail general, with cross remainders*, p. 939, *Form* 14. *Tenants in tail born in testator's lifetime made tenants for life*, p. 937, *Form* 12. *Powers to charge jointures and portions*, p. 947, *Form* 25. *Legacies to daughters on marriage; power for daughters dying unmarried to bequeath £—— by will, and clause of accruer; interest for maintenance*, p. 811, *Form* 39. *Legacies to younger sons*, p. 804, *Form* 33. *Residuary personalty to children*, p. 862, *Forms* 5, 6. *Power to mortgage realty for debts and legacies*, p. 873, *Form* 16. *Appointment of trustees of settlement for purposes of Settled Land Acts, and sect.* 42 *of the Conv., &c., Act*, 1881, p. 955, *Form* 33. *Modifications of powers and provisions of Settled Land Acts*, pp. 956 *et seq.*, *Forms* 34—45. *Trustee clauses*, pp. 967 *et seq.*]

IN WITNESS, &c.

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XXV. *WILL of a* LANDED PROPRIETOR. *Bequest of* RENEWABLE LEASEHOLDS *with Provisions for Renewal. Accumulation of Rents.* FREEHOLDS *and* COPYHOLDS *in* STRICT SETTLEMENT. *Residuary Personalty for Younger Children.*

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of executors and trustees*, p. 747, *Form* 3. *Of guardians*, p. 753, *Form* 21. *Specific legacies*, pp. 759 *et seq.* *Pecuniary legacies*, pp. 792 *et seq.* *Bequest of renewable*

XXV. Strict Settlement: Renewable Leaseholds: Accumulations.

*leaseholds to trustees upon trusts to renew, &c.; in trust for son at twenty-one; if no son, for daughter; if no daughter, for wife; Accumulation of rents during minority: power to sell, &c.*, p. 844, *Form* 5. *Devise of freeholds*, p. 933, *Form* 1. *And subject to rentcharge, to wife*, p. 934, *Form* 4; *in strict settlement*, p. 938, *Form* 13. *Jointuring, and other powers*, p. 947, *Form* 25, *and* p. 948, *Form* 26, *and* p. 949, *Form* 30. *Devise of copyholds to uses of freeholds*, p. 960, *Form* 46. *Wife to give up interest under marriage settlement*, p. 981, *Form* 5. *Residuary bequest of personalty to trustees*, p. 866, *Form* 15; *in trust for conversion*, p. 866, *Form* 1; *and investment*, pp. 874 *et seq.* *Power to vary investments*, p. 877, *Form* 23. *Declaration of trusts*, p. 877, *Form* 24. *Trusts of residuary personalty for all children except eldest son or child taking the real estates*, p. 898, *Form* 14. *Appointment of trustees of the will to be the trustees for the purposes of the Settled Land Acts, and sect.* 42 *of the Conv., &c., Act*, 1881, p. 955, *Form* 33; *and extension of powers of Settled Land Acts*, pp. 956 *et seq.* *to Form* 46. *Trustee clauses*, pp. 967 *et seq.*]

In witness, &c.

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## XXVI. *WILL devising* Realty *to an only* Son *and his Issue in* strict Settlement.

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of son executor*, p. 747, *Form* 1. *Devise of realty to uses declared*, p. 933, *Form* 1. *Son for life*, p. 935, *Form* 6. *To the use of his first son and other sons in tail*, p. 936, *Form* 9. *Remainder to his daughters in tail as tenants in common*, p. 941, *Form* 16. *Power to son to charge jointures*, p. 946, *Form* 23; *and to charge portions*, p. 946, *Form* 24. *Power to son in case of death without issue to charge estates with a sum by will*, p. 950, *Form* 31. *Power to son to sell mansion house*, p. 958, *Form* 40. *Power to son to raise money on mortgage for purposes not specified in Settled Land Acts*, p. 959, *Form* 43. *Power to son to purchase or take in*

XXVI. Devise to only Son and his issue, in Strict Settlement.

*exchange or on lease any settled lands, and to direct application of capital monies in purchase of his own lands*, p. 960, *Form* 45. *Personalty to son*, p. 861, *Form* 21. *Trustee clauses*, pp. 967 *et seq.*]

In witness, &c.

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## XXVII. *WILL disposing of the* principal Part *of the* Testator's Property *to the* Uses *and upon the* Trusts *of his* Marriage Settlement.

Heirlooms to go with settled mansion-house.

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Specific bequests*, pp. 759 *et seq.*] I bequeath my gold and silver plate, and also my collection of paintings in oil, to [*trustees*], or other the trustees or trustee for the time being of my marriage settlement, In trust to permit the same to go and be enjoyed as heirlooms with the mansion-house called —— Hall comprised in my said settlement; And, until all the limitations in tail of the said messuage comprised in the said settlement shall fail or be barred, or until the expiration of twenty-one years from the death of the survivor of such of the descendants or issue of my father as shall be living at my death (whichever event shall first happen), I direct that on the death of each person who shall be entitled to the freehold in possession of the said messuage by virtue of the said settlement, the said heirlooms shall go over to and be possessed by the next person on whom such freehold shall devolve by virtue of the said settlement; And on the failure or destruction of the said limitations in tail or the expiration of the said period (whichever shall last happen), I give the said heirlooms to the person who shall then be or last have been entitled to the possession thereof under the trusts aforesaid, his [or her] executors, administrators, and assigns.

Pecuniary legacies.

I give to my nieces, [*names*], each the sum of £——, free from legacy duty, to be paid to them as soon as conveniently may be, with interest at 4 per cent. per annum from the time of my death.

General devise and bequest to trustees of marriage settlement.

I charge my real estates with the payment of my debts in exoneration of my personal estate; And, subject thereto, I give the same and

the residue of my personal estate to [*trustees*], or other the trustees or trustee for the time being of my said marriage settlement, their or his heirs, executors, administrators, and assigns, To USES AND UPON TRUSTS corresponding as nearly as may be to the uses and trusts in the said settlement contained concerning the freehold estates thereby settled. AND I APPOINT the said trustees or trustee to be the executors or executor of this my will, and also trustees or trustee of the settlement hereby created for the purposes of the Settled Land Acts, 1882, and 1884, and of sect. 42 of the Conveyancing and Law of Property Act, 1881.

XXVII. Devise and Bequest on Trusts of Settlement.

IN WITNESS, &c.

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## XXVIII. *WILL of a* SOLICITOR. *Various* TRUSTS *for* CHILDREN. INTEREST *in* PARTNERSHIP BUSINESS, *Law Books, Papers, &c., bequeathed to a Son (a Partner).*

[*COMMENCEMENT*, p. 745, *Form* 1 *or* 2. *Appointment of executors and trustees*, p. 747, *Form* 3; *and guardians*, p. 752, *Form* 17. *Immediate legacy to wife*, p. 792, *Form* 1, *and life interest in furniture, &c., to wife*, p. 764, *Form* 24. *Plate to children*, p. 762, *Form* 17. *Share of residue under will of father-in-law in trust*, p. 776, *Form* 53*a* (*for wife for life; then for children, subject to power of selection, see* p. 886, *Form* 2). *Substituted legacy in case of ademption*, p. 777, *Form* 53*b*. *Share of law books, office furniture, papers, &c., to son*, p. 770, *Form* 36.] I APPOINT my said son [*name*] to be my sole executor (*x*) so far only as concerns my share and interest in the business and property of our said partnership; And I empower [*Add power to wind up partnership affairs, etc.*, p. 987, *Form* 16. *Legacy in trust for inalienable use of aunt for life; then for her two daughters; provision in case of aunt becoming imbecile*, p. 839, *Form* 4. *Residue of realty*

Appointment of testator's partner as special executor of share of testator in partnership.

(*x*) It seems advisable to appoint the son to be special executor in respect of the partnership business, as otherwise it seems doubtful whether the statutory powers given to *executors* by sect. 37 of the Conveyancing and Law of Property Act, 1881, would be excluded: see sub-sect. (3) of that section.

XXVIII. Solicitor's Share in Partnership, &c.

*and personalty to trustees*, p. 864, *Form* 11. *Trust for conversion*, p. 866, *Form* 1]. In trust for such of my five children hereinafter named (that is to say) [*names*], and any child or children of mine hereafter to be born, as shall be living at the time of my death, and being a son or sons shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, for the absolute use and benefit of such children respectively, in equal shares; Subject, nevertheless, as to one moiety of the share of each of my daughters, to the trusts hereinafter declared concerning the same. Provided also, and I further declare, that my trustees or trustee in their or his discretion, may apply any part not exceeding one-half of the principal of the expectant or presumptive share of each such child of mine as last aforesaid, in the said trust monies, in or towards his or her advancement or preferment in the world, or for his or her benefit or advantage, in such manner as my trustees or trustee shall think proper. Provided always and I hereby direct and declare, that my trustees or trustee shall stand possessed of one moiety of the share of each and every such child of mine, being a daughter, of and in the said trust monies upon the trusts following (that is to say), Upon trust to invest the said trust monies in manner hereinafter mentioned. And upon further trust, from time to time, to pay the income arising from the stocks, funds, [shares], and securities for the time being composing the said moiety or equal half part of the share of each such daughter of mine as aforesaid unto such daughter during her life, but without power of anticipation; And from and after the death of such daughter of mine as aforesaid, I declare that my trustees or trustee shall stand possessed of the said trust monies, stocks, funds, [shares], and securities constituting such moiety of the respective share of each such daughter in the said trust premises, and the future income thereof, In trust for all or any one or more of the children, grandchildren, or other issue of such daughter (such grandchildren or other issue to be born in her lifetime), for such interest or interests and in such proportions, if more than one, and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, or other issue, and with such provisions for maintenance, education, and advancement, and to be paid or transferred at such age or ages, either

Trusts for certain of the existing children by name and all after-born children;

advancement of testator's children;

trusts of a moiety of daughters' shares;

to invest;

for inalienable use of each daughter for life;

after her death,

for the children or more remote issue of daughter as she shall appoint;

XXVIII. Solicitor's Share in Partnership, &c.

absolutely or upon such contingencies and in such manner in all respects as such daughter of mine, whether covert or sole, shall at any time or from time to time by any deed or deeds revocable or irrevocable, or by will or codicil appoint; But so, nevertheless, that no object of this present power, of either sex, shall take or acquire any transmissible interest by virtue of any appointment by deed, to be executed in pursuance thereof, until such appointee shall have attained the age of twenty-one years, or shall have married; And, in default of and subject to any such appointment, IN TRUST for such child or children of such daughter of mine as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, if more than one in equal shares as tenants in common, for the absolute use and benefit of such child or children respectively; And, if there should be no child of such daughter of mine who shall live to acquire a vested interest in such daughter's share of the said trust monies, stocks, funds, [shares], and securities, under the trust lastly hereinbefore contained, then IN TRUST for such one or more of my other children who shall be living at the death of such daughter, or the issue who shall be living at such death of any child or children of mine then living or dead, and if more than one, in such shares and proportions, and subject to such provisoes and restrictions, and in such manner in all respects as each such daughter of mine shall at any time or times, whether covert or sole, by any deed or deeds, revocable or irrevocable, or by will or codicil appoint; But so, nevertheless, that no object of this present power of either sex shall take or acquire any transmissible interest, by virtue of any appointment by deed as aforesaid, until such appointee shall have attained the age of twenty-one years, or shall have married; And, in default of and subject to any such appoinment, then as to the said trust monies, stocks, funds, [shares], and securities (including any accruing or additional share or shares which may have been acquired by virtue of this present clause), I DIRECT AND DECLARE that my trustees or trustee shall stand possessed thereof, and the future income thereof, upon the same or the like trusts, and for the same or the like intents and purposes, as are hereby declared concerning the other or remaining shares of my said residuary estate, or such of the same trusts, intents, and purposes as shall happen to be subsisting or capable of taking

appointed shares not to vest in unmarried minors;

in default of appointment,

for children equally;

on failure of children,

for testator's other children or issue living at death of daughter, as she shall appoint;

and in default of appointment,

upon the same trusts as are declared concerning the other shares.

XXVIII. Solicitor's Share in Partnership, &c.

effect; Save and except only, that the whole or entire share accruing to any and every daughter of mine under or by virtue of this present clause, shall be subject to the trusts and restrictions hereby declared concerning one moiety of the original share of such daughter respectively. [*Hotchpot clause*, p. 886, *Form* 1 *d*, *adding after the word* "child" *the words* "of any daughter of mine." *Advancement clause*, p. 916, *Form* 11. *Power to daughters to appoint life interests to husbands*, p. 931, *Form* 35. *Power to trustees to settle the other moiety of shares of daughters marrying under age, adding before the word* "share" *the words* "the moiety hereinbefore bequeathed absolutely to each such daughter of her," p. 932, *Form* 36. *General direction as to investment of trust monies*, p. 882, *Form* 32. *Power to appoint new trustees in respect of daughters' shares*, p. 969, *Form* 6. *Power to trustees to decide questions on will*, p. 977, *Form* 25 *or* 26.]

In witness, &c.

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## XXIX. *SURRENDER by* Husband *and* Wife, *of* Copyholds *belonging to* Wife, *to such Uses as she shall by* Will appoint (*y*).

Memorandum

*The manor of* —— *in the County of* ——.

BE IT REMEMBERED, that on the —— day of ——, [*husband*], of, &c., and [*wife*], his wife, came before [*steward*], steward of the said manor, and (the said [*wife*] being first examined by the said steward apart from her husband and consenting thereto) did, out of court, surrender into the hands of the lord of the

of surrender by husband and wife of,

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(*y*) As to the validity of such surrender and will, see *Peacock* v. *Monk*, 2 Ves. sen. 190; *Driver* v. *Thompson*, 4 Taunt. This and the following Precedent have been retained in the present Edition of this Work, inasmuch as such a surrender may still be necessary, notwithstanding the stat. 55 Geo. 3, c. 192, to enable a married woman to devise copyholds in some manors, if her marriage took place and her title to the property accrued prior to the commencement of the Married Women's Property Act, 1882, *i.e.*, the 1st of January, 1883; see *Doe* d. *Nethercote* v. *Bartle*, 5 B. & Al. 492; see also sect. 8 of the Wills Act, *ante*, p. 728.

said manor, [by the rod, by the hands and acceptance of the said steward], ALL that copyhold [*parcels*], and all other the hereditaments of which the said [*wife*] was admitted tenant, out of court, on the —— day of ——, 18—; [TO THE USE of [*trustee*], of, &c., his executors, administrators, and assigns, during the life of the said [*wife*], IN TRUST for her separate and inalienable use, with remainder] TO SUCH USES, and upon such trusts, as the said [*wife*] shall at any time or times, notwithstanding any coverture, by will or codicil appoint; AND, subject thereto, TO THE USES to which the same now stand limited. [*Or*, TO THE USE of the said [*wife*], her heirs and assigns, To hold according to the custom of the said manor, by the customary rents and services.]

XXIX. **Surrender of Copyholds to use of Will.**

parcels.

To such uses as wife shall by will appoint; subject thereto, to her in fee.

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XXX. *WILL of a* MARRIED WOMAN, *disposing of* COPYHOLDS *surrendered to such Uses as she shall appoint, (last precedent); exercising a* POWER *of* APPOINTING *a* LIFE INTEREST *in Trust Funds to her* HUSBAND, *and a Power of* SELECTION *in favour of her* CHILDREN *and more remote issue, (given her by her Father's Will); and disposing of her* SEPARATE *Personal* ESTATE *and* SAVINGS.

[*COMMENCEMENT*, p. 745, *Forms* 1, 2. *Appointment of executors and trustees*, p. 747, *Form* 3. *Specific legacies*, pp. 759 *et seq*. *Pecuniary legacies*, pp. 792 *et seq*]. IN EXERCISE of a power reserved to me by a certain customary surrender, made after my marriage, on the —— day of ——, 18—, and of all other powers thereto enabling me, I APPOINT that all my copyhold hereditaments in the county of —— shall, after my death, be and remain TO SUCH USES as my trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, shall at any time or times for the purpose of raising by sale, mortgage, or otherwise, the sum of £—— and interest hereby charged on the same hereditaments, by deed appoint; AND, subject thereto, and charged with the

Appointment of copyholds to such uses as trustees shall appoint; in default to husband for life,

XXX. Will of Married Woman, appointing Copyholds, Bequeathing separate Estate, &c.

payment of the sum of £—— to my trustees or trustee for the time being, at such time or times as the same may be required under the trusts hereinafter declared, with interest on the said sum of £——, from the time of my death, after the rate of —— per cent. per annum, by equal quarterly payments, To THE USE of my husband during his life; With

remainder to eldest son or his issue.

remainder To THE USE of my eldest son, [*name*], his heirs and assigns; or, if he should die before me, To THE USE of such his child or children as shall be living at my death, (if more than one, in equal shares), and his, her, or their

on failure of such devise, to second son or his issue.

heirs and assigns; AND, if there be no such child, To THE USE of my second son, [*name*], his heirs and assigns; or, if he should die before me, To THE USE of such his child or children, &c. I DECLARE, that my trustees or trustee shall be possessed of the said sum of £——, and the interest thereon, upon the trusts hereinafter declared concerning the residue of my separate personal estate; But if such trusts should wholly or partially fail, I direct that such failure shall be for the benefit of the person or persons who shall be entitled to the said copyhold hereditaments. I GIVE the residue of my

Residuary personalty to be invested (*z*).

personal estate to the said [*trustees*], UPON TRUST to call in, or convert into money, and invest upon government, parliamentary, or real securities in England or Wales (but not on real securities in Ireland, nor on any other securities), such parts thereof as shall not be already so invested; and also, the said sum of £——, or such part or parts thereof as from time to time shall come to their hands and not be immediately otherwise applicable; With power from time to time to vary the

Annuity to sister.

investments of all or any part of the said trust property. I DIRECT the trustees or trustee for the time being of this my will, out of the income from the said trust funds, to pay an annuity of £—— to my sister, [*name*], during her life, for

Legacies to sister's children, or their issue.

her inalienable use, by equal quarterly payments; AND, subject thereto, to pay the sum of £—— to each child of my said sister [*name*] who shall attain the age of twenty-one years, or marry; and to such child or children of each child of my said sister dead at my death, as shall survive me, and attain the age of twenty-one years, or marry; if more

(*z*) If desired, a more comprehensive investment clause may be inserted: see *ante*, p. 874 *et seq.*, Forms 18 to 22.

XXX. Will of Married Woman, appointing Copyholds, bequeathing Separate Estate, &c.

Residue to testatrix's children, or their issue, at twenty-one.

than one in equal shares; AND, subject to the trusts aforesaid, to pay or transfer the residue of the said trust funds unto such child or children of mine [other than my said son, [*name*]]; and such child or children of any child or children of mine dead at my death, [other than my said son, [*name*]], as shall survive me and attain the age of twenty-one years, or marry; if more than one, in equal shares as between brothers and sisters; But so that the child or children of any deceased child shall take only such share as his, her, or their parent would have taken if such parent had lived and attained a vested interest therein. [*Trustee clauses*, pp. 967 *et seq.*]

IN WITNESS, &c.

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## XXXI. *CODICIL appointing* ADDITIONAL EXECUTOR *and* TRUSTEE.

THIS IS A CODICIL to the will of me, [*testator*], of, &c., which bears date the —— day of ——. WHEREAS, since the date and execution of my said will, my eldest son, [*name*], has attained his age of twenty-one years, NOW I HEREBY appoint him to be a trustee and executor of my will, in addition to [*trustees*], the trustees and executors named therein: [AND I HEREBY (*a*) DEVISE AND BEQUEATH all the real and personal estates by my said will devised and bequeathed to the said [*trustees of will*], UNTO AND TO THE USE of the said [*trustees, including son*], their heirs, executors, administrators, and assigns, UPON THE TRUSTS, for the purposes, and with and subject to the powers and provisions in and by my said will expressed and contained concerning the same respectively.] AND I DECLARE that my said will shall be read and construed in the same manner, and shall have the same operation and effect in all respects, as if my said son [*name*] had been originally named and appointed a trustee and executor thereof,

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(*a*) The clause within the brackets is unnecessary, and may be omitted if brevity is desired; it is sufficient for the testator to intimate his intention that the name of his son shall be added to those of the trustees and executors appointed by his will.

XXXI. Codicil adding New Trustee.

together with and in addition to the said [*trustees of will*], and as if the name of the said [*son*] had been in each and every instance throughout the said will added to the names of the said [*trustees of will*], excepting only that my said son shall not take or have any pecuniary legacy for his trouble in the execution of the trusts of my said will (*b*), as he will take valuable beneficial interests under the trusts thereof. And in all other respects I CONFIRM my said will.

In witness, &c.

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### XXXII. *CODICIL appointing a new* Trustee *and* Executor *in the* Room *of a Trustee and Executor of the Will, who had died in* Testator's Lifetime.

XXXII. Codicil substituting New Trustee.

I [*testator*], of, &c., DECLARE this to be a codicil to my will, bearing date the —— day of ——. Whereas, since the date of my said will [*deceased trustee*], of, &c., one of the trustees and executors named therein, has died: Now I HEREBY APPOINT my friend [*new trustee*], of, &c., to be a trustee and executor of my said will in the place of the said [*deceased trustee*]. And I DIRECT AND DECLARE that my said will shall be read and construed in the same manner and shall have the same operation and effect in all respects as if the name of the said [*new trustee*] had been inserted therein, instead of the name of the said [*deceased trustee*]. And I BEQUEATH to the said [*new trustee*], for his trouble in the execution of the trusts of my said will, the legacy or sum of £——, which by my said will is expressed to be given to the said [*deceased trustee*]. And I DECLARE, that the said legacy shall be payable at the same time and in the same manner as the legacy for which it is substituted. And in all other respects I CONFIRM my said will.

In witness, &c.

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(*b*) An expression of intention on this point seems to be advisable, in order to exclude doubt.

XXXIII. *CODICIL substituting* TWO PERSONS, *in lieu of those named in the Will, as* TRUSTEES *and* EXECUTORS.

XXXIII. Substitution of other Trustees and Executors.

[*COMMENCEMENT*, p. 745, *Forms* 3, 4.] I HEREBY DECLARE that my will, dated, &c., shall be read and shall take effect as if the names of [*new executor*], of, &c., and [*other new executor*], of, &c., respectively, were written in every part of the said will wherein the names of [*old executors*] occur, in lieu of such last-mentioned names, and as if such last-mentioned names had been struck out from every part of the said will.

IN WITNESS, &c.

XXXIV. *CODICIL made* AFTER MARRIAGE, *confirming the Will, giving an* ANNUITY *to the Testator's* WIFE, *and admitting his* CHILDREN BY HER *to* SHARE *in his* GENERAL ESTATE *with the Children provided for by his Will.*

XXXIV. Codicil after Marriage.

[*COMMENCEMENT*, p. 745, *Forms* 3,4.] WHEREAS, since the date of the said will, I have intermarried with [*wife*]: NOW I HEREBY GIVE to my said wife the annual sum of £——, to be paid to her by equal half-yearly payments, on each —— day of —— and —— day of ——, during her life; With a proportional part thereof in respect of the period between the day of my death and the first of such days. AND I DECLARE, that all expressions and gifts contained in my said will, and referring to any child or children of mine otherwise than by name, shall be construed as if I had made the said will, and used the same expressions after my said marriage. IN all other respects I CONFIRM my said will, and declare that the same shall operate and be construed, as to persons and things, as if I had made the same on this —— day of ——, 18—.

IN WITNESS, &c.

## XXXV. *CODICIL* REVOKING LEGACIES *and* ANNUITIES *and* BEQUEATHING *others.*

XXXV. Codicil revoking Legacies, &c.

[*COMMENCEMENT*, p. 745, *Forms* 3, 4.] I HEREBY REVOKE the legacy of £—— given to [A.] by my said will: I BEQUEATH a legacy of £—— to [B.] in addition to the legacy of £—— given to him by my said will: I BEQUEATH the legacy or sum of £—— to [C.]: I revoke the annuity of £—— bequeathed by my said will to my wife [D.] during her life, and in lieu thereof I bequeath to her during her life an annuity of £——, but without power of anticipation during any future coverture, and so long as she shall continue my widow an additional annuity of £——, to commence from my death, such substituted annuities, or such of them as shall for the time being be payable, to be paid at the like times and in like manner as the said annuity of £—— bequeathed to her by my said will and hereby revoked: I BEQUEATH to my sister [E.] an annuity of £—— during her life in addition to the annuity of £—— bequeathed to her by my said will, and to be paid to her at the times and in like manner as such last-mentioned annuity. AND in all other respects I CONFIRM my said will.

IN WITNESS, &c.

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## XXXVI. *CODICIL made after the* PURCHASE *of* REAL ESTATES, *with* DIRECTIONS *as to* PAYMENT *of* LEGACIES, &c., *for Purposes of* DUTY (*c*).

XXXVI. Codicil as to Real Estates Recently Purchased.

[*COMMENCEMENT*, p. 745, *Forms* 3, 4.] I GIVE AND DEVISE all my freehold and copyhold estates TO THE USE of my trustees and their heirs, IN TRUST, as soon as conveniently may be after my death, to sell and convert the same into money, and to be possessed of the proceeds upon the trusts declared in my will of my genéral personal estate. I DECLARE, that all the annuities and other legacies, whether pecuniary, or specific, given by my will, shall be paid clear of legacy duty; AND I DIRECT that the annuities and pecuniary legacies

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(*c*) See as to this, *ante*, p. 992, note (*g*).

given by my will, and the legacy duty on all annuities and legacies, whether pecuniary, or specific, given by my will, shall be paid primarily out of the proceeds of sale, calling in, and conversion of my personal estate in exoneration of the proceeds of sale of my real estate, and that the several parts of my residuary estate shall, if necessary, be marshalled for the purpose of giving effect to this direction. In all other respects I CONFIRM my said will.

XXXVI. Codicil after Purchase of Real Estate.

In WITNESS, &c.

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## XXXVII. *CODICIL* REVIVING *a Will previously revoked.*

[*COMMENCEMENT*, p. 745, *Forms* 3, 4.] WHEREAS I, of ——, made my will on the —— day of ——, and have since revoked the same. Now, I hereby annul such revocation, and declare that the said will is valid and subsisting (*d*).

XXXVII. Revival of revoked Will.

In WITNESS, &c.

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## XXXVIII. *Another Form.*

[*COMMENCEMENT*, p. 745, *Forms* 3, 4.] WHEREAS I [*testator*], of ——, duly made my will on the —— day of ——, and by two codicils thereto, dated respectively the —— of ——, &c., have partially altered the disposition of my property contained in my said will; And by another codicil thereto, dated, &c., have wholly revoked my said will, together with the two first-mentioned codicils thereto. Now, I revoke the said codicil of the —— day of ——, and also the codicil of the —— day of —— (*e*); And I declare my said will, and the codicil thereto, dated the —— day of ——, to be and contain my last will.

XXXVIII. Another Form of Revival.

In WITNESS, &c.

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(*d*) See sect. 22 of the Wills Act, 1837, and *ante*, pp. 418, 731.

(*e*) These dispositions must be expressly revoked in the revoking codicil itself; they will not be effectually revoked by a statement to that effect in the attestation clause, which is no part of a will or codicil: see *Re Atkinson*, 8 P. D. 165.

It must be remembered that marriage is not an absolute revo-

## XXXIX. *WILL* REVIVING *a* WILL *revoked by Marriage* (*f*).

XXXIX. Revival of Will.

I [*testator*], of, &c., declare this to be my last will: WHEREAS I made my will on the —— day of ——, 18—, and have since intermarried with [*wife*], NOW I HEREBY REVIVE AND CONFIRM the said will, AND DECLARE that the same shall operate and be construed, as to persons and things, as if I had made the same on this —— day of ——, in the year ——.

IN WITNESS, &c.

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## XL. *SIMPLE REVOCATION of a* WILL.

XL. Revocation.

I [*testator*], of, &c., HEREBY REVOKE an instrument bearing date, &c., and purporting to be my last will, which instrument I have deposited with [*name*], of, &c.

IN WITNESS, &c.

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## XLI. *MEMORANDUM of* ALTERATION *and* REEXECUTION *of a* WILL.

XLI. Alteration of Will.

BE IT REMEMBERED, that I [*testator*], have made in my

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cation of every will; for an appointment made in exercise of a power simply collateral will remain unaffected by the marriage: stat. 7 Will. 4 and 1 Vict. c. 26, s. 18, *ante*, p. 730. Upon the wording of that section it seems to be clear, that an appointment under a power which is followed by a limitation, in default of appointment, to persons who *might* sustain the character of heir, or next of kin of the donee, but who are not so described, is within the saving, and would not be revoked by marriage: see *Re Fenwick*, L. R. 1 P. & D. 319. See also *ante*, p. 377.

Care must be taken here, as in every other case of attestation, not to allow a person to whom any beneficial interest is given by the will, nor the wife or husband of such a person, to be a witness. The penalty is the loss of the gift to the witness.

(*f*) A revival of a will may be effected with equal efficiency by a memorandum as follows, written at the foot of the will:—

"I HEREBY REVIVE AND CONFIRM the above-written will, and declare, &c."

The memorandum must of course be duly attested as any other testamentary instrument.

own handwriting [*or*, caused to be made], in this my will the alterations hereinafter specified; (that is to say) in the twenty-first line of the first page, the words [*words*] are erased, and the words [*words*] are inserted in their stead. THE words [*words*] in the seventh line of the second page, and the eighth, ninth and tenth lines of the same page, and the words [*words*] in the eleventh line of the same page, are erased. BETWEEN the words [*words*] and [*words*] in the nineteenth line of the same page, the words [*words*] are inserted. I DECLARE the above writing so altered to be my will. XLI. Alteration of Will.

IN WITNESS, &c.

## XLII. *MARGINAL ALTERATION in a* WILL.

FOR (*g*) the words [*words*] through which I have drawn my pen [*or*, which I have caused to be erased], it is my will that the words [*words*] be inserted. XLII. Marginal Alteration.

IN WITNESS, &c.

(*g*) If the marginal alteration be not written opposite to the part of the will which is intended to be corrected, some mark of reference should be affixed to the passage, and a corresponding mark to the marginal correction.

MIDDLE TEMPLE

# INDEX

TO THE

# DISSERTATIONS AND NOTES.

ABATEMENT
of legacies, 711, 712
where a debt is released, 775, n.
given free of legacy duty, 246

ABROAD,
absence, presumption of death after, 817, n.
instruments executed, or to operate, liability to stamp duty of, 33
agreement made at sea, 33
bills of exchange issued, 59
foreign currency, 12
foreign securities, 34, 35
receipt signed, whether liable, 95
relating to personalty here, 33
realty here, 34
stamping after execution, 16
probate of wills made, 314, 320

ABSOLUTE INTEREST,
directions to trustees to postpone vesting of, beyond legal limits is void, 438
implication of, 553 *et seq.*
in leaseholds, when passes by will, 701

ABSOLUTE SALE,
revocation of will by, 385

ABSTRACT,
Commissioners may require, before assessing stamp duty, 14, 66

ACCELERATION
of devise in remainder by gifts void or refused, 468
title, succession duty in respect of, 289

ACCOUNT,
application for probate to be accompanied by, 190, 192

ACCOUNTANT,
report of, not an award for purposes of stamp duty, 48

ACCOUNTS,
duty on equivalent to probate duty, 197 *et seq.*

ACCRETIONS TO CAPITAL,
legacy duty on, 229 *et seq.*

ACCRUER,
clauses of, 690, 691
immediate vesting with clause of, 891, n.

ACCUMULATION
arising from express direction, 449 *et seq.*
nature of gift, 452
calculation of period of, excludes day of testator's death, 454
cumulatively, for all specified periods not allowed, 449
destination of income released from, 452
surplus income not required for maintenance, 913, n.
direction for of produce of property in trust for conversion, 486
excessive trust for, good *pro tanto*, 451
exceptions to operation of Thellusson Act, 454 *et seq.*
payment of debts, 448, 454
policy of assurance, directions for keeping on foot, 457
portions, 448, 455
raising of certain amount, 455
legatee's right to stop, 451
maintenance trusts directing, 450
minority of persons unborn entitled under the limitations, 449
period at which, must cease, 453
perpetuity, trusts for, beyond limits of, void altogether, 451, 904, n.
trust for, pending conversion, rule as to, 486
validity of, may depend on events, 452

ACKNOWLEDGMENT
of signature to will, 370, 371
subsisting contract not liable to stamp duty, 38

ACTION,
rights of, how may be disposed of by will, 348

ADEMPTION,
mortgages of devised lands, examples of, rather than of revocation *pro tanto* of will, 388, 389
of pecuniary legacies and portions by advancement, 816, n.
specific bequest, 772, n.
republication does not revive adeemed legacy, 415.
And see "*Republication*," "*Satisfaction*."

ADHESIVE STAMPS,
cancellation of, 15
instruments in the case of which use is permitted, 15, n.
penalties relating to, 16
when may be used in relation to probate duty, 171, n.

ADJUDICATION OF STAMP DUTIES BY COMMISSIONERS,
appeal against, 13
particulars to be furnished on, 14
rolls, books, &c., to be open to inspection, 14

ADMINISTRATION
action, legacy duty to be provided for in, 208
bond, stamp duty on, 115
duties on application for letters of, 169 *et seq.*
And see "*Probate.*"

ADMINISTRATORS,
testamentary gifts to, how construed, 667 *et seq.*
And see "*Executors.*"

ADMISSIBILITY
of unstamped instruments, 2 *et seq.*

ADMISSION
to Inns of Court, &c., stamp duties on, 100 *et seq.*

ADMITTANCE TO COPYHOLDS,
devise so as to save double, 855, n.
stamp duty on, 120

*AD VALOREM* DUTIES,
tables of present, 100 *et seq.*
repealed, 142 *et seq.*

*AD VALOREM* DUTY,
facts affecting liability to, must be stated, 12
how charged on foreign or colonial currency, 12
stock and marketable securities, 12

ADVANCEMENT,
alimony not an, 721
annuity settled on a child is, 721
portion settled on marriage is, 721
presumption that purchase by father in son's name is, 200, n., 277, n.
satisfaction of legacies by, 819, n.
trusts for, 912, n.
under Statute of Distributions, 720, 721
customs of London and York, 722, 723
what provision for the heir is deemed an, 722
when a satisfaction of a legacy, 816, n.

ADVOWSON,
mode of dealing with, during a vacancy, 860, n.
succession duty on, 258

AFFIDAVIT
of value for probate, form and contents of, 190
proofs in support of, 191
stamp duty on, 105

AFFINITY. See "*Relations.*"

AGE
of testamentary capacity, 328, 329

AGREEMENT,
stamp duty on, amount of, 35, 36
denotation of, by adhesive stamp, 36, n.
evasion of, void, 22
exemptions, 41 *et seq.*
bailment of goods, 41
hire of labourers, &c., 43
promise of marriage, 41
purchase of several lots at auction, 42
sale of goods, 43
goodwill, 45
growing crops, 45
fixtures, 45
timber, 44
tenancy at rent not exceeding 5*l.* for whole term, 42
for lease for term not exceeding thirty-five years chargeable as a lease, 78
under seal, 36
unsigned, whether liable, 36
what instruments liable, or otherwise, 36 *et seq.*
acknowledgment of subsisting contracts, 38
attornment, 40
auctioneer's note, 40
authority to pay money, 40
broker's note, 40
cognovit, 40
committee, minutes of proceedings of, 38
resolution of, 38
consent to judge's order, 40
draft of proposed contract, 38
I. O. U., 40
letter of allotment, 37
license, 40
memorandum of facts indicating implied contract, 39
notice of dissolution of partnership, 41

AGREEMENT—*continued.*
stamp duty on—*continued.*
promise to pay, 41
proposal accepted, 36, 37
followed by variation in terms, 37
verbal agreement, 36
referring to some of terms only, 38
testamentary operation of, in certain cases, 305
to make mutual wills, whether binding, 310

ALIEN,
devises by, 336
devises to, 340

ALIENATION,
annuity or life interest determinable on, 832, n.
of land subject to executory limitations, 601
succession, effect of, as to liability to duty, 255, 288
restraint on, by married woman, 827, n., 849, n.
void for remoteness, when, 435
revocation of devise by, 385 *et seq.*
utility of power of selection in checking, 885, n.

ALLOTMENT,
stamp on letter of, 128

ALLOWANCE,
by way of maintenance not an advancement, 721
in respect of succession duty, 257 *et seq.*
And see "*Succession Duty.*"

ALTERATIONS,
of estate, revocation of will by, 385 *et seq.*
instruments, admission in evidence after, without fresh stamp, 10
will, if unattested, fail of effect, 383
presumption as to time of making, 384

ALTERNATIVE GIFTS,
lapse in reference to, 466
remoteness in reference to, 436

AMANUENSIS,
signature of will by, for testator, 366, 995, n.

AMBIGUITIES IN WILLS,
class, gift to one member of, 508
description, absolute correctness of, not necessary, 510
applicable to several objects, 506
defective, aided by parol evidence, when, 525
devise, failure of, from, 503
omission of, through inadvertence, 530

AMBIGUITIES IN WILLS—*continued.*
distinction between latent and patent, 523 *et seq.*
latent, removable by parol evidence, 525
patent, not so removable, 523
failure of trust for uncertainty of purpose, 514
gift of part of specified whole, 506
of so much as donee may select, 506
sum "not exceeding 100*l.*," 505
what is left at death of prior donee, 507
joint tenancy or tenancy in common, 681
illegal purpose, gift of residue after providing for, 507
object of gift, uncertainty as to, 508 *et seq.*
omission of devise through inadvertence, 530
name of devisee or legatee, 508
original will may be produced to explain, 311
parol evidence, admissibility of, 523 to 537
And see "*Parol Evidence.*"
quantity, uncertainty as to, 505
repugnant clauses, latter of, generally preferred, 511
to be reconciled, if possible, 511, 512
words, rejection of, 512
shares of devisees, uncertainty as to, 504
specific devise not controlled by general devise, 513
subject-matter of gift, uncertainty as to, 504 *et seq.*
unascertained residue, gift of, 506 *et seq.*
*veritas nominis tollit errorem demonstrationis*, 529

AMBULATORY NATURE OF WILLS, 304, 458

ANNUITY,
abatement of, 712
advancement by way of, 721
apportionment of, 826, n., 833, n.
appropriation of fund for, 828, n.
authority to purchase elsewhere than from government, 825, n.
clear of legacy duty, gift of, 824, n.
commencement of, from testator's death, 824, n.
direction to purchase, 824, n., 831, n.
implication of life estate from gift of, to heir, 546
to several and the survivor, 548
legacy duty on, 206 *et seq.*, 237, 241 *et seq.*, 824, n.
And see "*Legacy Duty.*"
legatee's right to value of, directed to be purchased, 824, n., 825, n.
restraints on alienation of, 825, n., 827, n., 832, n.
succession duty on, 260, 273
tables of value, for purposes of succession duty, &c., 300 *et seq.*

APPEAL,
against assessment of stamp duties, 13
of succession duty, 265

APPOINTMENT,
execution of testamentary, what sufficient, 728
general devise, operation of, as, 566 *et seq.*
lapse by death of appointee, 461
excessive appointment, 461
legacy duty in respect of, 221 *et seq.*
when made under powers in marriage settlement, 211
of auditor by testator is imperative, 523
guardians by infants, 328, 329
life interest to widow, as to giving to tenants for life power of, 931
protector of settlement, 1035, n.
special executor, 749, nn., 750, nn.
trustees, new, 967 *et seq.*, nn.
for purposes of Conv., &c., Act, s. 42, 918, n.
Settled Land Acts, 955, n.
powers of, exercisable by will unless otherwise expressed, 358
probate of, 311
probate duty payable in respect of, 183
relations, extent of power of, among, 665
restriction of powers of, to infants, as to, 837
utility of giving power of, to devisee of copyholds, 848, n., 855, n.
parent over children's shares, 885, n.
what amounts to, under present law, 566 *et seq.*
words cannot be sufficient reference to power of, 994, n.

APPORTIONMENT,
of annuity, 826, n., 833, n.
consideration for stamp duty, 73
legacies for purposes of legacy duty and succession duty, 992, n.

APPRAISEMENT,
definition of, 47
of value not an award, 47
stamp duty on, 47 *et seq.*

APPRAISER,
parol testimony by, not excluded by written valuation, 48

APPRENTICE,
assignment of, stamp duty on, 49

APPRENTICESHIP, INSTRUMENT OF,
consideration must be truly stated, 49
stamp duty on articles of, 48 *et seq.*
consecutive apprenticeship, 49
exemption from in cases of charity, 49

APPROPRIATION,
of fund for legacy duty, 229
trust fund by executors whether a retainer, 233

APPROPRIATED STAMPS,
denotation of duties by, 14

ARBITRATOR,
production of unstamped instruments before, 22

ARMS,
proviso in will as to assuming testator's, 943, n.
stamp duty on grant of, 126

ARTICLES OF CLERKSHIP,
stamp duty on, 109

ASSESSMENT,
of stamp duty, by Commissioners, 13

ASSETS,
equitable, realty when liable as, for payment of debts, 757, n.
probate duty payable only on, within jurisdiction, 174
stamp, whether evidence of, 185

ASSIGNMENT,
order to pay may be liable to stamp duty as an, 57
And see "*Alienation.*"

ATTEST,
meaning of the word, 373, 374

ATTESTATION,
creditor may be a witness, 730
executor may be a witness, 730
form of, 994, n.
gift to attesting witness void, 341, 342, 729
rules in regard to, under old law, 360 *et seq.*
present law, 312, 363 *et seq.*

ATTORNMENT,
mere, not liable to stamp duty, 40
unstamped, containing matter of contract, not received in evidence, 9, n.

AUCTION,
purchase of several lots at, stamp duties on, 31, 42

AUCTIONEER,
note of, whether liable to stamp duty as agreement, 40

AUDITOR,
appointed by testator not removable, 523

AUTHORITY,
to pay money not liable to stamp duty, 40

*AUTRE VIE ESTATE PUR.* See "*Estate pur autre vie.*"

AWARD,
accountant's report not an, 48
appraisement of value not an, 47
counsel's opinion not an, 48
stamp duty on, 47, 48, 110

BAILMENT,
agreement for, liability of, to stamp duty, 41

BANK NOTE,
stamp duty on, 111

BANKRUPTCY,
gifts by will of life interests determinable on, 832, n.
reversionary interests determinable on, 897, n.
revocation of devise by, 389
stamp duties, exemption from, in cases of, 142

BASTARDS. See "*Illegitimate Children.*"

BENEFIT,
legacy on condition of relinquishing, priority of, 712
legacy duty on, not ascertainable beforehand, 206
succession duty on, by determination of charges, &c., 287

BILL OF EXCHANGE,
abroad, 59
address of, 52
adhesive stamps for, 60
appropriated stamp for, when payable otherwise than on demand, 14
assignment of debt, 57
consideration for, presumed, 55
definition of, 50, 56
exemptions from stamp duty, 61
foreign, cancellation of stamps on, 60
what are, 60
payee, must be ascertainable, 54
payment at a fixed time, 53
on demand, 57
out of particular fund, 51
with interest, or by instalments, &c., 54
signature of, 52
stamping of, after execution, 59
sum payable must be certain, 54

BILL OF LADING,
stamp duty on, 113

BILL OF SALE,
stamp duty on, 113

BLIND TESTATOR,
testamentary capacity of, 333

BOND,
legatee of, when not entitled to arrears of interest, 773, n.
probate duty payable on debts secured by, 175
stamp duty on, 62 *et seq.*, 113 *et seq.*

BOOKS,
gift of household goods or furniture does not include, 708

BROKER'S NOTE,
not liable to stamp duty, 40

BROTHERS AND SISTERS,
testamentary gifts to, 608

BUILDING SOCIETIES,
exemption of from certain stamp duties, 65, 81, 96

BURNING,
revocation of will by, 376 *et seq.*

BUSINESS,
legatee of, should be appointed limited executor, 749, n.

CANCELLATION,
of adhesive stamps, 15
of will, reservation by, 378
And see "*Revocation.*"

*CAPITA*,
distribution per, 610 *et seq.*

CAPITAL,
accretions to, after testator's death, legacy duty on, 229 *et seq.*

CELIBACY,
gifts during, 884, n.

CERTIFICATE,
of payment of legacy duty discharges liability to succession duty, 265, n.
of succession duty protects purchasers, &c., 265
of solicitors, stamp duty on, 116

CESSER,
of legacy duty at 1 per cent. in certain cases, 248

CHARGE OF DEBTS AND LEGACIES,
effect of, 757, n.
lands specifically devised, whether within, 758, n.
residuary gift of realty and personalty with direction for payment of debts, effect of, 861, n.

CHARITY,
accumulations cannot be stopped by, 451
bequests to, abatement of, 712
directions as to fund for payment of, 820, n.
in Ireland exempt from legacy duty, 247
liable to succession duty, 256
parol evidence admissible to explain, 527
exemption from stamp duty of articles of apprenticeship in cases of, 49
gift of personalty to parent and effect of, 634,
gift over, however remote, of property given to, is good, 442
gifts to, clear of legacy duty, 821, n.
And see Vol. IV. sub tit. "*Mortmain.*"

CHATTELS,
bequests of, what will pass by, 704 *et seq.*
moveable, devolution of, governed by *lex domicilii*, 313
real. See "*Leaseholds.*"
settlement of, as heirlooms, 710

CHEQUE,
post dated, admissible in evidence, 57

CHILDREN,
class of, entitled by reference to period of birth, 615 *et seq.*
accession of fresh objects between periods of vesting and distribution, 615
child *en ventre sa mère* regarded as *in esse*, 625
death "without issue," meaning of, 627
distribution, no object at period of, 618
postponed to a certain age, effect of, 621
whether children must be living at period of, 617, n.
executory gifts, 617
gift over does not vary rule of construction, 617
gifts of income, 623
gifts to await birth of children, 619
grandchildren, &c., gifts to, are within ordinary rules for ascertaining class, 626
"heirs" of husband and wife construed to mean, 677
immediate gift to, 615
life interest preceding gift to, effect of, 617
pecuniary legacies, whether within ordinary rules for ascertaining classes, 625
reversionary property, gifts of, 617
vested interests liable to be divested *pro tanto*, 617
where gift is future, 616 *et seq.*
immediate, 615, 616
words restricting or enlarging classes, 623 *et seq.*
construed "issue" in certain cases, 627, n.
descendants or issue, meaning of, 609

CHILDREN—*continued.*
distribution among, whether *per stirpes* or *per capita*, 610 *et seq.*
dying without, how construed, 627
*en ventre sa mère*, claims of, 625
gifts to, how construed in regard to marriage whence they proceed, 605
leaving issue at testator's death do not lapse, 480
not extended to grandchildren, 606
not implied by gift nor in default, 554
of several persons, 676
several persons "and their children" deemed substitutional, 613
with remainder to their, effect of, 614
unborn, at twenty-two, void for remoteness, 428
younger, how construed, 628 *et seq.*
immediate gifts to, with clause of accruer, 891, n.
"issue," gifts to, how construed, 609
lapse in gifts to, provisions as to, 796, n.
legitimate, *primâ facie* alone included in term, 645
married testator should provide for possibility of having, 746, n.
offspring gifts to, how construed, 609, n.
power of selection among, advisability of, 885, n.
substituted gift to, of donees where there are no children, 599
when construed as word of limitation (rule in *Wild's Case*), 632 *et seq.*
word "family," when construed as, 673
words "children" and "issue," respective extent of, 808, n.
younger children, gifts to, how construed, 628 *et seq.*

CHOSE IN ACTION,
appointment of limited execution of, 750, n.

CLASS,
distribution *per stirpes* or *per capita*, 677
gifts to, in reference to lapse, 463 *et seq.*
in reference to remoteness, 432
"or their children" deemed substitutional, 613
what are, 465
heirs, &c., of several persons whether to take respectively or collectively, 677
introduction of qualifying contingencies in gifts to, 678
period for ascertaining objects, 615 *et seq.*
implication as to, 556
tenancy in common, 682

CODICIL,
annexation of, whether revives revoked will, 385
attestation of, whether applicable to unattested wills, &c., 541
whether avoids legacy given to witness by will, 342
conditional, 308
confirmation of will by, does not prevent lapse, 460

CODICIL—*continued.*
incorporation of unattested wills, &c., by attested, 541
legacy duty, exemption of gifts by, from, 409
mode of framing, suggestions as to, 402
republication of wills by, effect of, 410, 419
revocation of will *pro tanto* by, 403
will includes every, which has been added to it, 410, 411

COGNOVIT,
whether liable to stamp duty, 40

COLLATERAL PURPOSE,
unstamped agreement, when admissible for, 5 *et seq.*

COLONY,
company in, probate duty payable on shares in, 176

COMMITTEE,
minutes of proceedings of, whether liable to stamp duty, 38

COMMON RECOVERY,
revocation of will by, 386

COMMON, TENANCY IN. See "*Tenancy in Common.*"

COMMUTATION
of legacy duty, 212

COMPENSATION,
on compulsory purchase liable to stamp duty, 68

COMPOSITION,
for legacy duty, 210, 212
stamp duties, 112, n., 119, n.
succession duty, 263

CONDITIONS,
in restraint of alienation, 435, 827, n., 849, n.
marriage, 884, n.
legacy upon, of relinquishing a claim or benefit, 712
without gift over, or security to refund, 980, n.
of residence, 844, n., 855, n.
sale in evasion of stamp duty, void, 22
relief against, 982, n.
wills, &c., to take effect only on, 308

CONFIRMATION
of void conveyance, stamp duty on, 73
will by codicil does not prevent lapse, 460
removal of testator's disability does not validate will without, 335

CONFLICT OF LAWS,
as to administration of estates of deceased persons, 315 *et seq.*
differences between English and foreign law, 319
English and Scotch law, 315
domicil, how ascertained, 321 *et seq.*
And see "*Domicil.*"

CONSENT,
marriage with, testamentary conditions as to, 840, n.
of tenant for life to conversion, 491
to judge's order not liable to stamp duty, 40

CONSIDERATION,
appointment of, for stamp duty, where property is conveyed by several instruments, 73
debt to be deemed part of, 66
incorrect statement of, effect of, 66
periodical payments, 67
stock or securities, 67

CONSTRUCTIVE CONVERSION. See "*Conversion.*"

CONSUMABLES,
gift by will of, for life, effect of, 709
whether included in gifts of household "goods" or furniture, 708

CONTINGENCY,
effect of words of, in wills as regards vesting of realty, 576, 577
probate duty payable on interests subject to, 184
promise to pay on, liable to duty as an agreement, 41
qualifying, introduction of in gifts to classes, 678
return of succession duty in respect of, 263
successive limitations, whether affected by words of, 577 *et seq.*
wills, &c., to take effect only on, 308
words of, explained by context, 575

CONTINGENT INTERESTS,
in realty or personalty may be disposed of by will, 346

CONTINGENT REMAINDERS,
devises seemingly, construed as vested, 574
distinction between, and executory devises, 421, 595
limitations to trustees to preserve, 1002 n.
remainders in default of object of prior estate not, 572
rule in *Shelley's Case* does not destroy intermediate, 643
whether within rule against perpetuities, 425, 429

CONTRACT,
for purchase, effect of death of testator pending, 352
for sale, revocation of will *pro tanto* by, 392, 850 n.
stamp duty *ad valorem* not payable on, 69 *et seq.*

CONTRACT NOTE,
stamp duty on, 117

CONVERSION,
*actual*,
duty of executor or trustee as to, 494 *et seq.*
power to postpone, as to giving, 496
redemption of annuities, 496
reversionary interests, postponement of, as to, 489
wasting property, postponement of, as to, 872 n.
*constructive*,
absolute, nature of property not charged except by, 482
duty of executors and trustees as to, 485 *et seq.*
effect of words apparently giving discretion as to, 493
election, to take property in actual state, 483 *et seq.*
what amounts to, 484
whether parol declaration sufficient, 484, 485
exclusion of doctrine, 489 *et seq.*
extent of operation of doctrine of, 482
heir takes land as personalty, when, 483
power for, with consent of tenant for life, 491
probate duty whether payable in cases of, 179 *et seq.*
residue, conversion of, rules as to, 485 *et seq.*
where a general residue is bequeathed without a trust for, 485
accumulation of produce is directed pending, 486
no disposition of interim produce is directed, 486
part of property is converted within the year, 488
whole property remains *in statu quo* after the year, 488
right of tenant for life to enjoyment in specie, 489
undisposed of interests in realty, 496 *et seq.*
legacy void *ab initio*, 499
proceeds of realty passes by residuary devise, 499
not by residuary bequest, 498
rule as to blended fund, 501, 502

CONVEYANCE,
revocation of will by, for partial purpose, 387
by void, 394
covenant to convey whether operates as, 391
rule under present law, 396
stamp duty on, 65 *et seq.*, 118, 119
abstract may be required, 66
consideration determines, 65
apportionment of, 73
compensation on compulsory purchase, 68
debts subject to which property is conveyed, 67
evidence may be required, 66
how to be stated, 66 n.
periodical payments, 67
stock and securities, 67

CONVEYANCE—*continued.*
stamp duty on—*continued.*
confirmation of void, 73
contracts not chargeable, 69 *et seq.*
creditors' deeds, 69
exemptions by statute, 74
extraneous matter, 74
family arrangements, 69
memorandum of sale of goods, 71
property what is, 67 *et seq.*
goodwill, 67
judgment debt, 68
life policy, 68
share in partnership, 68
timber, fixtures, &c., 67

COPIES,
stamp duty on, 119, 120

COPYHOLDS,
attestation of will of, under old law, 361
devise of after-acquired, 354
equitable estate in, 355
enfranchisement of, allowance of succession duty, in respect of, 259
general devise passes, 563
power of testamentary appointment over, utility of, 848, n., 855, n.
Statute of Frauds does not extend to, 361
stamp duties on instruments relating to, 77, 120
strict settlement, power of devisee of, in, 933, n.
succession duty in respect of, 259
trust and mortgage estates in, devise of, 756, n.

CORPORATIONS,
bequests to, of specific articles, exemption from legacy duty of, 210, 247
devises to, 339
succession duty on property of, 259

COSTS
of administration action, 208

COUNSEL,
opinion of, not liable to stamp duty as award, 48

COUNTERPARTS,
stamp duty on, 123
unstamped, how far admissible in evidence, 10

COURT,
payment into, whether retainer of a legacy, 232

COUSINS,
gifts to, by will, how construed, 607

COVENANT,
stamp duty on, 120, 121
testamentary gift pursuant to, not protected from lapse, 460
to convey, effect of, as to revocation of will, 391
settle after-acquired property does not include property saved from lapse by sect. 33 of Wills Act, 481

COVERTURE. See "*Married Women.*"

CREDIBILITY
of witnesses attesting a will, 375

CREDITOR'S DEED,
stamp duty, *ad valorem*, not payable on, 69

CRIMINAL PROCEEDINGS,
unstamped instruments admissible in evidence in, 3, 5

CROPS,
bequest of farming stock, whether passes, 770, n.

CROSS REMAINDERS,
implication of, between devisees for life, 548
in tail, 556

CROWN
entitled to fund which ought to have been appropriated for payment of legacy duty, 229
instruments relating to property of, liable to stamp duty, 11

CURTESY,
defeasible estates in fee subject to, 601

CUSTOMS,
devised by infants of real estate, under old law, by, 328
of London and York as to distribution of personalty, 723
trade, &c., evidence of, to explain will, 534

*CY PRÈS*, DOCTRINE OF,
as to charitable gifts, see sub tit. MORTMAIN, Vol. IV., pp. 37 *et seq.*
remote devisees, 443 *et seq.*
unborn tenant for life made tenant in tail by, 444

DATE,
stamp duty regulated by, of execution of instrument, 11

DEAF PERSONS,
testamentary capacity of, 333

DEATH,
lapse caused by, of appointee, 461
joint devisee, none, 463
legatee or devisee before will made, 460
of legatee in testator's lifetime leaving issue, probate duty whether payable in respect of, 183
testator, legacy duty on profits made after, 229
will speaks from, 350, 351
presumption as to, after long absence, 817, n.

DEBTS,
accumulations for payment of, not within Thellusson Act, 454
bequest of, accompanied by limited executorship, 750, n.
arrears of interest, whether pass by, 773, n.
for payment of, whether liable to legacy duty, 244
charge of, exempts personalty, how far, 758, n.
makes real estate equitable assets, 757, n.
power of sale under, 758, n.
deduction of, for probate duty, 185 *et seq.*
forgiveness of, is consideration for conveyance, 67
liable to legacy duty, 228
interest, arrears of, whether pass to legatee of, 773, n.
legacy forgiving, abatement of, 775, n.
legacy duty payable on, 228
lapse of, 459, n., 775, n.
to pay, priority of, 713
whether liable to legacy duty, 228, 229
power to compound, express, not generally necessary, 978, n.
probate duty, deduction of, for, 173, 185 *et seq.*
foreign, whether liable to, 174
secured by bond liable to, 175
on real estate, no deduction for, 189
voluntary, no deduction for, 189
provisions for payment of, not within Thellusson Act, 448, 454
residuary gift of realty and personalty with direction for payment of, effect of, 861, n.
stamp duty payable on amount of, subject to which property is conveyed, 66

DECLARATION
of use or trust, stamp duty on, 121
statutory, stamp duty on, 105
against lapse, inoperative, 460

DEED
of covenant in lieu of will whether liable to legacy duty, 215
instrument in form of, held testamentary, 215, 305
legacy duty held to be payable on property purporting to be settled by, 305
not otherwise charged, stamp duty on, 122

DEFEASIBLE LEGACY,
whether liable to legacy duty, 207

DENIZATION. See "*Naturalisation.*"

DENOTING STAMPS, 13

DESCENDANTS,
testamentary gifts to, how construed, 609
to relations do not include their, 606, 607

DESCRIPTION,
imperfect, in will, 525 *et seq.*
And see "*Parol Evidence.*"
reference to occupancy, &c., in, 848, n.

DESTRUCTION OF WILL,
effects a revocation, when, 377 *et seq.*
must be in presence of testator, 379
partial, effect of, 380, 381
under mistake, 378, 382, 383
while testator is insane, 378
with reference to other dispositions, 382

DEVISE,
description of parcels in, by reference to occupancy, &c., 848, n.
mode of passing, intended to pass legal estate, 933, n.

DISCLAIMER,
distinction between, and release, 97
of legacy, no legacy duty payable in cases of, 239

DISSOLUTION OF PARTNERSHIP,
notice of, whether liable to stamp duty, 41

DISTRIBUTION,
implication of absolute interest from powers of, 553
*per stirpes*, or *per capita*, 610 *et seq.*, 677
words of, added to words "heirs," "issue," &c., effect of, 637 *et seq.*

DIVESTING,
estate not divested unless all the prescribed events happen, 578
whether vesting is postponed, or estate vests, subject to be divested 574 *et seq.*
And see "*Vesting.*"

DIVIDENDS,
word held to indicate intention that property to be converted should be enjoyed in specie, 491

DOMICIL,
colonial, for purposes of duty equivalent to foreign, 216, n.
construction of will of moveable property determined by, 314
effect of, as to administration of property, 312 *et seq.*
deduction of debts for probate, 186
grant of probate, 314, 320
liability to legacy duty, 215 *et seq.*
succession duty, 266 *et seq.*
validity of will, 315
how ascertained, 321 *et seq.*
domicil of choice, 322
of origin, 321
continuance and revivor of, 325
permanent residence will change, 323
residence of necessity will not change, 322
temporary residence will not change, 324
liability to legacy duty depends on, of testator, 215
estate *pur autre vie*, 220
legacies and annuities charged on land, 220
property abroad of person domiciled here, 216
property in this country of person domiciled abroad, 217
rule as to leaseholds, 219
shares in immoveable partnership property, 221
to succession duty depends on, of owner, 266 *et seq.*
military service does not change, 221
moveable personalty, wills and distributions on intestacy of, regulated by law of, 313 *et seq.*
probate of will of person having foreign, 314
probate duty not regulated by, 174

*DONATIO MORTIS CAUSÂ*,
account duty on, 198
definition of, 199

DOWER,
attaches to defeasible estates in fee, 601
clause in will in bar of, 979, n.
legacy in lieu of, priority of, 712
succession duty in respect of, 287

DRAFT,
of proposed contract, settled on behalf of all parties, whether liable to stamp duty, 38

DUPLICATE. See "*Counterpart.*"

DUTY. See "*Legacy Duty*," "*Stamp Duty*," "*Succession Duty.*"

EASEMENTS,
as to express mention of, in testamentary gift of lands, &c., 842, n.

EFFECTS,
at what period, must answer locality specified in will, 705
And see "*Household Effects.*"

ELECTION,
to take property directed to be converted in its actual state, 483 *et seq.*
what amounts to, 484
whether parol declaration sufficient, 484, 485

ENFRANCHISEMENT OF COPYHOLDS,
allowance of succession duty in respect of, 259

ENLARGEMENT,
of indefinite devise, 692 *et seq.*

EMPLOYMENT,
direction by will to employ a particular person is imperative, 523

ENTIRETIES,
tenants by, 683

ENTRY,
rights of, may be disposed of by will, 348, 349

*EN VENTRE SA MÈRE,*
child, claims of, under gift to children, 625 *et seq.*
under Statutes of Distribution, 716
illegitimate, 653 *et seq.*

EQUITABLE ASSETS,
real estate, when liable as, for payment of debts, 757, n.

EQUITABLE INTEREST,
in copyholds, devise of, 355
in freeholds, devise of, 351
under covenants to invest in land, 353

EQUITY OF REDEMPTION,
mortgage, with conveyance of, how stamped, 87

ESTATE,
effect of use of word, in will, to pass the fee, 693
of freehold, defeazance of, by executory devise, 596, 597

ESTATE BY IMPLICATION. See "*Implication.*"

ESTATE FOR LIFE,
implication of, 545 *et seq.*
indefinite devise formerly passed only, 692
*secus,* under present law, 696

ESTATE IN FEE SIMPLE,
what words formerly passed, 692, 693
now pass, 694, 695
where trusts are imposed, 695 *et seq.*

ESTATES *PUR AUTRE VIE*,
devise of freeholds held for, 357
indefinite, effect of, 696
devolution of, 728
legacy duty in respect of, 208
where testator is domiciled abroad, 220
succession duty, when payable in respect of, 266

ESTATE TAIL,
implication of, 733
lapse of, 734
executory devise over on indefinite failure of issue void, unless grafted on, 424, 425

EVIDENCE,
commissioners may require, before assessing stamp duty, 15, 66
parol, admissibility of, to explain will, 523 *et seq.*
And see "*Parol Evidence.*"
of circumstances of execution of will, where no attestation clause, 374
of intention to show testamentary character of document, 308
of words obliterated in will, 383
unstamped instrument generally inadmissible, 2, 3

EXCHANGE,
deed of, how stamped, 123
revocation of will by, 387

EXECUTION,
of instrument, date of, determines liability to stamp duty, 11
of will, 360 *et seq.*
acknowledgment, what sufficient, 370
formalities of law of domicil to be observed, 314
incorporation of unattested instruments in duly executed will or codicil, 537 *et seq.*
peculiarities of, not held to prove intention to exercise power, 565
signature, what sufficient, 364 *et seq.*
testamentary appointments under present law, 728
under the old law, 360 *et seq.*

EXECUTORS,
appropriation of trust fund by, whether a retainer, 233
bequest to A. and his, construed an absolute gift, 459, 669
construed next of kin, when, 669
discharge of, from liability to legacy duty, 213

EXECUTORS—*continued.*
duty of, as to actual conversion, 494 *et seq.*
as to constructive conversion, 485 *et seq.*
legacies to, not generally deemed to be for their benefit, 670
unless so expressly given, 671
subject to abatement, 712
when dependent on acceptance of office, 792, n.
liabilities of, as regards legacy duty, 236
probate duty paid limits value recoverable by, 185
trustees of residue for next of kin, 474

EXECUTORY BEQUEST,
legal remainders cannot be vested in personalty, 603
remedies for recovery of, 603, 604
substituted partial gift, whether defeats prior gift *in toto*, 604
successive bequests good as executory gifts, 603

EXECUTORY DEVISE,
alienation of land subject to, 601, 602
curtesy and dower attach to defeasible estates in fee, 601
defeazance of estates of freehold by, 596, 597
definition of, 594
distinction between, and contingent remainder, 421, 595
failure of, effect of, 598, 599
illegal purpose, 599
remainder, devise capable of taking effect as, not an, 595
statute 40 & 41 Vict. c. 33, effect of, 595, 596
residuary devise, effect of, under old law, 476, 477
statutory restriction on (Conv. Act, 1882, sect. 10), 601, 602
substituted gifts to children of donees, 599
unsupported by antecedent estate of freehold, 600
void, failure of prior gift by, 599

EXECUTORY TRUSTS,
definition of, 641, n.
rules as to contingency of gift to A., if he shall attain twenty-one, applies to, 576
rule in *Shelley's Case* does not extend to, 641

EXEMPTIONS FROM LEGACY DUTY,
appointments under limited powers in marriage settlement, 211
bequest "clear of all deductions," &c., 241 *et seq.*
of money for payment of duty, 246
specific articles to corporate bodies, 246
to charities in Ireland, 247
husband or wife, 246
estates under 100*l.*, 247
leaseholds, 247
personalty of person domiciled abroad, 217

EXEMPTIONS FROM PROBATE DUTY,
estates of soldiers and sailors dying on service, 194
under value of 100*l.*, 194
where no administration need be taken out, 194, 195
trust property, 166, 193

EXEMPTIONS FROM STAMP DUTY,
burden of proof lies on person claiming, 2, n.
general, 142
particular. See "*Table of Duties*," *passim*, 100 *et seq.*
special under various statutes, agreements, 46
bills of exchange, &c., 61
bonds, 64
conveyances, 74
leases, 80
letters of attorney, 81
mortgages, 93
receipts, 96

EXEMPTIONS FROM SUCCESSION DUTY,
generally, 299
estates under 300*l.*, 299
life policies, 256
post obit bonds, 256
tontine, 276

FAILURE,
of devise, effect of, on gift over, 468
executory devise, effect of, 598, 599
gift of money charged on land, 469
issue, indefinite, gift over on, effect of, 424
words "dies without issue," &c., how construed, 733
of testamentary gifts for uncertainty, 503 *et seq.*
And see "*Ambiguity*," "*Lapse.*"

FAMILY,
construed to mean children, 673
heir, 672
relations, 673
gift to, held void for uncertainty, 508
"to go in heirship for ever," how construed, 672
stamp duty in respect of arrangements, 69
succession duty in respect of arrangements and resettlements, 284

FARMING STOCK,
bequest of, whether includes growing crops, 770, n.

FEE SIMPLE. See "*Estate in fee simple.*"

FELONS,
testamentary gift to, 341
wills of, 337

FEME COVERT. See "*Married Woman.*"

FINES,
succession duty in respect of, 259

FIRST SON,
testamentary gift to, how construed, 632

FIXTURES,
agreement for sale of, whether exempt from stamp duty, 45
bequest of "furniture" will not pass tenant's, 709
stamp duty on conveyance of, with land, 67

FOREIGN COUNTRY,
currency of, how calculated for stamp duty, 12
subjects of, presumption that, are not intended to be affected by statutory enactments, 267

FOREIGN SECURITY,
definition of, for purposes of stamp duty, 34, 35
probate duty, whether payable on, 174
succession duty on, comprised in settlement, 271

FRAUD,
admissibility of unstamped instruments to prove, 6
as to adhesive stamps, penalty for, 15, 16

FRAUDULENT DEED,
revocation of will by, 395

FUNERAL EXPENSES,
deductions allowed from probate duty for, 180

FURNITURE,
bequests of, what passes by, 703 *et seq.*

FUTURE ADVANCE,
security for, how stamped, 89

FUTURE PAYMENT,
conveyance in consideration of, how stamped, 67

GENERAL AND PARTICULAR INTENTION,
doctrine of, 643

GENERAL BEQUEST,
operates as exercise of a general power, 566
And see "*General Devise.*"

GENERAL DEVISE,
appointments by will, how executed, 566
what amounts to, 566
copyholds pass by, when, 563
trust and mortgage estates in, 559
coverture, whether ground for excluding trust estates from, 558
estates contracted to be sold, 558
infancy, whether ground for excluding trust estates from, 558
leaseholds for lives, 562
years, 562, 563
powers exercised by, under old law, when, 563 *et seq.*
under present law, when, 566 *et seq.*
failure of gift through death of donee, 569
personalty not within former rule, as to, 564
special, not exercised by, 568
unless contrary intention indicated, 568, 569
proceeds of sale of land, 567
remainders and reversions pass by, when, 559 *et seq.*
tenancy in common, 558
trust and mortgage estates, 557 *et seq.*

GIFT OVER,
effect of, as to construction of gifts to "survivors," 689, 690
enlargement of devise to fee by, 695

GOODS AND CHATTELS,
bequests of, what will pass by, 704 *et seq.*
settlement of, as heirlooms, 710

GOODWILL,
agreement for sale of, with goods, whether liable to stamp duty, 45
assignment of, liable to stamp duty, 67

GRANDCHILDREN,
gift to, at expiration of more than twenty-one years from testator's death, 430
does not include grandson's widow, 609
children does not include, 606
rules fixing class of objects of gift apply to, 626

GROWING CROPS,
agreement for sale of, whether exempt from stamp duty, 44, 45

GUARDIANS,
appointment of, by infant, 328, 329
mother entitled by statute to be, 751, n.
of illegitimate children, utility of nominating, 755, n.

HALF-BLOOD,
entitled to share in personalty, 717
included in gifts to relations, &c., 608, 664

HEIR,
advancement for, what provision amounts to, 722
construction of word, in relation to personalty, 674 *et seq.*
devise to, effect of, 343
gift to, within rule in *Shelley's Case*, 637
probate duty, whether payable where undisposed-of interest in land directed to be sold is taken by, 181
rights of, to undisposed-of realty directed to be sold, 496 *et seq.*
under lapsed or void devises, 476
takes land as personalty, when, 483
word "family" construed, in devise, 673

HEIRLOOMS,
limitations of chattels to go as, 710

HEIRS,
of husband and wife construed "children," 677

HEIRS OF THE BODY,
devise to A. followed by devise to his, 635
what words will control the words, 676

HOTCHPOT CLAUSE,
points decided respecting, in Stat. of Distributions, 720 *et seq.*

HOUSE,
gifts to, how construed, 672 *et seq.*
And see "*Family.*"

HOUSEHOLD EFFECTS,
how construed, 709

HOUSEHOLD FURNITURE,
how construed, 707 *et seq.*

HOUSEHOLD GOODS,
how construed, 707 *et seq.*

HUSBAND,
bequest to, by wife exempt from legacy duty, 246
claims of surviving, in cases of intestacy, 715
gift to relations or next of kin will not include, 664

HUSBAND AND WIFE,
gifts to, concurrently with a third person, how construed, 683
succession duty not payable in respect of, 285
heirs of, construed to mean children, 677

IDIOTS,
testamentary gifts to, 344
wills of, void, 329

ILLEGITIMATE CHILDREN,
appointment of guardians of, 755, n.
"children" *primâ facie* means legitimate children, 645, 646
conjecture does not entitle, 649
description of, in will, what sufficient, 652, 653, 805, n.
existence of legitimate children generally fatal to claims of, 651
future, gifts to, whether valid, 655, 656
intention, express or implied, may let in, 646 *et seq.*
may take by name, 652
necessary implication in favour of, in certain cases, 650
reference to male parent, rule as to, 655
succession duty on property given to, or devolving on, 251
unborn, gift to, how far valid, 343, 653
whether can take by reputation, 654

IMBECILE PERSON,
form of trust for, 840, n.

IMPLICATION,
absolute estates and interests, 553 *et seq.*
annuity to heir, gift of, 546
several and the survivor, gift of, 549
cross executory limitations, 549
remainders between devisees for life, 548
in tail, 556
devise to heir at law and others, 546
where there is express devise of part, 547
residuary devise, 547, 548
one of several co-heiresses, 546
estate for life implied from future devise to heir, 545
co-heiresses, 546
residuary devisee, 548
gift to survivors, 548
estates tail, when implied, 549 *et seq.*
gift on death combined with a contingency, 555
over in default of children does not raise, 554
life interests in personalty, when implied, 552, 553
"necessary implication," definition of, 545
powers of selection and distribution may raise, of absolute gift, 553
tenancy in common, 682
time for ascertaining class, 556

IMPROVIDENT PERSONS,
provisions for, 832, n.

INCOME,
Crown not liable for, if next of kin establish claim to intestate's personalty, 723

INCORPORATION,
of trusts not disclosed by wills, 543, 544
of unattested documents, 537 *et seq.*
admission of parol evidence to identify document, 540
document must be in existence, 537
so referred to, and identified in will, 539
what words will effect, 538
of unattested wills and codicils by subsequent attested codicil, 541
probate of incorporated documents, 542

INCREASE OF BENEFIT
for purposes of succession duty, 256

INDEFINITE DEVISE
formerly passed estate for life only, 692
where enlarged to fee simple, 693
now passes fee simple, 694
what amounts to indication of "contrary intention," 697

INDEMNITY
of trustees by statute or express provision, 972, n., 974, n.

INFANTS,
testamentary gifts to, 344
wills by, under old law, 328
"present law," void, 329

INSTITUTION,
testamentary gifts to, not being charitable when within the rule against perpetuities, 436
of specific articles when exempt from duty, 246

INSTRUCTIONS FOR WILL,
not allowed to vary will, 530

INTEREST,
arrears of, whether pass to legatee of debt, 773, n.
on legacies runs from what time, 989, n.

INTESTACY,
advancement, what is, 720
provision for the heir is deemed an, 722
where intestacy is partial, 722
consanguinity, mode of computing degrees of, 717, 718

INTESTACY—*continued.*
Crown, rights of, to personalty on, 723
customs of London and York as to, 723
distribution of personalty on, whether *per stirpes* or *per capita*, 717
hotchpot, 720
husband, claim of surviving, 715
inconvenience of, 719
"legal representatives," meaning of, in Statutes of Distribution, 714, n.
mother may claim with brothers and sisters, 716
mother-in-law not entitled, 716
"next of kin under the statutes," meaning of, 715, n.
posthumous child not excluded, 716
relations of half blood, 717
representation, right of, 717
succession duty payable on devolutions of property by, 279
wife surviving, claims of, 714, 715
where no next of kin, 715, n.

INVENTORY,
legatee for life of chattels must sign, 764, n.
of contingent or executory bequest must sign, 603

INVESTMENTS,
clauses as to, mode of framing, 875, n.
in foreign securities of trust funds liable to succession duty, 271
in lands in Ireland not advisable, 835, n.
of lunatics, personalty in land liable to probate duty, 181

ISSUE,
gifts by will to, how construed, 609, 610
to issue leaving issue at testator's death do not lapse, 480
mode of distribution among, of various degrees, 610 *et seq.*
probate duty whether payable where legatee dies in testator's lifetime leaving, 183
rule in *Shelley's Case*, whether applies where word, is used, 629
words "children" and "issue," respective extent of, 808, n.
importing failure of, meaning of, 733

JOINT INVESTMENTS,
amount of duty in respect of, 200

JOINT LEGACY,
legacy duty on, 207

JOINT TENANCY,
different periods of vesting held inconsistent with, 682
estates held in, not devisable, 345
lapse, 462, 463
succession duty in respect of property given in, 253, 285, 291
trust estates usually held in, 347
what testamentary expressions will create, 680

JOINT WILL,
revocable by survivor, 309

JURISDICTION,
of English courts as to testamentary dispositions and distribution of property of intestates, 312 *et seq.*

KIN. See "*Next of Kin.*"

LABOURER,
agreement for hire of, exempt from stamp duty, 43

LANDS,
testamentary gifts of, what included under, 848, n.

LAPSE,
alternative gifts by will, 466
appointee's death causing, 461
appointment, interests of persons taking in default of, 461
bequests of personalty, 459
confirmation by codicil does not prevent, 460
charge of money on land, 469, 479
death of appointee, 461
joint devisee, 462
legatee or devisee before will made, 460
debt forgiven by will, 459, n.
declaration against, inoperative, 460
devisees in tail and in fee, 458, 459
of onerated lands, 467
to A. "*or* his heirs," effect of, 461
destination on, of legacy out of proceeds of realty, 499
doctrine of, stated, 458
excessive appointment, 461
failure of particular gifts, 468 *et seq.*
acceleration of gift in remainder, 468
death of donee for life, 468
gift of money charged on land, 469
gifts over, when not defeated by, 469
gifts void or refused, 468
where charged sum is void *ab initio*, 470
gift pursuant to covenant, 460
gifts to classes, 463 *et seq.*
next of kin of married woman, 462
tenants in common, 463
joint devisee, death of, does not cause, 462
legacies forgiving debts, 459, n.
out of proceeds of sale of realty, 499
legacy duty not payable in cases of, 239

LAPSE—*continued.*
next of kin of deceased persons, gift to, as tenants in common, 466
married woman, effect of, 462
pecuniary charges on land, application of doctrine to, 469
peer, gift to, describing him by his title, 466
provisions against, in gifts to children, 807, n.
real estate directed to be converted, 497
residuary bequest, effect of, 471 *et seq.*
devise, effect of, 475 *et seq.*
And see "*Residuary Bequest*," "*Residuary Devise.*"
testamentary gift pursuant to covenant not protected from, 460
Wills Act, sects. 25, 32, and 33, effect of, 479 *et seq.*
destination of sums charged on realty, 479
devises of estates tail, 479, 480
gifts to children, &c., having issue living, 480, 807, n., 853, n., 861, n.
residuary devise includes lapsed and void estates in realty, 479

LATENT AMBIGUITIES,
in wills, parol evidence admissible to explain, 525

LEASE,
directions for granting, at fixed permanent rent are void for remoteness, 436
revocation of will, whether effected by renewal of, 385
stamp duty on, 78 *et seq.*, 126
succession duty not payable on determination of, at rack rent, 257
payable on determination of, at ground rent, 256, n.

LEASEHOLDS,
absolute interest in, passes, when, 701
exemption of, from legacy duty, 247
liability of, to probate duty, 164
succession duty, 253
*lex rei sitæ* governs devolution in case of testacy or intestacy, 312, 313
succession duty on, 266, 272

LEASING, POWERS OF,
rule in *Shelley's Case* not excluded by, 637

LEGACIES,
abatement of, 711, 712
ademption of, 793 n., 816, n.
by codicil, whether follow those given by will, 409
charge of, whether extends to lands specifically devised, 758, n.
charged on realty, interest payable from testator's death on, 990, n.
clear of legacy duty, what expressions render, 246 *et seq.*
whether legacies by codicil are, 244, 409
conditional, paid without security to refund, 980, n.
for payment of debt, privity of, 713
in consideration of legatee relinquishing some benefit, 712

LEGACIES—*continued.*
interest on, from what time payable, 990
of stock, frame of, 771, n.
not "pecuniary legacies, 771, n.
priority and order of payment of, 712 *et seq.*, 992, n.
what expressions will vary, 712
receipts stating certain particulars to be given on payment of, 208
relationship of legatee should be stated, 799, n.
specific, interest on, payable from testator's death, 991, n.
succession duty on, charged on realty, 266, 272
to executors and trustees, 792, n.
when payable, 989, n.

LEGACY DUTY,
abatement of gift of, 246
accretions to capital, 229 *et seq.*
administration action, duty to be provided for in, 208
annuities, 206
charged on land, 211, 220
"clear of all deductions" is free from, 241, 243
legacy charged with, 206
life interest subject to, 237
should be exempted from duty, 824, n.
to purchase, 206
appointment, legacy subject to power of, 207
appointments by will under general and limited powers, 221 *et seq.*
under powers in marriage settlements exempt from, 211
appropriation of trust funds by executors, 233
benefit not ascertainable beforehand, 206
cesser of, at 1 per cent. in certain cases, 248
charitable bequests in Ireland exempt from, 247
commutation of, in certain cases, 212
composition for, 210, 212
corporate bodies, specific bequests to, exempt from, 210, 247
debts, bequest for payment of, whether free from, 244
release by will of, liable to, 228
deed of covenant retained by covenantor, 215
defeasible legacy, 207
direction that legacies are to be paid free of, does not apply to residue, 246
domicil, effect of, as to liability to, 215 *et seq.*
donations *mortis causâ*, 211
And see "*Domicil.*"
estate *pur autre vie*, 208
executor, discharge of, from claims for, on distribution of fund, 213
liability of, 236
exemption from, what words amount to, 240 *et seq.*
stock legacy not within, of pecuniary legacies, 244
tenant for life of specific fund, 245
exemptions from, by statute, 246 *et seq.*

LEGACY DUTY—*continued.*
gift by codicil, whether included in exemption by will, 244
gift of money to pay, is exempt from, 246, 992, n.
husband or wife, gift to, is exempt from, 246
joint legacy, 207
lapse or disclaimer of legacy, 239
leaseholds exempt from, 247
liability of devisee for life subject to annuity, 237
executor, 236
legatee, 238
person administering estate, 239
receiving money for payment of, 239
purchaser, 238
mistakes, rectification of, 209
money arising from sales of land, 224
property not reduced to, 208
to be laid out in land, 207
to pay duty exempt from, 208
mortgage debt not merged, 224
payable, by whom, 211
on each devolution of title, 240
payment of, enforcement of, 211
into court, whether a retainer of a legacy, 232
on legacies to infants and persons beyond seas, 209
under void authority, 210
plate, &c., not to be sold, 207
personalty less than 100*l.* exempt by statute, 247
300*l.*, relief in cases of, 247
purporting to be settled by deed, when liable to, 214, 305
power of sale of land, discretionary, if exercised generally, makes proceeds liable to, 226
exception where proceeds retain character of real estate, 227
profits made after testator's death, 229
purchaser cannot recover from vendor, 238
liability of, 238
rates of, 202 *et seq.*
recovery of, from legatee, 230, 236
refunding of, 210
refusal of legatee to allow deduction of, 208
release of debt by will liable to, 228
rentcharges, 224
retainer by executor, 210, 231 *et seq.*
revocable settlement in lieu of will, whether liable to, 214, 305 *et seq.*
successive interests in legacy, 206
testamentary dispositions generally liable to, 213
tolls of lighthouse, 224
trustees of personalty appointed under limited powers not liable for, 223
will with other matter *inter vivos*, 214

LEGAL ESTATE,
acquisition of, does not revoke devise, 390
distinction between trusts to pay rents and trusts to permit receipt thereof, as to vesting, 698
mode of devising, to uses, 933, n.
of trustees under present law, 699

LEGAL PERSONAL REPRESENTATIVES,
gifts to, in will, how construed, 667

LEGAL REPRESENTATIVES,
gifts to, in will, how construed, 668
in Statute of Distributions means descendants, 714, n.

LETTER,
held to be testamentary, 305

LETTER OF ALLOTMENT,
accepted, whether liable to stamp duty, 37

LETTER OF ATTORNEY,
stamp duty on, 81

LICENCE,
whether liable to stamp duty, 40

LIFE ESTATE,
indefinite devise formerly passed only, 692

LIGHTHOUSE TOLLS,
not liable to probate duty or legacy duty, 184, 224

LIMITATION,
"children," when a word of (Rule in *Wild's Case*), 632 *et seq.*
words of, whether exclude Rule in *Shelley's Case*, 639

LOCALITY,
accuracy in wills as to, of property devised, 848, n.
bequests of chattels with reference to, 706
evidence of custom of, to explain ambiguous will, 534
law of, determines devolution and testamentary dispositions of realty and chattels real, 312, 313

*LOCO PARENTIS*,
testamentary gifts by person in, 629

LUNACY,
destruction of will by testator during fit of, no revocation, 379
executors justified in investing legacy, and accumulating dividends, 209, n.
legacy duty refunded where probate revoked on ground of testator's, 210, n.

LUNATIC,
probate duty, whether payable on personalty of, invested in land, 181
testamentary gifts to, 344
trusts for, as to framing, 840, n.
wills of, 329 *et seq.*

MAINTENANCE,
destination of surplus income not required for, 913, n.
express clauses for, as to inserting, 812, n., 910, n., 945, n.
out of capital, 910, n.
out of realty, succession duty whether payable in respect of, 274
portions, interest on, payable as from testator's death for, 990, n.
widow, gifts to, for, of herself and children, 884, n.

MANAGEMENT,
powers of, whether exclude rules as to conversion, 493

MANOR,
devise of, what passes under, 354
succession duty on, 259

MANSION-HOUSE,
direction as to repairs of, 942, n.
restrictions on power of tenant for life to sell, 958, n.

MARK
of testator is a sufficient signature of will, 365
witness attesting will, sufficient, 373

MARRIAGE,
articles, revocation of devise by, 392
conditions in restraint of, 884, n.
dispositions in consideration of, succession duty whether payable on, 285
of legatee to attesting witness, effect of, 342
revocation of will by, and birth of children under old law, 376, n.
present law, 376, 377
exception as to testamentary appointments, 377, 1054, n.
settlement on, of infant, voidable not void, 84, n.

MARRIED WOMAN,
testamentary capacity of, 334, 335

MAXIMS,
exclusio unius est inclusio alterius, 631
non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram, 528
veritas nominis tollit errorem demonstrationis, 529

MINES,
succession duty on, 259

MISTAKE,
as to execution of will by, 524
payment of legacy duty, rectification of, 209
probate duty, rectification of, 192, 193
succession duty, rectification of, 262
signature of mutual wills, 366
destruction of will by, will not affect revocation, 378, 382, 383

MIXED FUND,
apportionment of legacies payable out of, for purposes of duty, 992,

MONEY,
gift of goods and chattels in house, whether passes, 704
"ready money," how construed, 769, n.
succession duty on, contingently raisable after a death, 278
directed to be invested in land, 260

MORTGAGE,
arrears of interest pass by bequest of, 773, n.
estates, general devise, whether passes, 557 *et seq.*
of copyholds when still to be devised, 756, n.
revocation of devise, how far effected by, 388, 390
succession duty where tenant for life and remainderman concur in, 261

MORTGAGE DEBT,
exoneration of devisee from, 851, n.
not merged, legacy duty on, 224
real estate primarily liable to, probate duty payable where, 189

MORTMAIN,
licence in, 339
limitations releasing land from, not within rule as to perpetuities, 442
And see sub tit. MORTMAIN, Vol. IV., pp. 1 *et seq.*

MOTHER,
claim of, under Statute of Distributions, 716

MOURNING RINGS,
bequest for providing, legatees right to money value of, 516, 794, n.
subject to abatement, 712

MUTUAL WILLS,
agreement by several to make, 310
mistake as to signature of, effect of, 366

NAME,
illegitimate children may take by, 652
next of kin of particular, who entitled under gift to, 660
omission of, of devisee or legatee, 508

NAME AND ARMS CLAUSE,
gift over on breach of, good if attached to estate tail, 425

NATURALISATION, 336

NEAREST RELATIONS,
testamentary gifts to, how construed, 664

NEPHEWS AND NIECES,
testamentary gifts to, how construed, 607, 608

NEXT OF KIN,
executor is trustee of residue for, 474
gift to, "by way of heirship," how construed, 660
construed nearest relations, 657
creates generally joint tenancy, 659
will not include husband or wife, 658, 664
half blood entitled, 658
of a particular name, who entitled under gift to, 660
period for ascertaining class, 661 *et seq.*
Statutes of Distribution, effect of reference to, 659
words "are married" or "without ever having been married," effect of, 660

NIECES,
gifts to, not extended to grand-nieces, 607

NOTICE
of dissolution of partnership, whether liable to stamp duty, 41

"NOW,"
use of word, in specific bequests, effect of, 705

NUNCUPATIVE WILLS,
under old law, 361
present law, invalid, except wills of soldiers and sailors, 363

OBLITERATIONS,
revocation of will not effected by, 383

OCCUPATION,
reference to, in specific devises, 848, n.
request as to permitting, by tenant, 518

OFFSPRING,
testamentary gifts to, how construed, 609, n.

ONLY SON,
testamentary gift to, how construed, 629

PARCELS,
description of, in wills, 848, n.

PARENT,
power of selection among children, utility of giving to, 885, n.

PAROL EVIDENCE,
admissibility of, as to ambiguities latent, 525
patent, 523
blanks, 525
charitable gifts, 527
contents of lost will, 379
customs of trade or locality, 534
description of persons, 525, 526, 528 *et seq.*
election as to conversion, 484
extrinsic facts, 532
fraud, 524
identification of documents, 540
initials, 525
intention of testator, 527
introduction of words *per incuriam*, 524
local customs, 534
nicknames, 534
plurality of objects of equal pretensions, 526
rebutting resulting trust, 525
terms of art, 534
time when alterations were made in will, 384
trust not disclosed by will, 543
secret, 543, 544
identification of documents to be incorporated, 541
principles laid down by Sir J. Wigram, 535 *et seq.*
unstamped instruments how far admissible to exclude, 3 *et seq.*
And see "*Unstamped Instruments.*"
valuation in writing does not exclude, 48

PARTITION,
whether operates as revocation of devise, 388, 390

PARTNERSHIP,
notice of dissolution of, whether liable to stamp duty, 41
property in land of, probate duty whether payable on, 180
stamp duty on transfer of share in, 68

PATENT AMBIGUITIES,
in wills, not removable by extrinsic evidence, 523

PAYMENT
of legacies, priority and order of, 70 *et seq.*

PENALTY,
not giving notice of succession, 265
not obtaining probate, 164, 201
not paying additional probate duty, 165
payment of legacies without stamped receipts, 209
rectification of stamp on affidavit of value for probate, 165
stamping instruments after execution, 16
remission of, 17

PERPETUITIES, RULE AGAINST,
absolute ownership, directions to trustees to postpone, 438
accumulations for payment of testator's debts not within, 454
alienation, restraint on, beyond legal limits, 435
alternative gift to one too remote is void, 436, 437
*Cadell* v. *Palmer*, case of, stated and considered, 422 *et seq.*
charity, gift over of property given to, 442
collateral events, alternative gift to arise on, 437
construction of gift not strained to bring it within legal limits, 443
*cy près*, doctrine of, 443 *et seq.*
limitations on the doctrine, 446
unborn tenant for life made tenant in tail, 444
distinction between remainder and executory devise, 421
executory devise arising on indefinite failure of issue, 424
grandchildren, gift to, at expiration of more than 21 years after testator's death void, 430
institutions not charitable, gifts to, when within, 436
leases, directions as to, at fixed permanent rents are void, 436
name and arms clause, gift over on breach of, good if annexed to an estate tail, 425
origin and history of, 420, 421
possession only too remote, effect of, 438
postponement of vesting for more than 21 years without a life, 429, 430
powers of appointment, 440 *et seq.*
effect of, or appointment embracing too wide a range of objects, 441
appointees under general, when rule begins to run against, 441
under special, take immediately from donor, 440
power of sale, validity of unlimited, 442
remainders, contingent, whether within, 429
destructible, whether within, 425
equitable, 428
subsequent events do not validate gifts originally void, 430
distinction when gift expressly made contingent on, 432 *et seq.*
terms of years, trusts for, when void, 426
unborn class, gift to, to vest after majority, 428
distinction as to contingent remainders, 429
persons, gift to, for life is good, 430, 439
remainders after are good, 430
gift to, without a life, to vest after majority, 429, 430
validity of gift determined by facts at testator's death, 430

PERSONAL REPRESENTATIONS,
testamentary gifts to, how construed, 668

*PER STIRPES ET PER CAPITA* (DISTRIBUTION),
under gifts to children, issue, 610 *et seq.*
relations, 666
under Statute of Distributions, 717

PLATE,
directed not to be sold, whether liable to legacy duty, 207
word, does not include plated articles, 761, n.

POLICY,
of life assurance, provisions for keeping up, are not within Thellusson Act, 457
stamp duty on assignment of, 68

POOR RELATIONS,
testamentary gifts to, how construed, 664, 665

PORTIONS,
accumulations for, not within Thellusson Act, 448, 455, 456
ademption of, by advancements, 816, n.
charge of, on estate of eldest son, does not necessarily exclude him, 629, n.
interest on, payable for maintenance, from day of testator's death, 990, n.
succession duty, allowance of, in respect of, 261, n.
trustees should see to payment of, 298

POSTHUMOUS CHILD. See "*En ventre sa mère.*"

POWER,
appointment by will under, when void for remoteness, 440 *et seq.*
whether liable to legacy duty, 211, 221 *et seq.*
And see "*Legacy Duty.*"
of appointment of new trustees, 967, n.
trustees for management, &c., 918, n.
to issue of child, 885, n.
widow, of life interest in personalty, 931, n.
of appropriating fund for annuity, 828, n.
charging jointures and portions, 946, n.
determining questions as to construction, &c., of wills, 977, n.
leasing, 921, n.
management of estate till sale, 918, n., 928, n.
sale of land given by settlement, whether a continuing charge on lands sold, 295
sale of land given by will discretionary, if exercised generally renders proceeds liable to legacy duty, 226
validity of unlimited, 442
selection of testamentary donees, utility of, in checking alienation, 885, n.
of settlement of shares of females, 810, n.
succession duty in respect of, 254, 281

PRECATORY TRUST. See "*Trust.*"

PRESENCE,
of testator, meaning of, 371
witnesses to will, must be simultaneous, 372

PRESUMPTION,
as to death after long absence, 817, n.
stamp on missing deed, 76
time of making alterations, 26

PRIORITY,
of payment of legacies, 711 *et seq.*

PROBATE,
administering without taking out, penalty for, 164
conclusive, how far, as to personalty, 310
realty, 311
of incorporated documents, 542
instrument testamentary according to law of foreign domicil, 314
joint will, 310
testamentary appointments, 311
revocation of, for wrong stamp, none, 165
where British testator is domiciled abroad, 314, 320
foreign testator is domiciled here, 313
will is to take effect only upon pending contingency, 308, n.

PROBATE DUTY,
accounts, duty on, 197 *et seq.*
additional, payment of, 165
adhesive stamps, when to be used, 171, n.
affidavit, account to accompany, 192
duty to be paid on, 191
form and contents of, 190
proof may be required in support of, 191
appointments by will liable to, 183
assets within jurisdiction only liable to, 174
*bonâ notabilia*, 175
bond debts liable to, 175
bonds, foreign, 174
colonial companies, shares in, 176
constructive conversion, 179 *et seq.*
Commissioners of Inland Revenue to have management of, 171
contingent interests, 184
death of legatee leaving issue in testator's lifetime, 183
debts, deduction in respect of, 173, 185 *et seq.*
foreign, whether liable to, 174
secured by bond liable to, 175
on real estate, whether may be deducted, 189
voluntary, no deduction for, 189
*donatio mortis causâ*, 199
domicil, 174

PROBATE DUTY—*continued.*
estate exceeding in value 1,000,000*l.*, 169
under 100*l.* exempt from, 194
under 300*l.*, partial relief in cases of, 196, 197
excessive, return of, 164
executors, &c., cannot recover beyond value on which duty has been paid, 185
exemptions of estates of soldiers and sailors dying on service, 194
under value of 100*l.*, 194
when no representation need be taken out, 194, 195
trust property, 166, 193
foreign debts and securities, 174
funeral expenses, deduction for, 190
heir taking undisposed of interest in land directed to be sold, 181
joint investments, 200
land contracted to be sold but not conveyed, 180
leaseholds liable to, 164
lighthouse tolls not liable to, 184
lunatic's personalty invested in land, 181
mistakes in estimate of value, rectification of, 192, 193
partnership property in land, 180
payable on appointments by will, 183
bond debts, 175
British ships at sea, 175
Indian government notes, 175
leaseholds, 164
successive devolutions of title, 184
value at time of grant, 184
payment of additional, 165
penalties in respect of. See "*Penalties.*"
proceeds of sale of real estate to be sold not liable to, 179 *et seq.*
rates of, 166 *et seq.*
reconversion of realty directed to be sold, 181
rectification of deficient stamp, 165
mistakes in estimate of value, 192, 193
return of overpaid, 164, 165, 192
reservation of life interest in voluntary settlement, 201
reversionary interests, 183
shares in colonial companies, 176
railway, &c., companies, 175
ships, 175
soldiers and sailors dying on service, estates of, exempt from, 194
successive devolutions of title, 184
trust property exempt from, 193
voluntary dispositions, 199
settlements, 199

PRODUCTION,
of original title to explain ambiguities, 311

PROFITS,
legacy duty on, made after testator's death, 229

PROMISE TO PAY,
liability of to stamp duty, 41, 57 *et seq.*

PROMISSORY NOTES,
stamp duty on, 50 *et seq.*
And see "*Bills of Exchange.*"

PROPERTY,
bequest of, at bankers, what included in, 769, n.
word, in wills, when formerly passed the fee, 693

PROTECTOR OF SETTLEMENT,
appointment of, by will, 1035, n.

PUBLICATION OF WILL,
under present law, not necessary, 364

PURCHASER,
liability of, for unpaid duty, on legacies, &c., 238
on successions, 265, 297, 298

RECEIPT,
definition of, for purposes of stamp duty, 94
duty on, 135
exemptions under Stamp Act, 1870...135
under other statutes, 96
legacy receipts, 208
unstamped, how far admissible, 8
witness may look at, to refresh memory, 95

RECOMMENDATION,
effect of words of, in will, in creating a trust, 518

RE-EXECUTION OF WILL, 412 *et seq.*

RELATIONS, TESTAMENTARY GIFTS TO,
admission of relatives by affinity, 609, 664
of half-blood, 664
"deserving," how construed, 664, 665
distribution, *per stirpes* or *per capita*, 666
gift to "next of kin" construed nearest, of equal degree, 657
husband or wife not included in gift to, 664
"nearest," how construed, 664
"poor relations," how construed, 664, 665
power to appoint among, extent of, 665
Statute of Distributions, effect of reference to, 666
word "family," when construed as, 673

RELATIONSHIP,
of legatee to testator should be stated in will, 799, n.

RELEASE,
distinction between, and disclaimer, 97
stamp duty on, 136
testamentary of debt liable to legacy duty, 228

REMAINDERS,
contingent, devises seemingly, construed as vested, 574
distinction between and executory devises, 421, 595
remainders in default of object of prior estate not, 572
whether within rule against perpetuities, 429
cross, implication of, between devisees for life, 548
between devisees in tail, 556
equitable, within rule against perpetuities, 428
legal, in personalty cannot be created, 603
general devise, whether passes, 559 *et seq.*
purchaser of, whether liable to succession duty, 298

REMOTENESS. See "*Perpetuities, Rule against.*"

RENEWAL OF LEASE,
trust for, as to discretionary, 845, n.
whether a revocation of devise, 385

RENTCHARGE,
power of distress to secure no longer necessary, 946, n.
succession duty in respect of, 272, 273
term of years to secure, no longer necessary, 946, n.

RENTS AND PROFITS,
express power to apply, for maintenance of infant, not now generally necessary, 955, n.

REPRESENTATIVES,
testamentary gifts to "legal," 667
"legal personal," 668
"personal," 668

RE-PUBLICATION OF WILL,
actual and constructive, distinction between, 412
adeemed legacy not revived by, 415
by codicil, 412, 413, 414, 419
intention to revive must be shown, 413
whether sets up intermediate codicils, 419
lapsed devises and bequests, how affected by, 416, 417
particular devises, how affected by, 414

REPUGNANCY IN WILLS, 511, 512
And see "*Ambiguities in Wills.*"

RESIDENCE,
conditions in wills as to, 844, n., 855, n.

RESIDUARY BEQUEST,
executor is trustee of undisposed of residue for next of kin, 474
failure of, effect of, 473
future gift of, 473
legacy to residuary legatee, effect of, 472, 473
operation of as regards lapsed gifts, 472, 479 *et seq.*
what included in, 471 *et seq.*

RESIDUARY DEVISE,
under old law, 475 *et seq.*
devise, every, specific, 475
devise void *ab initio*, 475
devises of partial interests, 476
executory and contingent devises, 476
immediate income of lands devised *in futuro*, 477
under present law includes lapsed and void estates in realty, 478
proceeds of realty directed to be converted, pass by, 501

RESIDUE,
conversion of, 485 *et seq.*
And see "*Conversion.*"
direction that legacies shall be paid free of legacy duty does not apply to, 246
transmissibility of, 593

RETAINER,
of legacies by executor, what amounts to, 210, 231 *et seq.*

REVERSIONARY INTEREST,
postponement of conversion of, 489
probate duty payable on, 183

REVERSIONS. See "*Remainders.*"

REVOCATION,
by marriage under present law, 376, 377
exception as to testamentary appointments, 377, 1054, n.
marriage and birth of children under old law, 376, n.
articles, 391, 392
mortgage, 388, 390
what words in proviso for redemption will effect, 390
partition, in what cases, 388, 390
renewal of lease, 385
subsequent will or codicil, 396 *et seq.*
under old law by incomplete or informal instruments, 397, 398
present law, 396, 399 *et seq.*
by clause of revocation, 400

REVOCATION—*continued.*
subsequent will, express words of revocation should always be inserted, 745, n.
words "this is my last will" do not operate as, 401, n.
by codicil, 402 *et seq.*
conditional revocation, 407
operates *pro tanto* only, 402, 403
recital will not restrain absolute, 406
republication of earlier will by reference, 410
where two estates are devised to same uses and devise is revoked as to one, 404
by inconsistent subsequent disposition, 399
mere intention to revoke by future act inoperative, 400
rule where several wills are subsisting at testator's death, 401
covenant against, is enforceable, 310
power of, essential characteristic of will, 309
prior will not revived by, 378, 385

REVOCATION OF WILLS AND TESTAMENTARY GIFTS,
acquisition of legal estate does not effect, 390
alterations by subsequent cancelling and interlineation inoperative, 383
presumption as to time of making, 384
by absolute sale, 385
bankruptcy, 389
burning, tearing, or otherwise destroying, 376 *et seq.*
cancelling, mere, is not "destroying," 380
destruction must be in testator's presence, 378
of one part of duplicate will, 381
partial, by cutting out clause, 380
under mistake, 378, 382, 383
while testator is insane, 378
with reference to other dispositions, 382
rule where will cannot be found, 381
by common recovery, 386
contract for sale, 392
conveyance in trust for sale, 389
for a partial purpose, 387
void, under old law, 394, 395
under present law, none, 396
by conveyances, &c., general rule as to, under present law, 393
exchange, 387

REVIVAL OF REVOKED WILL,
annexation of codicil to, not, 385
refixing of signature not, 385
revocation of subsequent will not, 378, 385

RIGHTS,
of action, entry, &c., under old law not devisable, 348, 349
present law devisable, 348, 349

RULE AGAINST PERPETUITIES. See "*Perpetuities, Rule against.*"

RULE IN SHELLEY'S CASE. See "*Shelley's Case.*"

RULE IN WILD'S CASE. See "*Wild's Case.*"

SAILORS,
nuncupative wills of, 364

SALE,
of land, succession duty now payable on proceeds of, 224, n., 272, 992, n.
revocation of devise by absolute, 385

SCHEDULE,
stamp duty on, 137
unstamped instrument, verbal agreement by reference to, 99
when may be read as, to duly stamped instrument, 10, 97

SCOTLAND,
wills by persons domiciled in, 315 *et seq.*

SECOND SON,
testamentary gift to, how construed, 631, 632

SECRET TRUSTS,
incorporation of, 543, 544

SECURITIES FOR MONEY,
gift of goods and chattels in house does not pass, 704
what will pass by bequest of, 763, n.

SECURITY,
specific legatee for life or conditional legatee not required to give, 764, n.

SELECTION,
donee of power of distribution of specific bequest may allot to himself the largest share, 506
implication of absolute interest from power of, 553
utility of giving power of, to parents, 885, n.

SEPARATE USE,
when legacy should be given to, of married woman, 995, n.

SERVANTS,
legacies to, subject to abatement, 712
who entitled under, 794, n.

SETTLED LAND ACTS,
extension of powers and provisions of, 956, n.
succession duty whether a continuing charge on lands sold under, 294

SETTLEMENT,
instrument purporting to be a, held testamentary, 305
marriage, of infant, voidable not void, 811, n.
power for, of shares of females, as to giving, 810, n.
stamp duty on, 99, 139 *et seq.*
strict, as to giving limitations in, 938, n.
voluntary, account duty on, 198, 200, 201

SHARES,
in colonial company liable to probate duty, 176
partnership property, stamp duty on transfer of, 68

SHELLEY'S CASE, RULE IN,
application and extent of, 636 *et seq.*
contingent remainders, intermediate, not destroyed by, 643
contrary intention, expressions of, will not exclude, 636
exceptions from operation of, 641
executory trusts not within, 641, 642
general and particular intention, 643
implied and contingent limitations within, 640
"issue," use of word whether imports, 639
limitations in different instruments not within, 641
partly legal, and partly equitable, not within, 641
statement of, 635
what words will import, 638 *et seq.*

SIGNATURE OF TESTATOR,
what sufficient under old law, 360 *et seq.*
present law, 365 *et seq.*

SOLDIERS,
nuncupative wills of, 364

SOLICITORS,
power for trustees who are, to charge for professional services, 975, n.

SON,
testamentary gifts to "first," "eldest," "second," "younger," &c., how construed, 628 *et seq.*

SPECIFIC BEQUEST,
gifts of household furniture, &c., 703 *et seq.*, 762, n.
ready money, 769, n.
securities for money, 763, n.
legatee for life to sign inventory but not to give security, 764, n.
time at which will speaks, as to, 705
true test whether bequest is or is not, 492

STAMP DUTY,
commissioners, opinion of, as to, 13
appeal against, 13
evidence may be required, 14

STAMP DUTY—*continued.*
contents of instrument regulate, 12
denotation of, 14
determination of, 11
facts and circumstances affecting, to be stated, 12
foreign or colonial currency to be valued, 12
grant of, 11
on agreements, 35 *et seq.*
appraisement and awards, 47 *et seq.*
articles of apprenticeship, 48 *et seq.*
bills of exchange, &c., 50 *et seq.*
bonds, 62 *et seq.*
conveyances on sale, 65 *et seq.*
copies, 75, 76
copyholds, 77
leases, 78 *et seq.*
letters of attorney, 81
mortgages, 82 *et seq.*
receipts, 93 *et seq.*
release or renunciation, 97
schedules, 97
settlements, 99
regulated by contents of instrument, 12
date of execution of, 11
several stamps on one instrument, 27
stock and marketable securities to be valued, 12
tables of rates of, 100 *et seq.*

STAMPS,
adhesive, use and cancellation of, 15
date of execution of deed determines, 11
denoting, 13
presumption as to, 79

STEWARD,
direction by will to employ a particular is imperative, 523

*STIRPES,*
distribution *per.* See "*Per stirpes et per capita.*"

STOCK,
bequest of "securities for money," whether passes, 67
conveyances in consideration of, liable to stamp duty, 67
definition of, 12
valuation for stamp duty, 12

SUBSTITUTED GIFT,
partial, whether defeats prior gift, 604
to children of donees, where there are no children, effect of, 599

SUCCESSION,
conflict of English and Scotch law as regards, 315 *et seq.*
definition of terms "successor" and "predecessor," 253, 280
what dispositions and devolutions confer a, 253

SUCCESSION DUTY,
acceleration of title, 289
accountable persons, 264, 297
additional, under Customs and Inland Revenue Act, 1888...250, 251
alienation of succession, 255, 288
allowance for annuity to remainderman on death of tenant for life 262, n.
fines, 259
incumbrances, 261
outgoings, 258
portions, 261, n.
relinquished property, 262
to copyholder on enfranchisement, 259, n.
donee of general power of appointment, 261
alternative conditions of succession, 278
annual value of property chargeable with, 290
annuity, interest in realty to be deemed an, 257, 289 *et seq.*
alternative mode of payment under Customs and Inland Revenue Act, 1888...291 *et seq.*
appeal against assessments, 265
assessment of, mode of, 289 *et seq.*
beneficial title and enjoyment only liable to, 277
certificate of payment of, 265
cesser of, at 1 per cent. in certain cases, 300
composition for, 263
contingencies, commutation having regard to, 263
corporate property duty at 5 per cent. per annum on, 259, n.
corporations, &c., "taking real estates," 259
continuing charge, when, 263, 293 *et seq.*
Customs, Annuity, and Benevolent Fund, 282
domicil, 266 *et seq.*
enfranchisement of copyholds, allowance in respect of, 259
evasion of, dispositions in, 254
exemptions from, generally, 299
estates under 300*l.* in gross value, 299
life policies, 256
post obit bonds, 256
tontine, 276
family arrangement and re-settlements, 284
first charge on property, 263, 293 *et seq.*
foreign investments comprised in settlement, 271
illegitimate children, rate of duty payable by, 251
joint purchase or transfer by father and son, 276
tenants, 253, 285, 291

SUCCESSION DUTY—*continued.*
lease at ground rent, duty payable on determination of, 256, n.
rack rent, none payable on determination of, 257
life policies and post obit bonds, 256
maintenance out of realty, 274
marriage, dispositions in consideration of, 285
married persons, provisions as to duty payable by, 250
mistakes in payment of, rectification of, 262
money payable under covenants, &c., on marriage, 271
on advowson, 258
annuity, 260, 273
charitable trusts, 256
copyholds, 259
dower, 287
estates *pur autrie vie* devolving on heir as special occupant, 266
extinction of determinable charges, 254, 287
fines, 259
gift "after an interval," 279
lands, houses, &c., 257
leaseholds, 253, 256
legacies charged on realty, 266, 272
manors, mines, &c., 259
money raisable after a death contingently, 278
personalty to be invested in land, &c., 260
proceeds of sale under Lands Clauses Acts, 260, n.
property of fluctuating value, 259
realty directed to be sold, 224, n., 260, 272, 992, n.
subject to leases, 259
rent-charges, 272, 273
reservation of benefit to grantors, &c., 254
successions by disposition and devolution, 255, 279
survivorship, beneficial interest accruing by, 253
tables for ascertaining value of annuities, 300 *et seq.*
timber, &c., 258
transferred interests, 287
transmitted successions, 287
portions, allowance in respect of, 261, n.
trustees should see that duty is paid on, 298
powers of appointment, 254, 281, 286
sale in settlement, lands sold under, 295
purchaser's liability of, 264, 297, 298
protection of, by certificates, &c., of payment of, 265
rates of duty payable, 249 *et seq.*
how determined, 251
when determinable, 279
release of claims against an estate, 284
re-settlement of entailed estates, 281
retrospective operation of the Act, 275
return of, paid by mistake, &c., 262
reversionary interest, *bonâ fide* sale of, 275, 298

SUCCESSION DUTY—*continued.*
Settled Land Acts, sales under, 294
substitutive charge of, 295 *et seq.*
"substitutive limitation," meaning of, 279
successor taking under a disposition made by himself, 255
tenant for life purchasing a charge on the estate, 282, 283
and remainderman concurring in mortgage, 261
sales, 293
time for payment of, 256
trust property not liable to, 277
trustees accountable for, 264, 297

SUCCESSIVE INTERESTS
in legacies liable to legacy duty, 206
probate duty, 184

SUGGESTIONS
to persons taking instructions for and drawing wills, 735 *et seq.*

SURVIVOR,
accruer, clauses of should extend to accruing shares, 690, 691
construed "other," where, 685 *et seq.*
strictly as a general rule, 685
gift over combined with collateral event, 689
on event happening to all the legatees, 689
joint will is revocable by, 309
qualified gift to, effect of, 681

SURVIVORSHIP,
succession duty on beneficial interest accruing by, 253

TENANCY,
agreement for, stamp duty on, 44

TENANCY IN COMMON,
created by what expressions, 680
estates tail, co-devisees of, 683
husband and wife regarded as one person, 683
qualified gift to survivors, effect of, 681
trusts arising by implication, 682
vesting, different periods of, 682

TENANT FOR LIFE,
enjoyment by, in specie of property to be converted on his death, 489
power for to purchase settled lands, 960, n.
sell his own lands to the trust, 961, n.
succession duty where charge on estate is purchased by, 282, 283
mortgage is made by and remainderman, 261
sale is made by, and remainderman, 292
unborn, made tenant in tail by *cy près* doctrine, 444

TENANT IN TAIL,
*quasi*, devise by, of estate *pur autre vie*, 357, 358

TERMS OF YEARS,
rent-charge need not now be secured by, 946, n.
when void for remoteness, 426

TESTATORS,
legacy duty on profits made after death of, 229
who may be, 327 *et seq.*

TIMBER,
agreement for sale of, whether exempt from stamp duty, 44
stamp duty on, conveyed with land, 67
succession duty on, 258

TIME,
from which will speaks, 350, 351

TOLLS
of lighthouse not liable to probate duty or legacy duty, 224

TRADE,
evidence of custom of, to explain ambiguous will, 534

TRAITORS,
wills by, 327

TRUST
not disclosed by will, incorporation of, 543
secret trusts, 543, 544
*what words sufficient to create*,
gifts for specific purpose, 513 *et seq.*
absolute gift followed by words denoting purpose, 515
discretion liable to be controlled, 515
failure of trust from uncertainty as to purpose, 514
where purpose is for sole benefit of donee, 516
precatory trusts, 516 *et seq.*
absolute gift followed by precatory words, 519
appointment of auditors, 523
direction as to employment of steward, 523
expressions of confidence, 516
kindness, 518
recommendation, 518
request, 517
where amount to be applied is left to trustees, 522
selection of object is left to trustees, 523
words too indefinite to create a trust, 522

TRUST ESTATES,
devise of, of copyholds, 756, n.
general devise, whether passes, 557

TRUST PROPERTY,
probate duty not payable in respect of, 193
succession duty not payable in respect of, 277

TRUSTEES,
devisees, whether take beneficially or as, 477, 478
duty of, as to actual conversion, 494 *et seq.*
constructive conversion, 485 *et seq.*
estates of, under indefinite devise, 697 *et seq.*
executors are, of residue for next of kin, 474
liability to succession duty of, 264, 297
of personalty, whether liable for legacy duty, 223

UNBORN PERSONS,
gifts of life interests to, 439
gifts to children of, void unless restrained, 439
tenant for life made tenant in tail by *cy près* doctrine, 444

UNCERTAINTY,
gifts, when void for, 503 *et seq.*
And see "*Ambiguities in Wills.*"

UNDISPOSED INTERESTS,
in realty directed to be converted, 496 *et seq.*

UNDUE INFLUENCE,
setting aside will on ground of, 333

UNFINISHED PAPERS,
when held to be testamentary, 306

UNSTAMPED INSTRUMENT,
admissibility of, in evidence, general rule as to, 3
for collateral purpose, 5
strangers, 7
to exclude parol evidence, 3 *et seq.*
prove fraud, &c., 6
when annexed as schedule to stamped instrument, 10
having twofold operation, one requiring no stamp, 8
part of *res gestæ*, 8
not invalidated but merely not enforceable, or admissible to prove claim, 3, 17
verbal agreement by reference to, 7, 99

USES,
devises to, mode of framing, 933, n.

VESTING,
contingency, whether affects one or more estates, 577
words of, explained by context, 575
must generally have full effect, 576

VESTING—*continued.*
court favours, of shares, where terms of will are inconsistent, 625
devises during widowhood, 573
if A. shall attain twenty-one, contingent; otherwise if a limitation over in alternative event, 575
of reversions and remainders, 573
seemingly contingent construed to be vested, 574
estate not divested, unless all prescribed events happen, 578 *et seq.*
executory trusts, 576
general doctrine as to, stated, 571
joint tenancy excluded by different periods of, 682
legacies of personalty, distinctions as to, 581 *et seq.*
gift of interest, effect of, 585
maintenance clause, 586
on uncertain event, 583
where only gift is in direction to pay, 583
words of future division, 582
seemingly contingent referred to determination of prior interest, 584
pecuniary charges on land, 579, 580
postponement of, beyond legal limits, trusts directing, void, 428 *et seq.*
prior estate taking effect but determining in manner not contemplated, 573
remainders, &c., devises of, how construed, 573
remainders in default of prior estate not contingent, 572
residuary bequests, 587 *et seq.*
contingent transmissible interests, 592
equivocal words will not postpone, 588 *et seq.*
gift on attaining certain age, 590
marriage, 587
particular age, attainment of, made qualification of donees, 590
transmissibility of residue, 593
widowhood, devise during, with gift over, 573

VOID GIFT. See "*Ambiguities in Wills*," "*Lapse.*"

VOLUNTARY DEBTS,
no deduction from probate duty allowed for, 189

VOLUNTARY DISPOSITIONS,
stamp duty on accounts relating to, 197 *et seq.*

WIFE,
gift to relations or next of kin will not include, 664
gift to, subject to maintenance of children, 884, n.
legacy to, by husband, exempt from legacy duty, 246
for immediate wants, advisability of, 792, n.
modes of providing for, 889, n.
power for tenant for life to appoint to, 931, n.

WILD'S CASE,
rule in, stated and considered, 632 *et seq.*
contrary intention will exclude, 634

WITNESSES TO WILLS,
acknowledgment of wills by, not sufficient, 371
creditors may be, 730
executors may be, 730
gift to attesting, void, 341, 342
incompetency of attesting, whether avoids will, 375
testator must sign in presence of, 371

WRITING,
necessary to wills, except those of soldiers and sailors, 362, 364

YOUNGER CHILDREN,
testamentary gifts to, how construed, 628
time at which class is to be scertained, 630

# INDEX

TO

# FORMS AND PRECEDENTS (a).

ABATEMENT,
annuities and legacies, of, 992
charitable legacies, of, 823
legacies, of, 819

ABROAD,
agents, power to appoint, 835
commencement of will, where property, 746
investments, 746, 870, 878
son, legacy to, resident, 817
special executorship of property, 751
trustee giving power for, to delegate authority, 975

ACCOUNTS,
auditing of, 788, 1016
settle, power to, 781, 978

ACCRUER,
clauses, 808, 809, n., 813, 815, 852, 853, 854, 863, 890, 903, 909, 939, 945, 1002, 1007, 1022, 1023, 1028, 1045

ACCUMULATION OF INCOME,
alienation, in case of provisions against, 804, 894
infant, to go to, 913
maintenance, not applied for, 913
provision for, with reference to Thelluson Act, 894, 904
renewable leaseholds, in case of, 846, 847
surplus, general provision for, 914

ADEMPTION,
provisions against, 772, 773, 793

(a) The following Index is intended, so far as regards the Common Forms, to be supplementary to the Table of Contents at the commencement of the Volume, where a complete list of such forms in order of arrangement will be found. The Common Forms are arranged in groups in the order in which such provisions would generally occur in a will (see General Scheme of Will, p. 744).

ADVANCEMENT,
power of, 798, 838, 914—917, 945, 1044

ADVANCEMENTS BY TESTATOR,
in lifetime. See "*Legacies.*"
legacies, whether in satisfaction of, 815, 819, 984, 985
residue, whether in satisfaction of share in, 983, 985, 1013
settlement, under, to be in satisfaction of legacies, 815

ADVOWSON,
devise of, 859, 860. See *Contents.*

AGENTS,
power to employ, abroad, 835
at home, 919, 975

ALIENATION,
provisions against, 802, 832, 833, 840, 893—897, 935

ALLOTMENT. See "*Partition.*"
property appropriated for legacies, of, 881
shares of residue, of, 899

ALLOWANCE,
for son, 795

ALTERATIONS,
in a will, attestation as to, 997

AMANUENSIS,
attestation by, 995, 997
signature by, 994, 995

ANNUITIES, 824 *et seq.* See *Contents.*
charged on real estates, 834, 851, 852, 1002
daughter, to, becoming a nun, 812
guardian of daughters, to, 755
income, in lieu of, pending conversion, 872
rent-charge, by way of. See "*Rent-charge.*"
residue, payable out of, 830, 903, 1012, 1016, 1024
to wife, 1012, 1016

ANTICIPATION, RESTRAINT ON. See "*Restraint on Anticipation.*"

APPOINT, POWER TO
children only, among, 885
general, over personalty, 838, 883, 888, 898, 906, 907, 996
realty, 933, 934. And see "*Specific Devise.*"
husbands, to. See "*Husband.*"
issue, among, 836, 885, 886, 888, 906, 1012, 1015, 1028, 1044, 1045
limitation on, 837, 1028, 1045
re-marriage of wife, to cease on, 885
testamentary, 800, 898, 949, 1022

APPOINTMENT,
children, among, under power, 998
copyholds, of, by married woman, 1047
executors, of, 747 *et seq.* (see *Contents*), 1009, 1017
gross sum, by will, of, 1047
guardians, of, 751 *et seq.*, 1009
husband, in favour of, 998
income, of, to husband, capital to children, 998
jointure and portions, of, under settlement, 815
new trustees, of, 917 *et seq.* See *Contents.*
protectors, of, 1034
special executors, of, 748 *et seq.* See *Contents.*
vested interest under, infant not to take, 837, 1028, 1045

APPORTION, POWER TO. See "*Partition.*"
blended trust funds, 977
fee-farm rents on sales, 925
residuary estate, 862

APPROPRIATE, POWER TO. See "*Annuities.*"
property, in satisfaction of legacies, 881
purchase-moneys, for indemnity of purchaser, 867
stock, a sum of, 995

ARBITRATION,
power to refer to, 978

ATTESTATION,
will or codicil, of, 994, 997

BAILIFFS,
power to appoint, 919

BANKRUPTCY,
legatee of, who is also debtor, 776
provisions against. See "*Alienation.*"

BENEFICE. See "*Advowson.*"

BEQUEST. See "*Legacies.*"
business of, 777 *et seq.* See *Contents*, "*Business.*"
leaseholds, of, 841 *et seq.* (see *Contents*), 1010, 1016, 1018
pecuniary, general, 792 *et seq.* See *Contents.*
personalty, general, of, 994, 998, 1018
residue of. See "*Gifts of Residue.*"
specific, 759 *et seq.* See *Contents.*

BROTHER,
trusts of residue for, 902 *et seq.* See *Contents.*
will by reference to will of deceased, 1006

BUILDING LEASE. See "*Lease.*"

BURIAL,
directions as to. See "*Funeral.*"
surplus of legacy for, 795, 839

BUSINESS. See "*Purchase,*" "*Valuation.*"
bequest of, with ancillary powers or directions for carrying on, 777 *et seq.* See *Contents.*
credits, exception of, 778
farm to be carried on, 1009 *et seq.*
farming stock, bequest of, 770
partnership. See "*Partnership.*"
profits, provisions respecting, 779, 783, 784, 1011, 1020
special executorship of, 749
stock in trade used in, bequest of, 749, 777
wife to carry on, 782
winding up,
power for executors to, 790, 1021
son may control, without executors, 987
trust for, 1020

*CAPITA, PER.* See "*Per capita.*"

CAPITAL,
arrears of profits of business to be, 1020
fines and premiums to be treated as, 1011
income, trustees may decide whether, or, 977
profits of business to be treated as, 1020

CESSER,
guardianship of, 752
provisos for. See "*Alienation.*"

CHARGE, POWER TO,
gross sum by will, 949
jointure, 946
portions, 946, 948
rentcharges for husband, 948, 1033

CHARGES ON REALTY,
annuities, 834, 851, 852
debts, 757-759, 852, 1032
gross sum to be raised under power, 1047
indemnity, to provide, for testator and co-trustee, 1027

CHARGES ON REALTY—*continued.*
jointure. See "*Jointure.*"
legacies, 757-759, 817, 852, 991, 1018, 1032
portions, 815
realty *pari passu* with personalty, 758

CHARITY,
legacies to, 820 *et seq.*

CHILD-BEARING,
distribution when mother past, 811

CHILDREN, TRUSTS FOR. See "*Appoint,*" "*Substitution.*"
person other than testator, of
class as a, 793, 839, 852, 853, 854, 862, 888, 894, 899, 902, 903, 905, 906, 907, 908, 909, 998, 1001, 1003, 1045, 1048
*nominatim,* 813
testator, of
class, as a, 797, 805, 853, 861, 862, 886, 887, 899, 1009, 1013, 1015, 1017, 1021, 1022, 1044
*nominatim,* 807, 853, 899, 900, 1043

CLERKS,
legacies to, 794

COAL AND IRON WORKS,
to trustees, 788
will of, 1015

CODICILS, 1049 *et seq.* See *Contents.*
commencement of, 745

COLONY,
provisions relating to property in. See "*Abroad.*"

COMMENCEMENT
of wills, 745 *et seq.* See *Contents.*

COMMISSION,
authority to trustees to deduct, 975

COMPOUND,
power to. See "*Debts.*"

CONDITIONAL WILL, 746

CONDITIONS, 979 *et seq.*
children to confirm sale under settlement, 980
devisee to assume name and arms, 942

CONDITIONS—*continued.*
estate A. to shift on accession to estate B., 950, 1032
furniture to son on condition of quitting messuage, 762
legacy to be refunded on succeeding to certain estate, 979
release of claims, 980
wife to give up interest under marriage settlement, 981
will to be inoperative, if testator has issue, 745

CONFIRMATION,
codicil, by. See "*Codicil.*"
marriage settlement, of, 747
will of property in India, of, 746

CONSENT,
appointment of new trustees, to, 971
investments, to. See "*Investments.*"
marriage, to. See "*Marriage.*"

CONSTRUCTION,
of will, trustees to determine questions on, 977

CONSUMABLE STORES,
to wife, 761

CONTRACT,
specific devise of land subject to, for sale, 850
trustees to complete or relinquish, 926

CONTRIBUTORY MORTGAGE,
power for trustees to lend on, see *Addenda.*

CONVEYANCING ACT, 1881,
appointment of new trustees, 969, 970, 971
trustees for sect. 42...849, 863, 917, 936, 955
incorporation by reference to, 918
maintenance of infants under sect. 43...913, 914

CONVERSION, 866 *et seq.* See *Contents.* See also "*Sale.*"

COPYHOLDS,
appoint, power to, 848, 849, 855
appointment of, by married woman, 1047
demise of, power to grant licenses for, 924, 926
devise of, subject to life interest, 855, 1047
to one absolutely, 848
enfranchise, power to, 926
limitation of, to uses as wife appoints, 1047
mortgage estates in, devise of, 756
residue, gifts of, including, 863, 865
settlement of, by reference to freeholds, 963
surrender of, by husband and wife, 1046
trust estates in, devise of, 756

COPYRIGHT
to wife, 759

CROSS LIMITATIONS. See "*Accruer.*"

DAUGHTERS, see "*Substitution.*"
furniture, unmarried to have use of, 766
guardianship of, with annuity for each, 755
legacies to, on marriage, 811
marriage, power to advance share on, 840
to be with consent, 807, 840, 889
married, legacy in trust for, 836, 995
power to appoint to husbands. See "*Husband.*"
settle shares of, power to, 810, 841, 932
settled legacy for, 836, 995
settlement of shares of, 887, 889, 1044
shares to be half those of sons, 889
unmarried, trusts for, 766, 840, 929, 1011
will, power to, to bequeath a sum by, 811

DEBTS,
bankrupt, deduction of, where legatee, 776
bequest of, 773, 775
charge on real estate. See "*Charges on Realty.*"
compound, power to, 781, 978
direction for payment of, 873
legatee's, to be deducted, 776, 989
mortgage, for payment of, 758, 873
payment of, direction for, 776, 873
release of, 775, 776
sale, for payment of, 758, n.
satisfaction of, legacy to be in, 774, 1015
son's, defer calling in, power to, 870, 986
nominal value, to be taken at, 870
transfer to, to trustees of legacies, 986
special executorship for, 750
term of years for payment of, 1032

DEDUCTION. See "*Advancements,*" "*Hotchpot,*" "*Debt.*"

DEEDS,
excepted from specific gift, 759
produce, devisee to, 982

DEFICIENCY
of assets to fall on certain legacy, 992

DELEGATE,
power to, 975

DESCRIPTION. See "*Parcels.*"

DEVISE,
codicil by, after purchase of real estate, 1052
copyholds. See "*Copyholds.*"
general, of freeholds, 933, 1001, 1010, 1016
realty, 994, 998, 1016, 1018
mortgage estates, of, 758
residuary. See "*Residue, Gifts of.*"
specific, 848 *et seq.* (see *Contents*), 1027, 1032
strict settlement, in. See "*Strict Settlement.*"
trust estates, of, 758

DISCHARGES,
power to give. See "*Receipts.*"

DISCLAIM,
power to, devise of copyhold trust and mortgage estates, 756

DISCRETION. See "*Power.*"

DISTRIBUTION
of specific articles by executors, 759 *et seq.*

DOUBTS,
as to will, trustees to determine, 977

DOWER,
provision for wife to be in lieu of, 979

DRAIN,
power to, 928

DWELLING-HOUSE. See "*Residence.*"

EASEMENTS,
copyholds, in devise of, 848
freeholds, in devise of, 848, 933
leaseholds, in bequest of, 842

ENFRANCHISE,
power to, 926

ESTABLISHMENT,
to be kept up by trustees, 928, 933 *et seq.* (see *Contents*)

ESTATES TAIL. See "*Strict Settlement.*"
children as a class, to, 853
persons taking, reduced to life estate, 937

EXCHANGE, POWER TO,
extension of, under Settled Land Acts, 958
land in trust for sale, 926
tenant for life, his own lands, 960
trustees, to, 926

EXECUTION
of will, 994, 996

EXECUTOR. See "*Trustee Clauses.*"
additional, by codicil, 1049
appointment of, 747 *et seq.* (see *Contents*), 997, 998, 1009, 1019, 1049, 1050
legacies to, 792
literary, 751
powers of (*see under appropriate heading*).
recital of appointment of, of Indian will, 746
son at twenty-one, to be, 748, 1009
special, 748 *et seq.*, 1043
substituted, 748, 998, 1051
winding-up partnership, not to interfere in, 987, 1043

EXONERATION. See "*Charges on Realt*

FARM. See "*Business.*"

FARMER,
will of, 1009

FEE FARM RENTS,
sale, power of, in consideration of, 924
power to apportion, on, 925

FOREIGN SECURITIES. See "*Securities.*"

FORFEITURE. See "*Alienation,*" "*Condition.*"

FREEHOLDS. See "*Devise,*" "*Parcels.*"

FUNERAL,
directions respecting, 757

FURNISHED HOUSE,
power to lease until sold, 924

FURNITURE. See "*Specific Bequests.*"

GROUND RENTS,
bequest of leasehold, 84

GUARDIANS,
appointment of, 751 *et seq.*, 1009
consent to marriage. See "*Marriage.*"
management by, trustees may depute powers of, 919

HEIRLOOMS, 767, 768, 965, 965 n., 1042

HOTCHPOT,
shares appointed to be brought into, 837, 886, 887, 1013, 1028
son, certain advancements to, not to be brought into, 1003

HOUSE. See "*Residence.*"

HUSBAND,
life interest to, 906, 996, 1031
name and arms, of female devisee to take, 942
power to appoint life interests to, 836, 888, 891, 931
rentcharges to, 948, 949, 1033
join husband in appointing to children, 889
trustees to raise gross sum for, 932
will by married woman in favour of her, 998

ILLEGITIMATE CHILDREN,
devise to, to prevent escheat, 850
guardianship of, 755
legacy to, 805
supposed, special direction as to, 983

IMBECILITY. See "*Lunatic.*"

IMPROVEMENTS,
power to make,
extension of, under Settled Land Acts, 959
generally, 927

INCOME. See "*Conversion.*"
capital or, trustees may decide whether, 977
destination of, pending conversion, 869, 872
profits of business, whether capital or, 1020

INDEMNITY,
charge of lands to furnish, 1027
executors, to, in business, 778
mortgagees, to, 845, 874
purchasers, of, where power to appropriate purchase-monies for, 867
option to son to purchase, 869
trusts delegated, 976
trustees, to, 764, 878, 972, 974

INDIA,
investments in, power to retain, 878
will of property in, recited and confirmed, 746

INFANT,
receipt of, sufficient discharge, 796
specific devise to, 849

INSURANCE,
directions as to furniture, trustees to, 765
wife to, 764, 765, 843
heirlooms. See "*Heirlooms.*"
house, tenant for life to, 1029
trustees to, 842
wife to, 843, 844, 855, 858
lives, in case of renewable leaseholds, 964

INTEREST,
arrears of, provisions respecting, 851
legacies, on. See "*Legacies.*"

INTERLINEATIONS
in will, 997, 1054, 1055

INTERPRETATION. See "*Construction.*"
clause as to trustees, 836, 842, 866, 1005, 1020, 1038

INVENTORY,
furniture of, 764, 765
heirlooms of, 768, 966

INVESTMENT, 866 *et seq.* (see *Contents*)
accumulations, trust for, of, 913
clauses, 874–876
consents as to, 883, 887
foreign property, of, 746, 870, 878
extension of powers of, under Settled Land Acts, 958
power to vary, 877
renewable leaseholds, rents of, 846
tenant for life by, in purchase of his own land, 961

IRON WORKS. See "*Coal and Iron Works.*"

ISSUE. See "*Children,*" "*Appoint, Power to.*"

JOINT TENANCY
in freeholds, for life, 854

JOINTURE,
appointment of annuity by way of, 815
limitation of rentcharge by way of, 934
power to, 946, 948

LANDS,
power to purchase. See "*Purchase.*"

LAPSE,
accruer, provision against by means of. See "*Accruer.*"
charges on lands, as to, 987
devisee, to be for benefit of, 988
freeholds, devise of, so as to prevent, 850
legacies, 793–799
proviso against, generally, 989
residue, shares of, as to, 987, 988
gift of, as to, 988
substitution of children, &c. See "*Substitution.*"

LAW BOOKS,
bequest of, 770

LEASE, POWER TO,
agricultural purposes, for, 921
building purposes, for, 921, 923
freehold house, 858
furnished house, 924
lands, &c., in trust for sale, 921—924
leasehold house, 844
mining purposes, for, 921, 922
new, grant, 1011

LEASEHOLDS, 841 *et seq.* See *Contents.*
bequest of, 750, 850
business, used with, 777, 788
farmer of, 770
furniture, with, to wife, 764
renewable, 844, 964
special executorship of, 750
strict settlement, of, by reference, 963, 964
trust for sale of, special provisions in, 871

LEGACIES. See "*Specific Bequests,*" "*General Pecuniary Bequests,*" "*Settled Legacies,*" "*Miscellaneous Clauses.*"
abatement. See "*Abatement.*"
ademption of. See "*Ademption.*"
allowance for son, 795
annuities, postponed to, 993
business, power to employ, in, 1010, 1018
charge of. See "*Charges on Realty.*"
charitable, 820 *et seq.*
creditor, to, 795, 796
debts to be deducted, 776, 989
demonstrative, 793
duty on, how payable, 991, 992, 1017, 1052
immediate, to wife, 792, 1009
infant, to, 796
instalments, payable by, 792, 795

LEGACIES—*continued.*
interest on, 796, 805, 811, 989
lapse. See "*Lapse.*"
mortgage debt, substituted for, 774
payment of, direction as to fund for, 992, 1052
time of, 989
power to raise, by sale or mortgage, 758, n., 1010
priority of. See "*Priority.*"
purchase-money of land sold, in lieu of, 850, 985
raising, provisions as to, 758, n., 819, 1018, 1032
retain, power to, for carrying on farm, 1010
revoking, codicil, 1052
satisfaction of, by advancements in lifetime, 816, 819, 983—985
appropriation of securities, 881
separate use of married woman, 995
settlement, under powers in, 815, 816
trustees, to, 792, 974
vesting of. See "*Vesting.*"

LEGACY DUTY. See "*Legacies.*"

LEGITIMACY. See "*Illegitimate.*"

LIFE-POLICIES. See "*Policies.*"

LIMITATION. See "*Specific Devise,*" "*Strict Settlement.*"

LOAN,
personal security of son, on, 787
power for executors to continue, to son, 870
trustees to make, to son, 882

LUNATIC,
income and capital for, 801, 905
legacy for, 801
proviso for legatee becoming, 839

MAINTENANCE. See "*Conveyancing Act,* 1881."
capital, out of, 912
common fund, as a, 912
general powers of, 910—913, 917, 954
legacy with interim, 797, 798, 812
proviso explanatory of trust for, 1019
request as to, 884
trust for, 887
wife, by, 809, 884, 887

MAJORITY
of trustees to decide, 976

MANAGEMENT, POWERS OF,
business, in carrying on, 781
land in trust for sale, of, 919, 920, 1010, 1011
trustees to exercise, under Conveyancing Act, 849, 863, 917, 955
Settled Land Act, 955
real estate in residuary devise, of, 863

MANSION-HOUSE,
repairs of, proviso as to, 942
tenant for life may sell, 958
trust for sale of, 857
trustees may complete alterations in, &c., 927
wife may reside in, 930

MARGINAL
alteration. See "*Alteration.*"

MARRIAGE. See "*Daughters.*"
codicil made after, 1051
consents to, 807, 840, 889, 1009
power of appointment to determine on, 885
validity of, provisions for doubtful, 983
will reviving will, revoked by, 1053

MARRIED WOMAN,
legacy to separate use of, 995
will of a, 998, 1047

MINING LEASES. See "*Lease.*"

MINING RENTS,
not to be capitalized, 957

MISCELLANEOUS CLAUSES, 979 *et seq.* See *Contents.*

MONEY,
exception of, from bequest, 762
ready, bequest of, to wife, 769

MORTGAGE,
debt, bequest of, 773, 775
charged on personalty, 758
realty, 757, 851
special executorship of, 749
substitution of legacy for, 774
estate, devise of, in copyholds, 756
power to, for debts and legacies, 758, n., 873
to lend on contributory. See *Addenda.*

MORTGAGEE,
protection of. See "*Indemnity.*"

MOURNING
ring, legacy for, 794

NAME AND ARMS CLAUSE, 942

NEW TRUSTEES,
legacy to, 947. See "*Appointment.*"

NEXT OF KIN,
trusts for, 801, 838, 888, 905, 910, 996.

NUN,
proviso for daughter becoming a, 812

OPTION,
business, for son to take. See "*Bequests of Business.*"
furniture, for tenant for life to purchase, 766
trust property, for sons to purchase, 868
tenant for life to purchase, 960
trustees to purchase, 868

PARCELS. See "*Bequests of Leaseholds,*" "*Specific Devise.*"
copyholds, general, 963
specific, 848
freeholds, general, 933
specific, 848
leaseholds, general, 1010, 1016, 1018
specific, 841 *et seq.*, 1010
renewable leaseholds, 844, 964

PARTITION, POWER TO,
*cestuis que trust*, among, 880, 1014
land in trust for sale, 926
residuary devisees and legatees, among, 862

PARTNER,
will of a, 1019, 1021, 1043

PARTNERSHIP,
appointment of successor in, 778
bequest of share in, 770, 778, 1020
power to trustees in respect of, 780
to wind up, 790
partner to wind up, without executors, 987
recital of, 780, 1019
special executorship of share in, 749
winding-up of, business. See "*Business.*"

*PER CAPITA*, 903, 904

*PER STIRPES.* See "*Substitution.*"

PERSONALTY. See "*Gifts of Residue*," "*Trusts of Residuary Personalty.*"
purchased lands to be treated as, 880
will of, 995

PIN MONEY,
power to son to appoint to wife, 946

POCKET-MONEY,
for son, 795

POLICIES,
of insurance for life, bequest of, 773
special executorship of, 748

PORTIONS,
appointment of, under power, 815
charge, power to, 946, 948
limit of, proviso for, 949
term to raise, trusts of a, 944

POWER. See "*Powers and Provisions*," &c., 910 *et seq.*, "*Trustee Clauses*," 967 *et seq.*, *and under appropriate headings.*

PRECATORY TRUST. See "*Recommendation.*"

PRESENTATION OF LIVING. See "*Advowson.*"

PRIORITY,
annuities, of, 832, 993
legacies, of, 818, 992

PROBATE,
expense of limited, 748, 751

PRODUCTION,
of deeds, devisee to covenant for, 982

PROFESSION,
trustee in, may charge, 975, 1014

PROFITS. See "*Income.*"

PROTECTORS,
appointment of, 1035

PURCHASE,
business, power for son to, 782, 784, 786
furniture, power for tenant for life to, 766
lands of, power to invest in, 846, 878, 882
real estate, codicil made after, of, 1052
residence for wife and unmarried daughters, power to, 929
trust estate, power for trustee to, 868

PURCHASER,
protection of. See "*Indemnity.*"

REAL ESTATE,
child taking, excluded from share, 804, 898
children may take as, 880

RECEIPT CLAUSE, 972

RECITAL,
contract to purchase land, 1025
covenant in settlement, 816
marriage settlement, 815
partnership, 780, 1019
power to appoint, 815, 1047
will of property in India, 746

RECOMMENDATION,
maintenance, to wife as to, 884
picture, as to devolution of, 760
professional advice, as to taking, 976
selection of new trustees, 970

RE-EXECUTION
of will revoked by marriage, 1053

REFERENCE,
copyholds settled by, 963
females to appoint rentcharges by, 949
leaseholds settled by, 963, 964
powers by, 917, 918
trusts for persons by, 891, 892, 895, 907, 908, 909, 1028, 1031
will by, to will of deceased brother, 1006

RELEASE,
claims by children, of, 980
debts, of. See "*Debts.*"

RENEWABLE LEASEHOLDS. See "*Leaseholds.*"

RENEWAL,
trusts for, 845

RENTCHARGE. See "*Charge*," "*Annuity*," "*Fee-farm Rent*."
limitation of a, 934, 1002
number of at one time, 949
power to appoint, to husbands, 948, 949, 1033

RENTS AND PROFITS,
accumulation of, 846, 847, 955
application of, until sale, 859, 869, 920
during bankruptcy of life tenant, 936
minority, 954
income of purchase money of lands sold, to go as, 882

REPAIR. See "*Waste*."
furniture by trustees, 765
wife, 764, 765, 843
house by tenant for life, 1029
trustees, 842
wife, 843, 844, 855, 858

REPUBLICATION. See "*Re-execution*."

REQUEST. See "*Recommendation*."

RESIDENCE,
freehold house for wife as, 855
leasehold house for wife as, 844
power to purchase, 929
provision for wife to use mansion-house as, 930
wife and unmarried daughters, for, 929, 1011

RESIDUE,
annuities out of. See "*Annuities*."
bequest of share in, under will, 777
gifts of, 861 *et seq.* (see *Contents*), 999, 1005, 1013, 1037
sons, to, 1008
trustees beneficially, to, 1005
trusts of, 884 *et seq.* (see *Contents*), 1000, 1012, 1021, 1030, 1039, 1044, 1048
wife, to, 1013, n., 1022, 1023

RESTRAINT ON ANTICIPATION (*passim*).
annuities in case of females with, 827
copyholds, devise of, with, 849
freeholds, devise of, with, 848, 935
general, of females, 896, 942
legacy to married woman with, 800

REVERSIONARY INTERESTS,
suspension of sale of, 869, 872

REVIVAL
of will, 1053

REVOCATION,
clause, usual, 745
legacy, of, by codicil, 1052
will of, 1054

SALE, 866 *et seq.* See *Contents.*
conduct of powers relating to, 867
consents to, several directions as to, 883
power of, for payment of debts and legacies, 757, n.
furniture by tenant for life, 766
power to postpone, 869, 872
trust for, freeholds, of, 854, 1010
furniture, of, 766
leaseholds, of, 844, 1010
after limitations in strict settlement, 1038

SECURITY,
son to give, for value of business, 782, 784. See "*Loan.*"

SECURITIES,
foreign, powers to suspend conversion of, 870

SEPARATE USE,
legacy to married woman for, 995

SERVANTS,
legacies to, 759, 794

SETTLE,
power to, daughter's shares. See "*Daughters.*"

SETTLED LAND ACTS,
appointment of trustees for purposes of, 955
exchange, power to, extended, 958
extension of powers given by, 956 *et seq.*
fee-farm grants, notwithstanding, 957
improvements without certificate or order required by, 959
investment, powers of, extended, 958
long leases, notwithstanding, 957
mansion-house, power to sell, notwithstanding, 958
mining rents arising under, not to be capitalized, 957
mortgage for purposes not specified in, power to, 958
notice to trustees under, dispensed with, 956
purchase, power to, extended, 958
sole trustee may act for purposes of, 960
tenant for life, under, may purchase settled lands, 960

SETTLED LEGACIES, 835 *et seq.* (see *Contents*), 995

SETTLEMENT,
advancements under, 815, 1003
appointment under, 815, 1047
confirmation of, 747, 1003
contingent interest under, bequest of, 815
costs of, 810
daughters' shares, of, 836, 887, 889
legacies, of. See "*Settled Legacies.*"
life interest in, wife to give up her, 981
power to trustees to make, 841, 932
property comprised in, children to confirm sale of, 980
satisfaction of covenant under, legacy in, 816
trustees of, gift of residue to, 863
trusts of, legacy upon, 816
residue upon, 1042

SHARES. See "*Investment.*"
in a company, bequest of, 172
unequal, 889, 899, 900

SHIFTING LIMITATIONS. See "*Name and Arms Clause.*"
in strict settlement, 950, 1032

SIGNATURE,
by testator, of his will, 994–997

SISTERS,
trusts of residue for, 902 *et seq.* (see *Contents*)

SON,
business, power for, to purchase, 782, 784, 786
children of, dying under twenty-one, 839, 996
debts of, owing to testator. See "*Debts.*"
executor, at twenty-one to be, 748, 1009
loan to. See "*Loan.*"
security, to give, for value of business, 782, 784

SPECIAL EXECUTORSHIP, 748 *et seq.* (see *Contents*)

SPECIFIC BEQUESTS, 759 *et seq.* (see *Contents*)

SPECIFIC DEVISES, 848 *et seq.* (see *Contents*), 1001

SPINSTER,
will of a, 1004, 1006

STOCK,
bequest of a sum of, 771

STREETS,
power to lay out, 928

STRICT SETTLEMENT, 933 *et seq.* (see *Contents*), 1032, 1037, 1040, 1041

SUBSTITUTION
of children or issue of,
children deceased, 793, 808, 839, 853, 854, 862, 886, 892, 899, 900, 906–909, 998, 1009, 1013, 1017, 1022
class of persons deceased, 814, 901, 902, 1007
daughters of testator, 942, 1038
deceased persons named, 799, 814, 815
grandchildren of testator, 901
sons dying under twenty-one, 837, 996
personal representatives of deceased person, 814, 1000
widow or widower of deceased person, 813

SURPLUS,
income, accumulation of, 913, 914, 918
rents and profits, 956

SURVIVORSHIP,
clause where interest contingent on, 886, 906. See "*Accruer.*"

TAIL. See "*Estates Tail.*"

TENANT FOR LIFE,
appoint rentcharges, power to, 946 *et seq.*
charge, power to, 946 *et seq.*
insure, to, 764, 765, 842, 843, 844, 855, 858, 1029
mansion-house, power to sell or lease, 958
to repair, 942
purchase, &c., power to, for himself, 960
tenant in tail born in testator's lifetime to be, 937

TERM OF YEARS,
limitation of a, 934
trusts of a, to pay debts and legacies, 1032

*TESTIMONIUM*, 996

TIMBER,
power to cut, for repairs, 919

TITLE-DEEDS,
production of, covenant by devisee for, 982

TRADE, STOCK IN,
bequest of. See "*Business.*"

TRADER,
will of a, 1017, 1018. See *Contents.*

TRUST,
precatory. See "*Recommendation.*"

TRUSTEE CLAUSES, 967 *et seq.* See *Contents.*

TRUST ESTATE,
in copyholds, devise of, 756

TRUSTS, *passim.* See *Contents.*

TRUSTS OF RESIDUE. See "*Residue.*"

VALUATION,
books, of, 761
business, of, 782—789, 868, 1013
farm, of, 1013
furniture, of, 766
lands, of, 1030
residue, of, 868, 870

VESTING,
birth, at, 890
death of testator at, 798, 799
leaving issue, to depend on, 909, 1002, 1003, 1021
postponed beyond twenty-one, 798, 889, 900
provision as to, generally, 910
surviving person other than testator, upon, 886, 906

WASTE,
general clause as to, 942

WIDOWER,
will of a, 999, 1003

WIFE, *passim.* See "*Contents.*"
jointure of, see "*Jointure.*"
power to son to appoint to his, 931, 946

WILL,
bequest of share under, 777
deceased brother, of, will by reference to, 1006

WINDING-UP
business. See "*Business.*"

YOUNGER CHILDREN,
trusts, for, 804, 898

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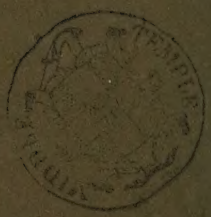
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